IN THE NATIONAL COMPANY LAW TRIBUNAL
BENGALURU BENCH, BENGALURU
(Exercising powers of Adjudicating Authority under
The Insolvency and Bankruptcy Code, 2016)
(Through Web-Based Video Conferencing)

IA No. 200 of 2022 &
IA No. 366 of 2022
C.P. (IB)No.12/BB/2021
U/s. 60(5) of the IBC, 2016
R/w Rule 11 of NCLT Rules, 2016

In the matter of:

Park View Developers Pvt. Ltd. ...Operational Creditor

Versus

SDU Travels Pvt. Ltd. ...Corporate Debtor

I.A 200 of 2022 and I.A 366 of 2022

Mr. Vipin Kumar Sharma
(Operational Creditor)
Through its Power of Attorney Holder
(Mukesh Kumar Grover)
13 Block, Block House No. 180
Geeta Colony
New Delhi-110031 ...Applicant

Versus

1. Mr. Ahsan Ahmad
IRP of M/s SDU Travels Private Limited,
C-108, 3rd Floor, Sector-2
Noida-201301
Uttar Pradesh

2. SDU Travels Pvt. Ltd
Through its IRP,
C-103rd Floor, Sector-2
Noida-201301
Uttar Pradesh ...Respondents

Order Delivered on: 19.04.2024

Coram: 1. Hon'ble Shri K. Biswal, Member (Judicial)
2. Hon'ble Shri Manoj Kumar Dubey, Member (Technical)

Parties/Counsels Present:

The RP : Shri Ahsan Ahmad
For the Applicant : Shri Kirit Javali

ORDER

Per: Manoj Kumar Dubey (Member Technical)

I.A 200 of 2022

1. The present petition is filed on 30.05.2022 by the applicant individual Mr. Vipin Kumar Sharma who is an erstwhile employee and shareholder of the Corporate Debtor –M/s SDU Travels Private Limited ("CD") seeking following reliefs against the respondent, Resolution Professional for Non-Consideration of claims under section 60(5) of IBC, 2016 which are enumerated below:

a) Quash and set aside the said email dt.7.05.2022 issued by the Respondent to the Applicant rejecting the said Claim for Debt submitted by the Applicant under Regulation 7&9 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 in the corporate insolvency resolution process of the Corporate Debtor;

b) This Hon'ble Tribunal be pleased to allow and admit said claim for 'Debt' as submitted by the Applicant under Regulation 7&9 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations in the corporate insolvency resolution process of the Corporate Debtor;

c) Direct the Respondent to forthwith furnish to the applicant a copy of all documents of the Corporate Debtor in terms of the mismanagement of the companies activities;

d) Pending the hearing and final disposal of the present application this Hon'ble Tribunal be pleased to stay the adjudication of the claim by the IRP;

e) For such further and other reliefs as this Hon'ble Tribunal think fit and proper, in the facts and circumstances of the present case, and in the interest of justice, equity and good conscience.

2. The facts of the case are perused hereunder for ready referral:

a) The Applicant herein submits that vide order dt.03.02.2022, this Tribunal appointed the incumbent Respondent No.1 i.e. Shri Ahsaan Ahmed as the IRP of the CD pursuant to which the IRP made public announcement vide order dt.08.02.2022 for submission of claims of creditors. The Applicant submitted his claim in Form B and Form D respectively on 16.04.2022.

b) The IRP issued an email dt.23.04.2022 for seeking clarification regarding the claim of the applicant. The applicant replied to the IRP's email on 29.04.2022 stating that the entitlement of the applicant on the CD's shares is due to the Shareholders Agreement entered between the parties in the form of sweat equity. However, the IRP rejected the claim of the applicant vide email dt.07.05.2022 stating that the terms of the settlement agreement entered between the parties was *ultra vires* as per Section 67 of the Companies Act, 2013.

c) The applicant has explained the rights that are made out in accordance with the Shareholders Agreement and the claim amount that arises from the Deed of Settlement. To that effect, the applicant contends he was allotted and issued share certificates dt.29.01.2014 of SDU Private Limited for 1,75,000 shares with distinctive nos. bearing from 40250001 to 4200000. On 29.03.2014 the applicant was issued further 58300 shares with distinctive nos. bearing from 6007901 to 6066200 and on 08.01.2013 additional 58400 shares were issued in favour of the applicant having distinctive no. bearing from 6824801 to 58300. Additional 1,00,000 shares of Rs.10 each were issued in favour of the applicant who contributed Rs.10 Lacs vide instrument no.633393 dt.09.08.2012 bearing distinctive nos. 78000001 to 7900000.

d) The Applicant submits that the parties entered into a Deed of Settlement ('Deed') on 15.12.2017 whereby the applicant agreed to transfer his 450,000 shares against the payment of Rs. 2,10,00,000/- (Rupees Two Crores Ten Lakhs Only) towards consideration of his shares and the CD also agreed to make the payment of Rs.2,10,00,000/- towards the purchase of shares. The amount was envisaged to be paid in four instalments as encapsulated in the said deed. In compliance with the deed, the

CD issued four post-dated cheques in favour of the applicant out which the first 2 instalments were paid, but the cheque of 3rd instalment bearing no.003876 dt.01.08.2018 drawn on HDFC Bank Ltd., Masjid Moth, Greater Kailsh Branch New Delhi for an amount of Rs.50 Lacs was dishonoured due to 'FUNDS INSUFFICIENT'. The applicant sent demand notices to the CD for the payment of amount which is not cleared till date. The Applicant was constrained to file a complaint u/s 138 of the Negotiable Instrument Act which is still pending before District Court of Karkardooma, New Delhi.

e) The Applicant states that the settlement agreement entered between the parties was without undue influence and coercion. Moreover as stated above even after the encashment of the first cheque in terms of the Deed of Settlement, the CD themselves did not prevent or stop the encashment of the second cheque as well. The applicant further states that the IRP has directed the applicant to return the monies encashed by the CD. However, the applicant has only enchased the Security Deposit since the CD has failed to fulfil his obligations under the Deed of Settlement by not identifying a nominee.

f) The Applicant submits that as per Clause 2 of the Deed of Settlement, it is upon the CD's nominee (qua the purchase of shares) who is required to make payment of each of the 2nd, 3rd and 4th instalments prior to the due dates mentioned in the Deed of Settlement and not the CD itself. That as per Clause 4 of the Deed of Settlement executed between the Parties it is clearly stated that the CD-SDU will notify the Applicant of its nominee upon the receipt of each of the four instalments as described in Clause 4 (a) to 4(d).

g) The applicant states that he has moved an application bearing I.A. no. 4142 of 2019 in OMP1 (COMM) 240/2017 seeking directions before the Hon'ble High Court to direct the CD to identify a nominee who will purchase the shares of the Applicant pending full and final settlement of the dues payable. The same is not been done and the 3rd and 4th instalment is unpaid till date. Moreover, order dt.26.04.2022 of the Hon'ble Delhi High Court in the above-mentioned matter further provides liberty to the applicant to pursue remedies in law.

h) The Applicant submits that since there was no buy back of shares, and the Deed of Settlement executed between the parties provided that the shares of the applicant were to be bought by a nominee of

the CD, hence the provisions under S.66 and 67 of the Companies Act, 2013 are not attracted. The applicant alleges that the IRP has wrongly interpreted the Companies Act and adjudicated the claims of the applicant as *ultra vires* as per S.66 and 67 of Companies Act, 2013 when in fact he is only vested with the power to verify the claims as per Section 13 of the Code.

i) Additionally, the applicant states that CP No. 93 of 2017 has been filed against the CD u/s 241/242/244 of the Companies Act, 2013 which had been admitted by this Tribunal. It is noted from the documents attached with the instant application that CP. No. 93 of 2017 was withdrawn as the matter was under active consideration of mediation. The Applicant submits that it is clear that the amount was disbursed by the CD in terms of the said agreement towards the salary dues and compensation to the applicant for his sweat equity shares. Moreover the applicant is also a former employee and shareholder of the CD.

3. The Learned Counsel for the Respondent has filed reply in diary no.3406 on 10.08.2022 and written submissions vide diary no.6451 on 20.12.2023. The Respondent/IRP submits that the Deed of dt.15.12.2017 is in violation of S.67 of Companies Act, 2013 as no company has the power to buy its own shares unless the consequent reduction of share capital is effected thus, the IRP accordingly rejected the claim of the applicant and asked the applicant to refund the total amount of Rs.1,10,00,000/- which were paid to the applicant in 1st and 2nd instalments. The IRP states that in Para 9 of the application, the applicant has specifically stated that *he has agreed to transfer his 450000 shares against the payment of Rs.2,10,00,000/- towards the consideration of his shares and the corporate debtor had also agreed to make payment of Rs.2,10,00,000/- and the amount was to be paid by the corporate debtor in four instalments*. Accordingly, the IRP rejected the claim and asked the applicant to return/refund Rs.1,10,00,000/- which the applicant has pocketed wrongfully from the CD.

4. With regards to the applicant's claim as an employee, the IRP avers that as per the books of accounts provided by the suspended Board of Directors, nothing is due and payable to the applicant. Further it may be considered that as per S.24 of the Contract Act, 1872, the agreement is void if consideration and object are unlawful. Thus, on this ground, the present application may be dismissed in *limine*.

5. Further, as per Clause 1 of the Deed of Settlement dt.15.12.2017, it is clearly states that the money shall be paid to the Applicant by the Corporate Debtor i.e., SDU Travels Private Limited, which abundantly manifests that the said contract was in violation of 67 of the Companies Act, 2013.

6. The IRP submits that the Applicant did not disclose under which provision of the Companies Act, the shares held by him was transferred or to be transferred to SDU or the nominee of SDU for which payment was made from the account of SDU i.e. Corporate Debtor. Additionally, the IRP submits that the position of transfer of shares and appointment of nominee was unclear from applicant's reply. The IRP submits that the applicant has failed to provide any provisions of the Companies Act under which the settlement agreement was executed. That upon receiving non-satisfactory email from the applicant vide email dt.23.04.2022 the IRP rejected the claim of the applicant on the ground of not qualified as operational debt.

7. The IRP submit that the claims arising out the settlement agreement suffer from illegality as it violates S.67 of the Companies Act, 2013. As per the provisions of the Companies Act, the CD cannot provide any money to the shareholder to buy the shares of the Company itself or to any third person. The first two instalments which have already been enchased by the applicant were provided by the CD to the applicant for an amount of Rs.1.1 crore which is per-se illegal.

8. In light of the above, the IRP has sought additional information vide email dt.23.04.2022 with respect to the claim of the applicant regarding the transfer of shares when the first two instalments were already encashed. The applicant has stated that no transfer of shares took place as there was no nominee and the applicant himself neither knows from whom he will receive money nor to whom he will transfer shares. Thus, the IRP states that the share transactions were not proper and the claim arising out of the sham transaction did not qualify as operational debt being ultra vires and unlawful under the Companies Act, 2013.

9. The IRP further states that as per the shareholders agreement, the nominees were already defined and known to the applicant. It is noted that at Page 5 of the Settlement Deed, the Resolution states that "*Mr. Sunit Suri be and is authorised to do all acts and sign all documents, deeds, agreements and memoranda of settlement pertaining to the settlement of all disputes and issues between the*

Company and Vipin Sharma on behalf of the Company and to do all acts deeds and ancillary things as may be necessary to accomplish and facilitate the same." Additionally, clauses 5.1 & 5.2 of the Shareholders Agreement dt.22.02.2012 clearly mention that no party can sell their shares without consent of the other party and subject to the Board approval. Further, in such a case the existing shareholders of the respective group will have the first right of refusal to purchase the shares in proportion to their existing shareholding. The group has been defined in clause 3 of the Shareholders Agreement. The IRP contends that the applicant was having the knowledge of the nominees who could have been indentified, but instead signed the Deed of Settlement to divert the funds of the CD illegally for their personal use in collusion and conspiracy with the members of the suspended Board of Directors.

10. The IRP submits that as per the Transaction/Forensic Audit Report dt.31.12.2022, the transaction was sham and in violation of S.67 of the Companies Act for which the RP has already filed an I.A. No.175 of 2023 under S.66 of the Code against the applicant and others.

11. The IRP states that as per S.13 of the Code, the term 'verify' includes to make sure or demonstrate something is true, accurate or justified and therefore, the RP is duty bound to look into the accuracy of the claim. Further, in the case of Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta & Ors. [C.A. No. 8766-67/2019], the Hon'ble SC has established that the role of RP is not adjudicatory but administrative and that all claims must be decided by the RP so that a prospective Resolution Applicant knows exactly what has to be paid in order that it may then take over and run the business of the CD.

12. Heard both the parties and perused the records available.

13. From the perusal of the facts and circumstances pertinent to the instant application, it can be observed that the applicant has come before this Tribunal for admission of claims in the capacity of a shareholder and as the erstwhile employee of the CD. The Applicant has filed its claim in Form B (Annexure 3 @Page 23) as the Operational Creditor of the CD. The applicant has claimed the amount of Rs.1crore along with interest @ 12 % amounting to Rs.1,41,00,000 /- as the amount in debt. In form D the applicant has filed the Proof of Claim as a Workman and Employee of the CD for an amount of Rs.10,00,000/- plus @ 12% interest amounting to

Rs.14,00,000 (Annexure 4, @Page 49). The applicant states that due to the disputes which arose between him and the CD, he filed a Civil Suit bearing No.236/2017 for seeking reinstatement of employment and salary along with CP No. 93/2017 before the NCLT, Bengaluru Bench alleging oppression and mismanagement by the Directors of the CD. To resolve the matters the applicant has filed a Petition under Section 9 of the Arbitration and Conciliation Act, 1996 before the Hon'ble High Court of Delhi which was registered as OMP(1)(COMM) No. 240/2017. Pursuant to the arbitration application, the matter was sent for Mediation which culminated into a Settlement Agreement dt.15.12.2017 signed by both the parties. In light of the same, OMP (1)(COMM) 240/2017 was disposed of with the "*liberty to the petitioner to seek appropriate remedies"* as per order dt.26.04.2022. Similarly, the applicant also withdrew the oppression and mismanagement application pending before this Tribunal in light of the mediation settlement.

14. It is the case of the applicant that he has based its claims against the CD as per the Settlement Agreement dt.15.12.2017.As per clause 2 of the said agreement, the first of the four instalments were to be paid directly by the CD. The relevant excerpt from Clause 2 is reproduced below:
"*At the time of signing the present deed, SDU shall also issue 3 (three) post-dated cheques (PDCs) to VKS for the amounts mentioned in the 2nd, 3rd, 4th instalments….as security qua the subsequent payment of these three instalments by the nominee of SDU who/which will make payment of these three instalments on or before their respect due dates….it is also clarified that upon SDU's nominee (qua the purchase of shares) making payment of each of the 2nd, 3rd and 4th instalments prior to the due dates mentioned above, VKS shall return each of the three PDCs issued to him by SDU within 15 working days of such payment and shall, in no circumstance, present the same for encashment.*"

15. It is clear that as per clause 2 of the settlement agreement, the cheques given to the applicant by SDU were security cheques in lieu of the instalments being paid by the nominee and such PDCs were to be returned to the CD. However, the applicant has encashed the security cheques in contravention to the settlement agreement. As per clause 4 of the agreement, it is stated that "*upon receipt of the First Instalment to VKS and notification of its nominee by SDU, Parties shall commence the process for transfer of 1,20,000 shares of SDU to SDU's nominee immediately and ensure that such transfer is completed and executed as soon as may be possible, as per law and*

without any delay." It is noticed that the parties have been acting in contravention to the settlement agreement itself as no nominee is identified, no transfer of shares as occurred and the applicant has encashed a post-dated cheque which was meant to secure the settlement agreed between the parties.

16. The IRP upon submission of claim by the applicant vide email dt.23.04.2022 has sought clarification regarding the debt of the applicant asking the following:

"*Under which provision of the Companies Act, 2013, the shares held by you was transferred or to be transferred to the SDU or the nominee of SDU for which payment was made from the account of the SDU i.e., Corporate Debtor;*
Who were the nominees to whom the shares were transferred or supposed to be transferred after the receipt of 1st and 2nd instalments by you?
Who has nominated the nominees to whom the shares were transferred or to be transferred?'

17. The applicant in its reply email dt.29.04.2022 has clarified that "*In accordance with the Shareholders Agreement between the Corporate Debtor and Operational Creditor, the shares were to be purchased by the nominee of the Corporate Debtor. As per clause 2 of the Deed of Settlement, it is ultimately upon the Corporate Debtor's nominee (qua the purchase of shares) who is required to make payment of each of the 2nd. 3rd, 4th instalments prior to the due dates mentioned in the Deed of Settlement and not the Corporate Debtor itself.*
In addition it is submitted that the provisions of Section 66 and 67 of the Companies Act, 2013 are not applicable to the facts and circumstances of the case. It is submitted that the shares of the Operational Creditor to be bought by a nominee of the Corporate Debtor, hence there is no buy back of shares in terms of the Companies Act.
Furthermore, only after SDU identifies and nominates i.e., the individual/ entity only thereafter shall the shares be purchased from VKS. In this regard it is important to highlight that the Operational Creditor has moved an application bearing I.A. No. 4142 of 2019 in OMP 1(COMM) 240/2017 seeking directions before the Hon'ble High Court to direct the Corporate Debtor to identify a nominee who will ultimately purchase the shares of the Operational Creditor which is currently owned by the Operational Creditor. It is further submitted

that the Corporate Debtor has failed deliberately to identify or notify a nominee to purchase the shares from the Operational Creditor."

18. After this, the IRP rejected the claim of the applicant vide email dt.7.05.2022 stating that the terms of the settlement agreement was "*ultra vires*" as in accordance with the provision of Section 67 of the Companies Act, 2013 no Company shall have the power to buy its own shares unless consequential reduction of share capital is effected.

19. It is noticed from the prayers in this Application that Applicant has contested the rejection of claim of 'Debt' submitted by the Applicant under Regulations 7 & 9 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 and have prayed for admission of such claim of 'debt' under these Regulations.

20. Now, the Regulation 7 under the aforesaid IBBI Regulations, 2016 relates to 'Claim by Operational Creditors' stating that such a claim is to be furnished during CIRP before the IRP in the prescribed Form-B. Similarly, the Regulation 9 relates to 'Claim by workmen and employees' to be made before the IRP during CIRP in the prescribed Form-D. Therefore, for proceeding with the claim which has been furnished in Form-B before the IRP, first it is to be ascertained whether the claim which had been made here is in respect of an 'operational debt' as defined under Section 5(21) of the IBC and whether the Applicant in this IA can be categorized as 'Operational Creditor' so that they can make the claim under Regulation 7. The Applicant herein is an employee as well as shareholder of the Corporate Debtor and has made this claim as an 'Operational Creditor' on the basis of Shareholders' Agreement.

21. In this connection, it is relevant to peruse the decision dated 12.05.2023 of the coordinate bench of Hon'ble NCLT, Mumbai in the case of Gopakumar Puthan Kattoor v. Oil Tools International Services Pvt. Ltd. CP No.1444/2020 which relates to a Petition under Section 9 of the IBC by the Petitioner claiming to be an Operational Creditor. In that case, the Operational Creditor had infused some money in the Corporate Debtor either in the form of share capital or in the form of loan. It was held that such an amount will not be covered within the definition of 'Operational Creditor' in terms of Section 5(21) of the IBC and thus Petition filed for admission under Section 9 was rejected on this basis. The NCLT, Mumbai Bench in this case also relied upon a judgment of Hon'ble NCLAT in the matter of *Mr. Kushan Mitra vs. Mr. Amit Goel and Anr. in Company*

Appeal (AT) (Insolvency) No.128 of 2021 & I.A. 2340 of 2021 and 2413 of 2021[1] *reported in (2021) ibclaw.in 616 NCLAT,* wherein, it was held that the refund of share application money in the event of non-allotment of shares fell within the ambit of financial debt. This was since refund of share application money, in the event of non-allotment of shares attracts interest as provided under Section 42(6) of the Act and therefore qualifies essential ingredients of Section 5(8) of the Code. Further, a three judge Bench of this NCLAT in Uniexcel Developers Pvt. Ltd v. Uniexcel Ltd. CP(IB) 20/ND/2021 has concurred with the finding of the Adjudicating Authority and held that in case of non-refund of Share Application Money within 60 days of receipt of the money, the money will be treated as Deposit and would change its character to fall within the definition of Financial Debt.

22. Additionally, in the Hon'ble NCLAT judgement in *Raj Geholt v. Vistra (ITCL) India Ltd.*, (CP(AT) (Ins) No. 6/2021), an admission order of the NCLT under Section 7 of the Code was set aside on the ground that an investment made under a Share Subscription and Shareholders Agreement would not come within the purview of a financial debt in terms of Section 7 read with Section 5(8) of the Code. It was observed that a financial debt must have disbursal of funds and must carry an interest element, therefore, the investment made with the object of profit sharing would not constitute a financial debt.

23. In consideration of the above discussion, this Tribunal is of the considered opinion that the applicant is not an Operational Creditor and the amount claimed by the applicant is not an operational debt within the meaning of Section 5(21) of the Code. Accordingly, the applicant is not eligible to file a claim under Regulation 7 of IBBI ((Insolvency Resolution Process for Corporate Persons) Regulations which is applicable only for Operational Creditors.

24. With regards to the claim under Regulation 9 for workmen and employees dues in Form D, the reply of the IRP has clarified that as per the books of accounts provided by the suspended Board of Directors, nothing is due and payable to the applicant. Therefore, this claim is also not tenable.

25. In view of the above discussion, the application is not maintainable. Therefore, **I.A. 200 of 2022 is dismissed.**

I.A No. 366 of 2022

1. The instant application is filed by the applicant against the CD-M/s SDU Travels Private Limited with a prayer to direct the respondent/CD to admit the claim of the applicant submitted in Form D, as debt under Regulation 9 of the Insolvency Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) and set aside the email dt.08.08.2022 whereby the IRP of the CD rejected the claim of the application in terms of the settlement agreement dt.15.12.2017 that was mutually signed by the parties pursuant to the mediation proceedings held between the parties.

2. The main contention raised by the applicant is that the claim was wrongly rejected by the IRP stating that as per the documents on record which relate to the financial affairs of the company, nothing is due and payable to the applicant. The payments alleged to be due to the applicant relate to the final amount of salary of Rs.40Lacs which was to be paid in four equal instalments of Rs.10 Lacs each. The applicant states that out of four cheques issued by CD, only two cheques have been enchased and the 3rd and 4th cheque were dishonoured.

3. The applicant is aggrieved by the IRP's decision to reject the claim and stated that no specific clarification or justification has been provided by the IRP regarding such rejection of claim.

4. The Learned Counsel for the Respondent has filed his objection vide diary no.5194 on 01.12.2022 and the same is taken on record. In the objections, Ld. Counsel for the Respondent/IRP has contended that the Applicant has filed an Application bearing I.A.No.200/2022 for rejection of its claim made in Form-B related to an Operational Credit. In the same Application, claim under Form-D under Regulation 9 is also attached. The RP clarified that the Form-D was rejected as no dues of salary payable to the Applicant was recorded in the Books of Accounts of the Corporate Debtor. Moreover, it is further submitted that the rejection of the claim in Form-B under Regulation 7 as 'Operational Creditor' was made by the IRP on the basis of the rejection of a claim pursuant to a Deed of Settlement which related to Share Purchase/Buy Back of

Share Agreement; and the same reasons should be considered for this claim also.

5. We have considered the submissions of the Applicant and the objections filed by the IRP while dealing with I.A.No.200/2022, in which Order has been passed above. It was recorded that as per the Books of Accounts of the Corporate Debtor provided by Suspended Board of Directors, there was no such amount of salary reflected as due and payable to the Applicant, and therefore the claim of the Applicant was not found to be legally tenable. When there is nothing recorded in the Books of Accounts provided by the Suspended Board of Corporate Debtor to the IRP, the claim under Regulation 9 of IBBI (IRP for Corporate Persons) Regulations, 2016 is liable to be dismissed.

6. Hence I.A No. **366 of 2022 is thereby dismissed.**

S/d
(MANOJ KUMAR DUBEY)
MEMBER (TECHNICAL)

S/d
(K. BISWAL)
MEMBER (JUDICIAL)