

IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH

CP 1313/I&BP/NCLT/MAH/2017

(Under Section 10 of the I&B Code, 2016)

In the matter of
Polychroic Petrochemicals Private
Limited

...Corporate Debtor

Order Delivered on:23.10.2018

Coram: Hon'ble Shri V. P. Singh, Member (Judicial)
Hon'ble Shri Ravikumar Duraisamy, Member (Technical)

For the Resolution Professional: Ms. Unnati S. Nandlaskar, Practicing
Company Secretary.
For the Financial Creditor: Mr. Rajesh Nagori, Advocate a/w
Indrjeet Hirjane, Advocate i/b
Sanjana Ghoghare, Advocate.
For the Corporate Debtor: Mr. Rajesh Bhora, Advocate.

Per V. P. Singh, Member (Judicial)

ORDER

1. There are two Miscellaneous Applications filed by Resolution Professional (**RP**) being MA 185/2018 filed under sub-section (2) and (3) of section 19 of Insolvency and Bankruptcy Code, 2016(**IBC, 2016**) and another being MA 505/2018 filed under section 33(2) of IBC, 2016 seeking liquidation of the Corporate Debtor as resolved by Committee of Creditors (**COC**). The suspended Promotor/Director of the Corporate Debtor has also filed two Miscellaneous Applications being MA 613/2018 under section 60(5) of IBC, 2016 praying to direct the RP and COC to consider the Resolution Plan submitted by them and MA 320/2018 seeking certain Ad Interim Reliefs.
2. This Company Petition was originally filed by Polychroic Petrochemicals Pvt. Ltd. (**Corporate Debtor**) under section 10 of IBC, 2016 for initiation of Corporate Insolvency Resolution Process (**CIRP**) against itself. The said petition being CP 1313/I&BC/NCLT/MAH/2017 was admitted by this Bench vide order dated 15.09.2017. The Corporate debtor is a classified micro, small and medium enterprise under sub-section (I) of section 7 of Micro, Small and Medium Enterprises Development Act, 2006.

3. It is pertinent to note the para 8 of the said order admitting the petition wherein it is recorded that the sole Financial Creditor opposed the appointment of Interim Insolvency Resolution Professional (**IRP**) proposed by the Corporate Debtor. Eventually, on 28.09.2017 name of another IRP was suggested by the Corporate Debtor after due consultation with Financial Creditor, who was then duly appointed vide the same admission order. However, as also noted in Para 11 of the said order, due to intervention of the Financial Creditor, the order could only be released on 04.10.2017. The Para 11 of the said order is reproduced below:

"Even Though the Petition was Admitted on 15.09.2017, given the change in Interim Insolvency Resolution Professional on the intervention of the Financial Creditor, this order is released on 04.10.2017."

4. The brief facts of this case after admission of the petition by this Bench follows when the IRP took charge of the Corporate Debtor on 24.10.2017 who was later confirmed as Resolution Professional (**RP**) in the First COC meeting. A public announcement intimating initiation of CIRP and inviting claims from creditors was published on 26.10.2017. Based on the claims received, the IRP constituted the Committee of Creditors (**COC**) comprising the sole Financial Creditor i.e. The Bharat Co-operative Bank (Mumbai) Limited and the First meeting of COC was convened on 22.11.2017 in which, it may be noted that the legal advisor of the sole Financial Creditor, having regard to the other legal proceedings before other forums between the same parties, had requested to liquidate the Corporate Debtor on immediate basis to initiate recovery of bank dues.
5. The Second meeting of COC was convened on 26.12.2017 in which the COC members were informed that under the Insolvency and Bankruptcy (Amendment) Ordinance, 2017 dated 23.11.2017 the Promoters of the Corporate Debtor are not eligible to be Potential Resolution Applicants. The Third meeting of COC was convened on 17.02.2018 wherein the resolution for extension of the CIRP period was passed and consequently application for extension of CIRP was filed by the RP which was allowed by an order of this Bench dated 13.03.2018 and the CIRP period was extended till 12.06.2018. Under the Third meeting of COC and given the Extension of the CIRP, RP published a public notice for inviting Expression of Interest (**EOI**) from potential investors. The

RP received EOI from three potential investors of which only one potential investor could meet the eligibility criteria laid down by the COC resulting into rejection of the other two proposals. The sole potential investor, who could meet the eligibility criteria, however, did not submit any resolution plan. Hence, the Fourth COC meeting was convened on 26.04.2018 wherein the COC decided not to give any more time for the submission of the Resolution Plan by the sole potential investor who could meet the eligibility criteria. The COC also refused to one more round of inviting EOI and instead voted for Liquidation of the corporate Debtor. During the course of the Fourth meeting of COC, Mr. Joshi, the suspended Promotor/Director of Corporate Debtor informed the COC about certain expected amendments to the provisions of IBC, 2016 which may allow the promotor to submit a Resolution Plan and in such a situation where he is eligible to submit a resolution plan before the order of Liquidation is passed by the Adjudicating Authority, he requested the COC to consider his Resolution Plan. To this request of the suspended Promotor/Director, the COC stated that it reserves the right to accept or reject the Resolution Plan.

6. Under the resolution passed at the Fourth COC meeting dated 26.04.2018 the RP has filed MA 505/2018 under section 33 of IBC, 2016 on 09.05.2018 with a prayer, among other things, to pass the order for Liquidation of the Corporate Debtor. On 28.05.2018 RP received a letter from Mr. Anirudha Joshi, one of the suspended Promotor/Director of Corporate Debtor seeking permission to submit a detailed resolution plan and that he was ready to make a payment of Rs. 50cr towards repayment of debt of dues of all stake holders throughout 7 years by reviving the Corporate Debtor and offered Rs. 5cr upfront payment on acceptance of his resolution plan. To this letter, the RP replied stating his inability to accept the request as he had already filed liquidation application as per the instruction of COC. Eventually, on 06.06.2018 the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018 was promulgated by the Hon'ble President of India. The said Ordinance inserted a new section in the IBC, 2016 being section 240A that provided for application of the Code to micro, small and medium enterprises. The new section provided for inapplicability of clause (c) and (h) of section 29A of IBC, 2016 upon the resolution applicant in respect of CIRP of any micro, small and medium enterprises. Thereby, the suspended Promotor/Director of the Corporate Debtor became eligible to

submit a resolution plan on 06.06.2018 i.e. the date from which the Ordinance comes into force. Under the Ordinance, Mr. Anirudha Joshi, vide his e-mail dated 11.06.2018 to RP, submitted a Resolution Plan. RP in his reply referred to the resolution of COC for liquidation of the Corporate Debtor on 24.04.2018 and expressed his inability to accept the resolution plan on the grounds of the CIRP period coming to an end on 12.06.2018 and the plan not being a resolution plan under the IBC, 2016 but a mere settlement plan.

7. The Promotors/Directors of the Corporate Debtor has applied on 21.06.2018 through its MA 613/2018 under section 60(5) of IBC, 2016 praying to direct the RP and COC to consider the Resolution Plan submitted by them as they are eligible to do the same under section 240A of IBC, 2016.
8. We are of the considered view that the object and purpose behind enacting IBC, 2016 is resolution of the corporate insolvency as opposed to recovery of debts of any particular creditor or class of creditors. The RP and COC are put at the helm of the affairs of the Corporate Debtor, by suspending the Promotor/Directors and given authority and responsibility to resolve the insolvency in a limited time frame and under the broad contours of law prescribed by IBC, 2016. Their actions shall be by the object and purpose of the IBC, 2016 and not to serve their sole interest at the cost of a running company and fate of its employees which they are entrusted with.
9. At the very first COC meeting, the legal advisor of the Financial creditor was keen to propose the liquidation of the Corporate Debtor. COC decided not to give any more time to the sole resolution applicant for submission of resolution plan neither did they agree to another round of inviting EOI, rather they passed resolution for liquidation of the Corporate Debtor when more than one month was left in the CIRP period to end. All this show that the COC, which comprises the sole Financial Creditor of the Corporate Debtor, was keen in liquidating the company and recover its dues.
10. From the reply of RP vide its letter dated 12.06.2018 it is clear that the resolution plan submitted by the suspended Promotor/Director of the Corporate Debtor was not put before the COC for its consideration and was rejected by the RP himself stating that it is not a resolution plan under IBC, 2016 but a broad

settlement plan. Considering the fair value and the liquidation value of the Corporate Debtor, the plan proposed by the Corporate Debtor demands a formal consideration of the COC by providing a fair opportunity to the suspended Promotor/Director to submit their plan as per the Ordinance promulgated on 06.06.2018.

11. It is well settled by the Hon'ble Supreme Court in *Arcelormittal India Private Limited vs Satish Kumar Gupta &Ors. In Civil Appeal Nos. 9402-9405 of 2018* that the Resolution Professional is to only "examine" and "confirm" that each resolution plan submitted to it conforms to what is provided under section 30(2). The Resolution Professional is required to examine that the resolution plan submitted to it is complete in all respects before submitting to the COC. The relevant para of the Judgment of the Hon'ble Supreme Court in the *Arcelormittal* case (*supra*) is reproduced below:

"77. ... The Resolution Professional is not required to take any decision, but merely to ensure that the resolution plans submitted are complete in all respects before they are placed before the Committee of Creditors, who may or may not approve it. The fact that the Resolution Professional is also to confirm that a resolution plan does not contravene any of the provisions of law for the time-being in force, including Section 29A of the code, only means that his prima facie opinion is to be given to the Committee of Creditors that a law has or has not been contravened."

12. Under sub-section 12 of section 5 of IBC, 2016 the "insolvency commencement date" is defined as to mean the date of admission of an application for initiating corporate insolvency resolution process by the Adjudicating Authority under section 7, 9 and 10, as the case maybe. The Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 (26 of 2018), dated 17.08.2018 which is in effect from 06.06.2018 has added a Proviso to this sub-section as follows:

"PROVIDED that where the interim resolution professional is not appointed in the order admitting application under section 7, 9 or 10, the insolvency commencement date shall be the date on which such interim resolution professional is appointed by the Adjudicating Authority"

13. As mentioned in the order admitting the petition that it was released on 04.10.2017 meaning thereby that the IRP could not have been appointed before that date. Therefore, the date of admission as mentioned in the order i.e. 15.09.2017 cannot be the insolvency commencement date. Hence, the period from 15.09.2017 till the date of release of the order i.e. 04.10.2017 is excluded from the entire CIRP.
14. Considering the facts and circumstances of the case, statutory developments and the Judgement of the Hon'ble Supreme Court referred above, we hereby direct the suspended Promotor/Director to submit a legally valid resolution plan within seven days from the date of this order to RP.
15. RP to put before the COC, the resolution plan so submitted by the resolution applicant within seven days from the date of receipt of the resolution plan and after that the COC shall take a formal decision, on merits of the resolution plan, either accepting or rejecting the resolution plan. The COC shall give its reason in writing for rejection of the plan, as the case may be.
16. All the other pending application shall be decided after the final decision of COC, upon the resolution plan is submitted before this Bench. The RP is further directed to inform this Bench of the outcome of the COC on the resolution plan, within Two days from the date when COC takes a decision.
17. The Registry is hereby directed to immediately communicate this order to the Financial Creditor, the Corporate Debtor and the Resolution Professional even by way of email and whatsapp.

SD/-

Ravikumar Duraisamy
Member (Technical)

SD/-

V. P. Singh
Member (Judicial)