IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH-I
KOLKATA

IA (IB) No. 664/KB/2021
in
CP (IB) No. 349/KB/2017

In the matter of:
An Application under section 60(5) of the Insolvency and Bankruptcy Code, 2016 read with rule 11 of the National Company Law Tribunal Rules, 2016..

CP (IB) No. 349/KB/2017

In the matter of:
Ramsarup Industries Limited … *Corporate Applicant*

And

IA (IB) No. 664/KB/2021

In the matter of:
Kotak Mahindra Bank Limited … *Applicant*

Versus

1. Kshitiz Chhawchharia,
   Resolution Professional
2. Asset Reconstruction Company (India) Limited
3. JM Financial Asset Reconstruction Company Limited
4. Vijaya Bank
5. Pegasus Asset Reconstruction Private Limited
6. UCO Bank
7. Axis Bank
8. ICICI Bank
9. West Bengal Industrial Development Corporate Limited
10. Indian Renewal Energy Development Agency Limited
11. SREI Multiple Asset Investment Trust Fund

… Respondents

Order reserved on: 29 April 2022
Order pronounced on: 28 June 2022

Coram:

Shri Rajasekhar V.K. : Member (Judicial)

Shri Balraj Joshi : Member (Technical)

Appearances (through video conference):

For the Petitioner	: 1. Ms. Manju Bhuteria, Advocate 2. Mr. V. Kedia, Advocate
For Respondent No. 1	: 1. Mr. Deep Roy, Advocate 2. Mr. Kataini Gurav, Advocate
For Respondent No. 9	: 1. Mr. Aritra Bose, Advocate 2. Mr. Piyush Agarwal, Advocate 3. Ms. Ranjabati Ray, Advocate

ORDER

Rajasekhar V.K., Member (Judicial)

1. This Court convened through video conferencing.
2. I.A. (IB) No. 644/KB/2021 has been filed by Kotak Mahindra Bank under section 60(5) of the Insolvency and Bankruptcy Code, 2016 ("Code") seeking the following reliefs:
   a. Direct the Resolution Professional to rework the distribution pattern so as to implement the provisions of amended section 30(2) of the Code;
   b. Direct the resolution Professional to pay a sum of Rs.1.44Crore to the Applicant, being the liquidation value determined by the Resolution Professional.
   c. Pending hearing and disposal of the Present Application, all disbursals pursuant to the Resolution Plan submitted by the successful Resolution Applicant be stayed.
3. ***Submissions of Ms. Manju Bhuteria, learned Counsel appearing on behalf of the Applicant***

3.1. The Applicant under a consortium agreement extended Working Capital Facility of Rs.15,00,00,000/- (Rupees Fifteen Crore only) to the Ramsarup Industries Limited, Corporate Applicant in the year 2004. The Working Capital Facility was enhanced to Rs.20,00,00,000/- (Rupees Twenty Crore only) in 2009.

3.2. The account of the Corporate Applicant was declared as Non-Performing Asset ("NPA") on March 2011. Thereafter, the Corporate Applicant filed a Petitioner under section 10 of the Code which was registered as C.P. (IB) No. 349/KB/2017 for initiation of Corporate Insolvency Resolution Process ("CIRP").

3.3. This Adjudicating Authority admitted the Corporate Applicant in CIRP on 08 January 2018 and appointed an Interim Resolution Professional.

3.4. The Applicant filed its claim with the Interim Resolution Professional for an amount of Rs.66,08,00,000/- (Rupees Sixty-Six Crore Eight Lakh only) which was admitted by the Interim Resolution Professional.

3.5. The Applicant had 1.13% voting share in the Committee of Creditors ("CoC"). Pursuant to the invitations for Expression of Interest ("EoI") issued by the Respondent No. 1, four prospective Resolution Applicants filed Resolution Plans.

3.6. The Respondent No. 1 determined the Liquidation value of the Corporate Applicant as Rs.615,00,00,000/- (Rupees Six Hundred and Fifteen Crore only). As per the Liquidation Value, the Applicant was entitled to Rs.1,44,00,000/- (Rupees One Crore Forty-Four Lakh only)

3.7. The Applicant objected to the distribution methodology as per the security interest as the Applicant was entitled to receive Rs.3,88,00,000/- (Rupees Three Crore Eighty-Eight Lakh only) as per the voting share.

3.8. On 02 March 2019, the Resolution Plan submitted by the consortium of SS Natural Resources Private Limited and Shyam SEL & Power was approved by the CoC, however the Resolution Plan does not provide any distribution methodology.

3.9. SS Natural Resources Private Limited and Shyam SEL & Power proposed Rs.351,00,00,000/- in the Resolution Plan, which brought the proposed payment to the Applicant to Rs.80,00,000/- (Rupees Eighty Lakh only).

3.10. The CoC proposed to vote on two distribution methodologies i.e. distribution on the basis of voting share and distribution on the basis of security interest. The two distribution methodologies were put to vote on 11 March 2019, whereby the distribution methodology of resolution proceeds on the basis of security interest was approved by the requisite majority of members of the CoC. The Applicant has voted against the distribution methodology as per security interest and also the Resolution Plan submitted by the successful Resolution Applicant.

3.11. The Resolution Plan was approved by this Adjudicating Authority on 04 September 2019.

3.12. Ms. Manju Bhuteria submits that subsequent to the amendment of section 30(2) of the Code which came into effect on 06 August 2019, which envisaged that any creditor not voting in favour of the plan is entitled to liquidation values in accordance with section 53(1) of the Code.

3.13. The resolution Professional had estimated the liquidation value at Rs.615,00,00,000/- (Rupees Six Hundred and Fifteen Crore only) and merely because the proposed amount is less than the Liquidation value, such amount cannot be considered as liquidation amount.

3.14. The distribution to the dissenting Financial Creditor should be done in accordance with section 30(2) of the Code. The said provision is applicable to the present case as the Resolution Plan was approved by the 04 September 2019 and the appeal was dismissed on 04 March 2021.

3.15. The Applicant *vide* email dated 25 September 2019 requested the Respondent No. 1 to consider the distribution in light of the amended section 30(2) of the Code. The Respondent No. 1 called upon his process advisors on 25 September 2019 to re-work the distribution pattern but the process advisors *vide* email dated 24 December 2019 refused to re-work the distribution process as the matter was sub-judice.

3.16. After the order approving the Resolution Plan was upheld by the Hon'ble NCLAT, the Applicant sent an email dated 11 March 2021 requesting the Respondent No. 1 to revise the distribution matrix, but the Respondent No. 1 has not revised the same till date.

4. ***Submissions of Mr. Deep Roy, learned Counsel for the Respondent No. 1***

4.1. The present I.A. has been filed with regard to distribution of the proposed amount to the dissenting Financial Creditor. The CoC has appointed a process advisor *viz.* Ernst Young to assist the CoC in the distribution among the Financial Creditors.

4.2. The distribution pattern had been discussed in the 24th CoC meeting held on 06 March 2019, the process advisors gave a detailed presentation with regard to the two distribution methodologies. The Applicant did not raise any issue in the said meeting.

4.3. The two distribution methodologies were put up for voting along with the Resolution Plan submitted by the successful Resolution Applicant. The results of the e-voting were shared by the erstwhile Resolution Professional *vide* email dated 16 March 2019.

4.4. The CoC by 74.41% voting share voted in favour of the Resolution Plan along with the distribution method on the basis of security interest. The Applicant had challenged the decision of the CoC and had sought for distribution to be as per voting share, the Application was dismissed by this Adjudicating Authority on 04 September 2019.

4.5. The distribution pattern was merely to distribute the proposed amount under the Resolution Plan and did not provide for reduction of the liquidation value.

4.6. At the time of finalisation of the distribution pattern and the conclusion of e-voting by the CoC i.e. 16 March 2019, the Insolvency and Bankruptcy Code (Amendment) Act, 2019 was not in force. It came into effect from 05 August 2019 which stipulated that the dissenting financial creditors would be at least paid the amount that they would have received in case of liquidation of the Corporate Debtor in accordance with section 53(1) of the Code. Hence, the distribution method approved by the CoC did not factor in any different treatment to any dissenting Financial Creditor.

4.7. This Adjudicating Authority approved the Resolution Plan along with the distribution method on 04 September 2019, and the approval of the Resolution Plan was upheld by the Hon'ble Supreme Court *vide* orders dated 04 May 2021, 02 July 2021 and 09 July 2021.

4.8. The Respondent No. 1 duly replied to all the enquiries raised by the Applicant post approval of the Resolution Plan.

5. ***Analysis and Findings***

5.1. Heard the learned Counsel appearing on behalf of the Applicant and the learned Counsel appearing for the Respondent No. 1 and perused the record.

5.2. The implementation and effect of the Insolvency and Bankruptcy Code (Amendment) Act, 2019 is in question. The Insolvency and Bankruptcy Code (Amendment) Act, 2019 dated 05 August 2019 came into effect from 16 August 2019. The Explanation 2 of section 30(2) (b)[1] of the Code envisages that the on and from the date of commencement of the Insolvency and Bankruptcy Code (Amendment) Act, 2019, the provisions of section 30(2)(b) shall also apply to the CIRP of a Corporate Debtor, where a resolution plan has not been approved or rejected by the

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[1] [(b) provides for the payment of debts of operational creditors in such manner as may be specified by the Board which shall not be less than- (i) the amount to be paid to such creditors in the event of a liquidation of the corporate debtor under section 53; or (ii) the amount that would have been paid to such creditors, if the amount to be distributed under the resolution plan had been distributed in accordance with the order of priority in sub-section (1) of section 53, whichever is higher, and provides for the payment of debts of financial creditors, who do not vote in favour of the resolution plan, in such manner as may be specified by the Board, which shall not be less than the amount to be paid to such creditors in accordance with sub-section (1) of section 53 in the event of a liquidation of the corporate debtor.
Explanation 1. — For removal of doubts, it is hereby clarified that a distribution in accordance with the provisions of this clause shall be fair and equitable to such creditors.
Explanation 2. — For the purpose of this clause, it is hereby declared that on and from the date of commencement of the Insolvency and Bankruptcy Code (Amendment) Act, 2019, the provisions of this clause shall also apply to the corporate insolvency resolution process of a corporate debtor- (i) where a resolution plan has not been approved or rejected by the Adjudicating Authority; (ii) where an appeal has been preferred under section 61 or section 62 or such an appeal is not time barred under any provision of law for the time being in force; or (iii) where a legal proceeding has been initiated in any court against the decision of the Adjudicating Authority in respect of a resolution plan;] (c) provides for the management of the affairs of the Corporate debtor after approval of the resolution plan; (d) the implementation and supervision of the resolution plan; (e) does not contravene any of the provisions of the law for the time being in force (f) conforms to such other requirements as may be specified by the Board.

Adjudicating Authority or where an appeal has been preferred under section 61 or section 62 or where a legal proceeding has been initiated in any court against the decision of the Adjudicating Authority in respect of a resolution plan.

5.3. It is pertinent to note the timeline from the date of approval of the Resolution Plan by the CoC to the date of dismissal of appeals by the Hon'ble NCLAT.

Sl. No.	Description	Date
1.	Approval of Resolution Plan by the CoC	16 March 2019
2.	Approval of Resolution Plan by the Adjudicating Authority	04 September 2019
3.	Approval of Resolution Plan by the Hon'ble NCLAT	04 arch 2021

5.4. Hence, it is clear that the provision in Explanation 2 of section 30(2) (b) of the Code, shall apply to the Resolution Plan of Ramsarup Industries Limited as the Resolution Plan was still under the consideration of the Adjudicating Authority when the Insolvency and Bankruptcy Code (Amendment) Act, 2019 came into force. The Applicant had emailed the Resolution Professional on various occasions requesting the Resolution Professional to revise the distribution methodology.

5.5. But the question is why did the Applicant not bring it to the notice of the Adjudicating Authority or the Hon'ble NCLAT when the approval of the Resolution Plan had not attained finality.

5.6. Be that as it may, Explanation 2 of section 30(2) (b) of the Code is applicable to the distribution of the proposed amount to the dissenting Financial Creditor, in such manner as may be specified by the Board, which shall not be less than the amount to be paid to such creditors in accordance with sub-section (1) of section 53 in the event of a liquidation of the corporate debtor. In theory one would assume that the Financial Creditor would be calculated from the estimated liquidation value. But one cannot assume that the liquidation value would be fetched in case of liquidation. The amount could be higher than the liquidation or could be lesser that the estimated liquidation value. The liquidator would have distributed in accordance with sub-section (1) of section 53 on the amount received during liquidation.

5.7. Similarly, the amount proposed by the successful Resolution Professional shall be considered and the distribution shall be done accordingly. The dissenting Financial Creditor shall receive payment in accordance with sub-section (1) of section 53, but calculated as per the amount proposed in the Resolution Plan.

6. In view of the above directions, **I.A. (IB) No. 664/KB/2021 in CP (IB) No. 349/KB/2017** is disposed of accordingly.

7. The Registry is directed to send e-mail copies of the order forthwith to all the parties and their Ld. Counsel for information and for taking necessary steps.

8. Certified Copy of this order may be issued, if applied for, upon compliance of all requisite formalities

9. File be consigned to the records.

BALRAJ JOSHI
Digitally signed by BALRAJ JOSHI
Date: 2022.06.28 20:56:50 +05'30'

Balraj Joshi

Member (Technical)

Rajasekhar V K
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Rajasekhar V.K.

Member (Judicial)

Order pronounced on the 28 day of June 2022.

GGRB[LRA]