IN THE NATIONAL COMPANY LAW TRIBUNAL
KOCHI BENCH

I.A.(IBC) No. 56/KOB/2021

In

TIBA No.11/KOB/2019

(Under Section 60(5) of IBC, 2016)

Date of decision: 12th March, 2021

CORAM

HON'BLE MR. ASHOK KUMAR BORAH, MEMBER (JUDICIAL)

Applicant:

NRI & RI Welfare Federal Co-operative society Ltd.
Sangeeth Nagar, 506, TC Old 24/451, TC New 28/622
Opp. Swathi Thirunal Music College, Gandhi Bhavan,
Aristo, Near Thampanoor, Thycaud PO
Trivandrum-695014
Represented by its Chairman Mr.Mannadi Anil & KS Anil

Versus

Respondents:

1. Shri Bijoy P Pulipra, CS
   Resolution Professional, PVS Mmorial Hospital Pvt.Ltd
   Ground Floor, TC-11/789(1), Vayal Road
   (Plamoodu Nalanda Junction Road)
   Nanthancode, Kowdiar PO, Kerala-695003.

2. PVS Memorial Hospital Pvt. Limited
   No.XXIV/1484, Kaloor
   Ernakulam-682017.

3. The Committee of Creditors
4. PVS Memorial Hospital Pvt. Limited
   No.XXIV/1484, Kaloor
   Ernakulam-682017.

Parties/Counsel appeared (through Video Conferencing)

For applicant : Mr. Akhil Suresh, Advocate
For Respondents : Mr.Bijoy Prabhakaran Pulipra, RP

ORDER

This is an application filed as IA(IBC)56/KOB/2021 on 22nd February, 2021 (after curing the defects) under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 by the NRI & RI Welfare Federal Cooperative Society Limited against the Resolution Professional and PVS Memorial Hospital and its Committee of Creditors in the matter of PVS Memorial Hospital Private Limited seeking the following reliefs:

(a) To direct *the respondent to declare that the Resolution Plan submitted by the 3rd respondent is illegal and is in violation of Section 60(5) of I&B Code and Regulation 35(2) of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.*

(b) *To set aside the Resolution Plan submitted by the 3rd respondent and* direct the respondent to consider the resolution plan of the applicant.

2. The brief facts are as under:

(a) The applicant is a federal co-operative society registered under the Kerala Cooperative Societies Act, 1969, situated at Thriuvananthapuram, Kerala. The objective of the society is to provide equitable socio-economic financial security, infrastructural through the togetherness of Non-Residents and Residents of the country to provide a quality life to all its members.

(b) The applicant received information regarding the initiation of resolution process in the Corporate Insolvency Resolution Process (for short CIRP) when the invitation for prospective Resolution Applicants had been published. The applicant had only received such information after the due date of submission of Expression of Interest had lapsed.

(c) Due to Covid 19 pandemic the applicant could not gather funds to submit a Resolution Plan and deposit the performance guarantee even though the CIRP was put on hold at that time.

(d) The suspended directors contacted the Resolution Professional vide email dated 23.12.2020 and stated that there are interested investors who can clear all the liabilities of the Committee of Creditors. The applicant has been prevented from making a Resolution Application before the respondents due to the fact that the request of the suspended directors had not been considered by the Resolution Professional.

(e) The 1st Respondent has violated Section 61(3)(ii) of IBC and exercised his powers to favour an existing Resolution Applicant. A duty is cast on the 1st respondent to ascertain minimum value for the assets of the corporate debtor while exercising his powers under the Code.

(f) The Resolution Application submitted by the present Resolution Applicant is per se violation of Section 61(3) of the I&B Code and Regulation 35(2) of IBBI (Insolvency Resolution Process for Corporate persons) Regulations, 2016.

(g) The Resolution Professional has colluded with the successful resolution applicant, which is contrary to the decision given by the Hon'ble Apex Court in Swiss Ribbon's case.

(h) The Resolution Applicant had access to the valuation reports obtained by the respondents which again violation of the breach of confidentiality under Regulation 35(2) of IBBI (Insolvency Resolution Process for Corporate persons) Regulations, 2016.

(i) After the Ernakulam district administration took the hospital for Covid Care Centre the property of corporate debtor is a running concern and the value quoted by the valuer is not correct. The valuers should have mandatorily consider the aspect of the corporate debtor being a running concern. The valuers have valued the property as stressed assets, hence the valuation reports are illegal and liable to be rejected.

(j) Earlier a valuation report was obtained by the Corporate Debtor in 2018 for value of Rs.4,23,17,00,000 from Er,.KV Kuriakose, Chartered Engineer. Another valuation also obtained by Corporate Debtor from MECC associates, they fixed the value as Rs. 277 crores in 2018-19.

(k) Reliance has been placed on the decision of Behari Kunj Sahkari Avas Samiti Vs State of UP and others in Civil Appeal No.1795 of 2000 and Satluj Jal Vidyut Nigam Vs. Rajkumar Rajinder Singh in Civil Appeal No.9871 of 2018 to state that the Resolution Professional has fraudulently colluded with the

Resolution Applicants, which is void ab initio and it is settled principle that fraud as well known vitiates even the solemn among the solemn acts.

(l) The applicant is willing to settle all debts of the Corporate Debtor as admitted by the Resolution Professional.

3. The Resolution Professional has filed a counter denying all the contentions raised in the application stating that they are baseless, frivolous, devoid of any merit and without any legal tenability. Since the Resolution Plan has already been approved by the CoC, instead of approaching the appellate authority, the applicants wrongly prayed to declare the Resolution Plan approved by the Committee of Creditors is illegal. The violation of Section 61(3) stated in the application is not correct because under that Section only an appeal can be filed against an order of the adjudicating authority approving the Resolution Plan and this Tribunal have no jurisdiction to consider an application under Section 61(3) of the IBC 2016. The applicants had neither sent an email or letter to the Respondent No.1 stating their interest to participate in the Resolution Plan submission process nor placed any request to condone the delay in submission of Expression of Interest. But, they approached the suspended directors of the CD whose powers are suspended upon initiation of the CIRP and also do not have any power/role under Regulation 36A of IBBI (Insolvency Resolution Process for Corporate persons) Regulations, 2016. Even the letter of Shri PV Chandran, one of the suspended directors was considered and directed him to submit the

entire plan in compliance with provision of the Code. However, no such details were provided by him. It is clear that the present application is filed with collusion of promotors of the Corporate Debtor with an intention to protract the CIRP.

4. It is further stated that during the deliberations on the Resolution Plan made at the meeting of Committee of Creditors held on 14th October, 2020, Mr. P V Chandran, Promoter of the Corporate Debtor had opined that the amount quoted by the Resolution Applicant is extremely low and requested the Respondent to provide an opportunity to a person within his contact circle to submit a Resolution Plan for consideration of the Committee. Since the time limit prescribed under the Code for submission of the Expression of Interest was already exhausted, the Respondent herein opined that a fresh Resolution Plan shall be considered only with the approval of the Adjudicating Authority based on the decision of the Committee of Creditors. The Respondent had also requested Mr. P V Chandran to update on the specifics of the proposal, detailing the name of the prospective applicant and the time limit within which they can submit the entire plan in compliance with the provisions of the Code to enable the CoC to take appropriate actions. Even though Mr. P V Chandran informed that the said details shall be submitted to Resolution Professional by email at the earliest opportunity, no such email was sent to the Respondent till date and none of the promoters had neither submitted a fresh plan to RP nor presented a fresh plan before the Committee of Creditors for its consideration. The Respondent received

two Expression of Interests, from the promoters of the Corporate Debtor, one from Mr. P V Chandran and Mr. P V Gangadharan and the other from Mr. P V Nidhish and Ms. P V Hemalatha on 14th March, 2020 and after due verification of the same, the Respondent pointed out certain discrepancies in the Expression of Interest and requested them to rectify the defects and submit the documents called for by him to enable him to effectively conduct due diligence in order to corroborate their eligibility regarding the submission of Resolution Plan, the relevant text of which is as follows:

> *a. Annexure B is required to be submitted in proper format as specified in the Detailed Invitation for Expression of Interest to Submit resolution plan*
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> *b. "Tangible Net worth Statement" of the prospective resolution applicants duly certified by a Chartered Accountant, in original to be submitted. The schedules forming part of the Tangible Net worth Statement is required to be attached as it is an integral part of the statement.*
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> *c. Kindly submit the latest CIBIL Report of the prospective resolution applicants and connected persons, as defined under Explanation [1] 1o Section 29A of the Insolvency and Bankruptcy Code, 2016, to affirm that they are not wilful defaulters in accordance with the guidelines of the Reserve Bank of India issued under Banking Regulation Act, 1949.*
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> *d. Demand Draft of Rs. 5,00,00,000 (Rupees Five Crore Only) to be deposited as refundable deposit with the Bank account No: 0525073000000455 opened in the name of PVS Memorial Hospital Private Limited with South Indian Bank, Kaloor Branch to consider and participate in the Expression of Interest to submit the resolution plan.*

5. However, instead of rectifying the defects in the EOI and submitting the documents called for by the Respondent, the Promoters of the Corporate Debtor had requested for relaxation of the eligibility norms fixed by the Committee of Creditors.

The CoC had fixed the eligibility norms cautiously to ensure that only serious parties are participating in the process of submission of the Resolution Plan. The Respondent submitted that he had sent emails to the Promoters of the Corporate Debtor on 24th March, 2020, 09th May, 2020, 18th May, 2020, 04th June, 2020, 05th June, 2020, 13th June, 2020, 0lst July, 2020, 09th July, 2020, 28th August, 2020 requesting them to rectify the defects in the Expression of Interest in order to be eligible to participate in the Resolution Plan Submission Process. It was further stated that the Promoters of the Corporate Debtor had not made any effort to reply and rectify the discrepancies brought to their attention by the Respondent, with the sole intention to unnecessarily prolong the CIRP with ulterior motives.

6. The Committee of Creditors had laid down the eligibility criteria for prospective resolution application in accordance with Section 25(2)(h) of the Code and also defined the capacity, technical as well as financial of the prospective resolution applicants. The applicant being a federal cooperative society formed with an objective of providing an equitable socio economic financial security, infrastructural through the togetherness of Non Resident and Residents of the country to provide a quality life to all the members, does not fulfil the eligibility criteria for the prospective Resolution Applicants. In the matter of **Kalinga Alied Industrial (India) Pvt. Limited -CA(AT) Insolvency No.518 of 2020 t**he Hon'ble NCLAT held that when the application for approval of resolution plan is pending before he adjudicating authority, it cannot entertain an application of a person who has not participated in CIRP, even when such

person is ready to pay more amount in comparison to the Successful Resolution Applicant.

7. The valuation was done by two independent Registered Valuers registered with the IBBI under the Companies (Registered Valuers and Valuation) Rules, 2017 and the fair value and the liquidation value of the Corporate Debtor was computed in accordance with internationally accepted valuation standards, after physical verification of the inventory and fixed assets of the Corporate Debtor. The fair value and the liquidation value of the Corporate Debtor arrived at by both groups of Registered Valuers were not significantly different and, therefore, there was no requirement to appoint another Registered Valuer by the Respondent to submit an estimate of the value computed in the same manner. The Registered Valuers are independent professionals and valuation of the Corporate Debtor was arrived at by adopting the most appropriate method with reference to the nature of the asset and the data available to arrive at the fair value and the liquidation value on the valuation date. The value arrived at by the Registered Valuers are only ‘estimates' and the same cannot be construed as the accurate value of the Corporate Debtor. Regulation 27 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 clearly provides for the criteria of independence of the Registered Valuers and the said appointments are made in accordance with the said Regulations. The respondent referred to a

judgment of the Hon'ble Supreme court in **Maharashtra Seamless Limited vs. Padmanabhan Venkatesh & Ors. (Civil Appeal No. 4242 of 2019)** in which it was categorically held that the "object behind prescribing the valuation process is to assist the Committee of Creditors ("CoC") to take decision on a Resolution Plan properly and there is no statutory mandate under the Code that the bid of the Resolution Applicant should match the liquidation value arrived at in accordance with Regulation 35 of the CIRP Regulations. The relevant para of which are quoted below:

> 26. No provision in the Code or Regulations has been brought to our notice under which the bid of any Resolution Applicant has to match liquidation value arrived at in the manner provided in Clause 35 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. This point has been dealt with in the case of Essar Steel (supra). We have quoted above the relevant passages from this judgment.
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> 27. It appears to us that the object behind prescribing such valuation process is to assist the CoC to take decision on a resolution plan properly. Once, a resolution plan is approved by the CoC, the statutory mandate on the Adjudicating Authority under Section 31(1) of the Code is to ascertain that a resolution plan meets the requirement of sub-sections (2) and (4) of Section 30 thereof. We, per se, do not find any breach of the said provisions in the order of the Adjudicating Authority in approving the resolution plan.

8. Respondent received the valuation reports from the Registered Valuers during May, 2020. The value arrived at by the Registered Valuers are mere guiding light to the CoC to take a commercial decision and the said estimated values are not binding on the CoC. The 15.92% variance in the value of the land in two reports is not a significant variation as-the Fair Value and Liquidation Value has been arrived at based on many other

factors. The Applicant made a bald allegation of "namesake compliance" without providing any proof of the same. The Applicant has made a mere guess work on government investment and demands for revaluation without any merits.

9. This Tribunal heard the arguments advanced by the learned counsel for the applicant and the resolution professional who appeared through video conferencing, at length. The only question for consideration is - whether this Tribunal can grant the reliefs sought by the applicants in the present application?

10. First of all, this application has been filed by the applicants at the 12th hour of approval of Resolution Plan by this Adjudicating Authority. The application MA/13/KOB/2021 for approval of Resolution Plan was heard and reserved for orders to be pronounced on 22.2.2021. This application has been filed on 22.2.2021 (after curing the defects) after the Resolution Plan has been approved by this Tribunal. Hence the first prayer to place the Resolution Plan of the applicants before the Committee of Creditors for consideration is not possible. Since the application has been presented after curing the defects only on 22.2.2021, the question of keeping in abeyance of the application MA/13/KOB/2021 by which the Resolution Plan has been approved is also not possible. Hence both the interim prayers cannot be granted by this Tribunal.

11. Coming to the main reliefs “to direct the respondent to declare that the Resolution Plan submitted by the 3rd respondent is illegal and is in violation of Section 60(5) of I&B Code and Regulation 35(2) of IBBI (Insolvency Resolution

Process for Corporate persons) Regulations, 2016", it is too late to carry out such an exercise by this Tribunal, because, as stated earlier, the Resolution Plan has been approved by this Tribunal on 22.02.2021 and as such this Tribunal cannot declare that the order passed by this Tribunal is in violation of Section 60(5) of the I&B Code and the Regulation 35(2) of IBBI (Insolvency Resolution Process for Corporate persons) Regulations, 2016. Regarding the other prayer to set aside the Resolution Plan submitted by the 3rd respondent and direct the respondents to consider the Resolution Plan of the applicant, it may be noted that the Committee of Creditors is the sole authority to accept or reject a Resolution Plan and after their approval only the Adjudicating Authority can interfere in the matter, either approve or return the Plan to them for any modification as suggested by this Tribunal. This Tribunal cannot exercise the power of appellate authority to set aside a Resolution Plan approved by this Tribunal under Section 31 of IBC, 2016.

12. Section 31(1) of the Code lays down in clear terms that for final approval of a Resolution Plan, the Adjudicating Authority has to be satisfied that the requirement of Sub-Section (2) of Section 30 of the Code has been complied with. The proviso to Section 31(1) of the Code stipulates the other point on which an Adjudicating Authority has to be satisfied. In the case of Committee of Creditors of ***Essar Steel India Limited vs. Satish Kumar Gupta, decided on 15th November, 2019 in Civil Appeal Nos. 8766-8767 of 2019 (2019***

SCC Online SC 1478).) it was held that the scope of interference by the Adjudicating Authority is a limited judicial review.

13. For the aforesaid reasons, the reliefs sought for by the applicants cannot be granted, hence this Tribunal finds no reason to entertain this Application. In view of the aforesaid discussions, this Tribunal has not gone to the other contentions raised by the applicants in this matter. Hence, **IA (IBC) 56/KOB/2021 stands dismissed,** however without costs.

Dated the 12th day of March,2021

Sd/-
(Ashok Kumar Borah)
Member (Judicial)