

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
KOLKATA**

I.A (IB) No. 131/KB/2022

In

C.P. (IB) No. 184/KB/2018

In the Matter of:

Under section 60(5) of the Insolvency and Bankruptcy Code, 2016, reads with Rule 11 of the National Company Law Tribunal Rule, 2016.

And

In the Matter of:

Sangita Fiscal Services Private Limited & Ors

...Financial Creditors

Versus

Duncan Industries Limited

.... Corporate Debtor

And

In the Matter of:

Aska Investments Private Limited, a Company within the meaning of the Companies Act, 2013, having its registered office at 1, Rawdon Street, 2nd Floor, Kolkata-700017.

.... Applicant

Versus

1. Ram Ratan Modi, resolution professional of Duncan Industries Limited, having his office at CFB R-1, 1st Floor, Paridhan Garment Park, 19, Canal South Road, Kolkata-700015 and also at Merlin Links, 2nd Floor, Room No. 2f 166b, S.P. Mukherjee Road, Kolkata-700026.
2. The Members of Committee of Creditors of Duncan Industries Limited(in CIRP) through Mr. Ram Ratan Modi, Resolution Professional;
3. Uniglobal Papers Private Limited, a company within the meaning of the Companies Act, 2013, having its registered office at 2A, Ganesh Chandra Avenue 2nd Floor, Kolkata-700013.

....Respondents

Date of Hearing : 10/02/2022

Date of pronouncing the order: 16/02/2022

Coram:

Mr. Rohit Kapoor, Member (Judicial)

Mr. Harish Chander Suri, Member (Technical)

Appearances (via Video Conferencing):

For applicant in IA/131/2022 :	Mr. Abhrajit Mitra, Sr. Adv. Mr. Jishnu Chowdhury, Adv. Mr. Ritoban Sarkar, Adv. Mr. Supriyo Gole, Adv. Mr. Shounak Mukhopadhyay, Adv.
For RP :	Mr. Joy Saha, Sr. Adv. Mr. Dipankar Das, Adv. Ms. Sanjana Nandi, Adv. Mr. Mohd. Azeem, Adv.
For R-2 :	Mr. Ajay Gaggar, Adv. Mr. Uttiyo Mallick, Adv.

For R-3 : Ms. Manju Bhuteria, Adv.
Ms. Suparna Sardar, Adv.

For Merico : Mr. Jishnu Saha, Sr. Adv.
Mr. Ishaan Saha, Adv.

ORDER

PER: Rohit Kapoor, Member (Judicial):

1. This Court convened through video conferencing.
2. The Interlocutory Application No. 131 of 2022 has been filed by the Applicant Aska Investments Private Limited under section 60(5) of the Insolvency and Bankruptcy Code, 2016 (IBC), seeking the following reliefs:

a. *“An order/orders and/or direction/directions cancelling and/or setting aside the ‘revised report on eligibility of legal & general compliance of resolution applicant Uniglobal Paper Private Limited in consortium with trade sea international Pte. Ltd. dated 26th January 2022 issued by the respondent no. 1 under section 30(2) of the Code and being Annexure ‘J’ hereto.*

b. *An order/orders of injunction and/or direction/directions in the nature of injunction restraining the respondent no. 1, its men, agents, servants and/or assigns from giving any effect to the ‘revised report on eligibility of legal & general compliance of resolution applicant Uniglobal Paper Private limited in consortium with trade sea international Pte. ltd.’ dated 26th January 2022 issued by the respondent no. 1 under section 30(2) of the Code and being Annexure ‘J’ hereto.*

c. *An order/orders of injunction and / or direction/ directions in the nature of injunction restraining the Respondent No. 2 from considering the impugned resolution plan submitted by the consortium led by the respondent no. 3 on 24th January, 2022, or in any manner proceeding with e-voting in relation to the approval of the impugned resolution plan submitted by the consortium led by the respondent no. 3 on 24th January 2022.*

- d. An order/orders and/or direction/directions staying the e-voting process of the respondent no. 2 for approval of the resolution plans before it;*
- e. An order/orders of injunction and / or direction/ directions in the nature of injunction restraining the Respondents and each of them, or their men, agents, servants and assigns from giving any effect to or in any manner acting upon any purported result of the said e-voting in relation to the approval of the impugned resolution plan submitted by the consortium led by the respondent no. 3 on 24th January, 2022;*
- f. An order/orders directing the respondent no. 2 and 3 to abide by the order of this Tribunal dated 14th January, 2022 passed in IA No. 29/2022;*
- g. Ad interim relief in terms of the prayers above”*

A. Submissions on behalf of the Applicant:

- a. Ld. Sr. Counsel appearing for the applicant argued that there are various infirmities in Resolution Plan. Under Regulation 39(1B) (c) of CIRP Regulations, the Committee of Creditor’s (CoC) jurisdiction to consider a plan that is not compliant with the provisions of Section 30(2) of IBC, has been ousted. Regulation 39(1) obligates the Resolution Professional (RP) to submit to the CoC only such plans that comply with the provisions of IBC.
- b. The applicant, a CoC member noticed one of the Resolution Plans (submitted by R3) placed by the RP (R1) for CoC’s consideration to be apparently non-compliant.

The infirmities in the plan are summarised as follows:-

- i. Cl. 2.8(2) at page 196 of the application—Termination of third party’s agreement and recovery of possession and management of four tea gardens from such third party simultaneously with the approval of the plan.

Third party contracts can be impacted/modified/ terminated only with the approval of such third party. Recovery of possession from third party cannot also be had through a resolution plan. In this regard, reliance has been placed on:

- I. ***K.L. Jute Products Private Limited v. Tirupati Jute Industries Ltd. and Ors.*** [MANU/NL/0131/2020] Para 2(26) & 2(27) and paras 64 and 65. The civil appeal to the Supreme Court from the above judgment of NCLAT has been withdrawn.
- II. ***Jaypee Kensington Boulevard Apartments v NBCC India Ltd.*** Civil Appeal no. 3395 of 2020, para 103
- III. **Re: Namdhari Food International (P.) Ltd.** [MANU/NC/0010/2019] paras 17 & 18

ii. Para 2.2.16 (page 185 of the application) extinguishes future (gratuity) liability yet to be crystallised. The same is not permitted, as held in **DBM Geotechnics and Constructions Pvt. Ltd. v. Dighi Port Limited** [MANU/ND/8907/2019] para 101 & 102.

iii. Para 2.2.16 at page 185 of the application—discrimination amongst creditors belonging to the same class: -

Gratuity and other dues of the workmen working in four tea gardens currently in possession of Merico would be treated differently from the workmen who are working in the other tea gardens. In this regard, reliance has been placed on—

(i). ***Committee of Creditors of Essar Steel India Ltd. vs. Satish Kr.***

Gupta & Ors. [(2019) 2 SCC 1] Para 56

(ii) ***K. Sashidhar vs. Indian Overseas Bank & Ors.***[Civil Appeal No. 10673 of 2018]

iv. Cl. 9.3.1 (page 193 of the application) 2 bold lines read with para appearing at page 106 of the resolution plan (page 194 of the petition)- Exemption from payment of taxes, stamp duty etc. and this being made an “integral part of this resolution plan” even though under the heading of

the “Reliefs and Waiver”, falls foul of several judgements including **DBM Geotechnics and Constructions Pvt. Ltd. v. Dighi Port Limited** (*supra*) para 100(a) & (b) and 101.

This is not a case where simpliciter waiver is prayed for but this has been made an integral part of the resolution plan, the plan cannot be approved without the reliefs/waivers coming into operation.

Reliance is placed on a judgement “ **Arcellor Mittal v. Satish Kumar Gupta** [Civil Appeal no. 9582 of 2018] para 75 to 70”.

3. In the context of a resolution applicant’s right to apply under S. 60(5) of IBC, the Supreme Court held that a resolution applicant has no vested right that the resolution plan be considered and accordingly rejection of the resolution plan will not warrant an immediate application before the Learned Adjudicating Authority. The resolution applicant has to wait for the application for approval of sanction plan, he is entitled to raise his objection at this stage.

B. Submission on behalf of Aska Investments Private Limited.

1. Aska Investments Private Limited submits that the impugned Resolution Plan and the provisions thereof are *inter alia* violative of Section (b), (e) and (f) to Section 30(2) of the Code, as well as Regulation 38(3) of the CIRP Regulations.
2. It is further submitted that the Respondent no. 1 was not entitled to submit and/or present the impugned Resolution Plan before the CoC as per Section 30(3) of the Code and Regulation 39(2) of the CIRP Regulations.
3. The respondent no. 1 was also not entitled to certify the impugned resolution plan as being non-compliant of the provisions of Section 30(2) of the Code and Regulation 38 of the CIRP Regulations.

4. The respondent no. 1 was also not entitled to prepare the proposed resolution for approval of the CoC approving of the impugned Resolution Plan for the 23rd meeting of the respondent no. 2 held on 28th January, 2022.
5. The Respondent no. 2 was not entitled to consider the impugned Resolution Plan in view of Regulation 39(1B) of the CIRP Regulations.
6. The Respondent nos. 1 and 2 were not entitled to put the proposed Resolution Plan up for e-voting by the CoC.
7. The e-voting has commenced on 1st February, 2022 for 12 days and will be concluded on 12th February, 2022.
8. The Applicant states and submits that if the respondent no. 2 were to be allowed to proceed with e-voting in relation to the impugned Resolution Plan, which was not even supposed to be submitted or presented before or considered by the respondent no. 2, it would cause further delay in the already delayed CIRP of the Corporate Debtor which in turn would cause irreparable injury, loss and serious prejudice to the Corporate Debtor and its creditors.
9. Allowing the respondent no. 2 to proceed with e-voting in relation to the impugned Resolution Plan would be contrary to the provisions and the Scheme of the Code and the regulations made thereunder.
10. Since the e-voting on the impugned Resolution Plan has already commenced and in view of the aforementioned illegality of the impugned Resolution Plan and the consequent illegality of the said e-voting on the impugned Resolution Plan, no effect can legally be given to any purported result in relation to such e-voting and no party involved in the CIRP of the Corporate Debtor can be allowed to take any steps in relation to any such purported result.

C. Submissions of Merico Agro Industries Private Limited

1. It has been stated on behalf of Merico Agro Industries Pvt. Ltd. that an IA No. 1256 of 2020 was filed by the RP under Section 19(2), 25(2) and 70(1) of the Code, inter alia, seeking to recover possession of the Hantapara, Garganda, Dhunchipara and Tulsipara Tea gardens from Merico. The said application was dismissed by this Tribunal by an order dated 28th May, 2021 holding that the said four tea gardens are not assets of the CD. A copy of the said order has been placed on record as **Annexure- A**.
2. Ld. Senior Counsel, Mr. Jishnu Saha further stated, the leases of the said gardens of the CD have expired long back. This has been accepted by RP in information memorandum. CD failed to obtain renewal of such leases and Merico has applied for grant of leases of the said gardens in its favour and is awaiting the same. The grant of leases of the said gardens to Merico is expected by the State of West Bengal. Merico has invested large amount of money in the said gardens to run the same successfully.
3. It is stated by the Ld. Senior Counsel, in these circumstances RP could not have entertained any Resolution Plan seeking termination of agreement under which Merico is running any of the gardens or seeking plea of possession of the gardens to it. According to Ld. Senior Counsel these tea gardens are not the assets of the CD. In these circumstances the Ld. Senior Counsel states that RP has entertained a Resolution Plan behind the back of Merico's rights and which is in contravention to the order of this Adjudicating Authority as referred above.

D. Submissions on behalf of Respondent No. 3

6. It is submitted that the Resolution Plan has been filed by Respondent No. 3 sometime in January, 2021 and thereafter has been revised from time to time as required by CoC / RP. The applicant being member of CoC was all along aware about Resolution Plan. The present application has been filed only after the Resolution Plan has been put to vote. It is further stated, the applicant along with other 3 groups of company's being member of CoC with 0.70% voting share are trying to create hurdles from time to time for completion of CIRP process with mala-fide intentions.

7. Respondent No. 3 is prospective resolution applicant, Uniglobal Papers Private Limited, has refuted the contentions of the applicant. It has been stated by the Ld. Counsel on behalf of Respondent No. 3 that this application has been filed at the instance of one "Merico". According to Ld. Counsel appearing for R3, it is alarming that the applicant a member of CoC is supporting Merico Group against whom an application under section 66 of IBC and other applications challenging illegal occupation are pending.

8. It has further been stated on behalf of the Respondent No. 3, that all the allegations raised by applicant are incorrect and against the provisions and object of IBC Code. Therefore, the present application deserves to be rejected.

E. Submissions on behalf of RP/Respondent number 1:

1. According to Ld. Sr. Counsel Mr. Joy Saha, appearing for the RP, in terms of judgement titled Arcelormittal India Private Limited vs. Satish Kumar Gupta and Ors. [(2019) 2 SCC 1]: Referring to Paragraph Nos. 79, 82 and 83, the Supreme Court has laid down in unequivocal terms that any

Application preferred by any party prior to the approval of the Resolution Plan be considered pre-mature.

2. It has further been stated on behalf of RP, any deviation, illegality or non-adherence to the law with respect to the Resolution Plans can only be examined at the stage of Section 30 (1) of the IB Code. Section 30 (1) of the IB Code is reproduced hereunder:-

“30 (1) A resolution applicant may submit a resolution plan along with an affidavit stating that he is eligible under Section 29A to the resolution professional prepared on the basis of the information memorandum.”

4. It has been brought to our notice by Ld. Sr. Counsel for RP, this Hon’ble Tribunal passed an order in IA 29/KB/2022 in CP (IB) No. 184/KB/2018 [Sunil Garg vs. Ram Ratan Modi] dated 14.01.2022 wherein a similar Application was made to stay the voting on the Resolution Plan on grounds that the Resolution Professional had failed to adhere to the statute and the regulations therein, especially Regulation 39 (1A) of the IBBI (Regulation for the Corporate Persons). The Tribunal was of the view that *“...only with the direction to the Resolution Professional to take into consideration the above referred Regulation if so and in the manner as applicable to the present undergoing Insolvency Process.”* A copy of the order dated 14.01.2022 has been placed on record.

5. It is further contended by RP, Applicant herein constitutes a total of 0.70% of the Committee of Creditors and wants to scuttle the entire Insolvency Resolution Process on the basis of its unfounded claim that the Resolution Plan submitted by one of the two Resolution Applicants is contrary to the provisions of IBC 2016 and regulations made thereunder. It is further argued, the

Applicant herein does not have any authorization to represent the workmen/employees whose cause he was vehemently trying to espouse.

6. Merico Agro Industries Private Limited has no locus in the present Application as it is not a party herein. Secondly, as prayed for on their behalf, under no provision can such third party be accorded a hearing before the Committee of Creditors as it is impermissible under the Code.

7. Ld. Sr. Counsel for RP has further stated, being a member of the Committee of Creditors, Applicant has chosen to come before this Tribunal at the Eleventh hour when the voting on Resolution Plans is ongoing and shall be duly completed within one week. The following are the timelines:

Date	Particulars
29.09.2020	Request For Resolution Plan (RFRP)
30.11.2020	Submission of First Version of the Resolution Plan
29.03.2021	Submission of Second Version of the Resolution Plan
24.05.2021	Submission of Third Version of the Resolution Plan
08.07.2021	Submission of Fourth Version of the Resolution Plan
30.09.2021	Regulation 39(1A) of the Insolvency And Bankruptcy Board Of India (Insolvency Resolution Process For Corporate Persons) Regulations, 2016 was substituted by Notification no. IBBI/2021-22/GN/REG078, dated 30th September, 2021 (w.e.f. 30-09-2021).
07.12.2021	Submission Of Fifth/Final Version of the Resolution Plan
22.12.2021	The CoC intimated the Resolution Applicants of the challenge
24.12.2021	mechanism which would be adopted by them for consideration of

	the Resolution Plans.
28.01.2022	CoC Meeting was held and the Resolution Plans were put to voting. A timeline of 12 days from 01.02.2022 was decided to complete the process of voting.
01.02.2022	The e-voting process on the Resolution Plan commenced
12.02.2022	The e-voting process on the Resolution Plan was intended to conclude, however one of the member of the Committee of Creditors sought for an extension of 5 days to complete the voting, which was agreed to by the Resolution Professional
17.02.2022	The e-voting process on the Resolution Plan is intended to conclude.

8. We have heard the Ld. counsel for the parties and perused the record.

- After considering the plea of the applicant and respective contentions of parties, appearing in this IA, we are of the view, in view of the law laid down by Hon'ble Supreme Court in **Arcelormittal India Private Limited vs. Satish Kumar Gupta and Ors. [(2019) 2 SCC 1]**, it not a stage for us to look into the alleged irregularities/ violations in the resolution plan. It is the settled law that resolution professional is merely a facilitator. Resolution plan prepared by him is not binding upon the CoC. It is only the CoC which has to take the final call to approve the resolution plan or reject it.
- The approval of the 'Resolution Plan' is in the domain of the 'Committee of Creditors' and not that of 'Resolution Professional, and CoC in the present case is yet to take a call on resolution plan/s before it.

- Feasibility and viability of a resolution plan has to be seen by CoC in terms of Regulation 39 of the Insolvency and Bankruptcy Code, 2016 (31 of 2016) is reproduced hereinafter:

39(3)(a)(b)(c)

(3) The committee shall-

(a) evaluate the resolution plans received under sub-regulation (2) as per evaluation matrix;

(b) record its deliberations on the feasibility and viability of each resolution plan; and

(c) vote on all such resolution plans simultaneously.

9. We, without expressing any opinion on any of the rival contentions (Relating to alleged infirmities of the Resolution Plan) of the parties before us in this IA, therefore, hold that this application is not maintainable as the contentions raised in it and reliefs prayed for cannot be entertained or granted at this stage.

10. Therefore, **IA(IB) No. 131/KB/2022** is hereby rejected.

11. Certified copy of the order may be issued to all the concerned parties, if applied for, upon compliance with all requisite formalities.

(Harish Chander Suri)
Member (Technical)

(Rohit Kapoor)
Member (Judicial)

Order signed on, this 16th day of February, 2022

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