IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
KOLKATA

I.A. (IB) No. 616/KB/2021
in
C.P. (IB) No. 956/KB/2018

An application under sections 60(5) and other relevant provisions of the Insolvency and Bankruptcy Code, 2016 read with Rule 11 of the National Company Law Tribunal Rules, 2016.

In the matter of:
State Bank of India ...*Financial Creditor*

Versus

Swati Udyog Private Limited
(CIN: U26922WB2006PTC109915) ...*Corporate Debtor*

And

In the matter of:
Shri Jai Baba Casting Private Limited
Successful Resolution Applicant ...*Applicant*

Versus

1. Manish Jain
   Resolution Professional of Swati Udyog Private Limited

2. State Bank of India
   Stressed Asset Management Branch, Nagaland House

3. Punjab National Bank (earlier known as Oriental Bank of Commerce)

...*Respondents*

Date of hearing: 15.07.2021
Date of pronouncement of order: 12.08.2021

Coram:
Mr. Rajasekhar V.K : Member (Judicial)
Mr. Harish Chander Suri : Member(Technical)

Appearances(via video conference)

For the Applicant	:	Ms. Manju Bhuteria, Advocate Ms. Meenakshi Manot, Advocate Mr. Rites Goel, Advocate Ms. Tanvi Luhariwala, Advocate
For Respondent No. 1	:	Mr. Shaunak Mitra, Advocate Ms. Shreya Choudhary, Advocate Mr. Manish Jain, RP in person
For Respondent No. 2	:	Mr. Joydeep Mukherjee, Advocate
For Respondent No. 3	:	Mr. Mainak Bose, Advocate Mr. Debasish Chakrabarti, Advocate Mr. Rishabh Karnani, Advocate Ms. Trisha Mukherjee, Advocate

ORDER

Per Rajasekhar V.K., Member (Judicial)

1. This court convened through video conference.

2. This is an application by Mr. Manish Jain, Resolution Professional of Swati Udyog Private Limited (CIN: U26922WB2006PTC109915), under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 ("the Code") praying to clarify or modify serial no. 2 of para 6.9 of the order dated 16.06.2021 and direct release of corporate guarantee given by Vaishnavi Metal and Power Private Limited.

3. Ms. Manju Bhuteria, learned Counsel appearing for the Applicant submits as follows:-

    a. Vaishnavi Metal and Power Private Limited is the wholly-owned subsidiary of the Corporate Debtor; the Corporate Debtor owns 18,50,000 equity shares in it. Vaishnavi Metal and Power Private Limited owns a property measuring around 30.27 acres situated in several plots at village-Juri, Thara No. 1367, P.S. Potka, District –East Singhbhum, Jharkhand, which it had leased out to the Corporate Debtor for a period of 41 years from 01.02.2010 under a registered Lease Deed dated 24.02.2010.

b. A significant portion of Corporate Debtor's cement plant is situated on the said plot. However, Vaishnavi Metal and Power Private Limited had mortgaged the said property in favour of Financial Creditors of the Corporate Debtor namely, State Bank of India and Punjab National Bank securing the debts owed by the Corporate Debtor.

c. On 02.04.2015, the debt was restructured. Pursuant to the said restructuring, Vaishnavi Metal and Power Private Limited gave the corporate guarantee in favour of the Financial Creditors by way of a deed of guarantee dated 02.04.2015.

d. The Resolution Applicant had prayed for the release of the corporate guarantee of Vaishnavi Metal and Power Private Limited. The Resolution Plan was made on such a basis and the applicant made its offer on the basis that the said corporate guarantee will be released.

e. It is recorded in the minutes of the ninth meeting of Committee of Creditors (CoC) that "*the CoC members communicated to the prospective resolution applicant that the two personal guarantees of Mr. Amit Kejriwal and Mr. Sarwan Kejriwal and the corporate guarantees of Swati Concast and Power Pvt Ltd and Turf Advertising and Marketing Company Pvt. Ltd. will not be released, hence the Resolution Plan needs to be modified accordingly*".

f. It is clear from the aforesaid facts that 100% of CoC members had agreed that Vaishnavi Metal and Power Private Limited's corporate guarantee would be released. In the tenth CoC meeting, Respondent No. 3 had not objected to this, objecting only to the valuation which was approved by the majority in the eleventh CoC meeting.

g. The Resolution Plan pertaining to the Corporate Debtor was approved by this Adjudicating Authority *vide* order dated 06.06.2021. At serial no. 2 in para 6.9, dealing with waivers, reliefs and exemptions prayed for in the Resolution Plan, of the said order against the relief "*Corporate Guarantee of Vaishnavi Metals & Power Pvt. Ltd. to be released pursuant to the transfer of the lease right*" the order thereon reads that "*why this direction is required is not clear*".

h. In the first meeting of the monitoring committee held on 02.07.2021, Respondent No. 2 having 92.46% voting share in the CoC agreed to release the corporate guarantee after implementation of the Resolution Plan, however, Respondent No. 3 holding 7.54% voting share in the CoC refused to release the corporate guarantee. This objection was raised for the first time during this meeting.

i. Respondent No. 3 is estopped from objecting to the release of corporate guarantee as it had itself agreed to release it.

j. The Resolution Applicant will suffer irreparable loss and prejudice if the corporate guarantee is not released. The release of Vaishnavi Metal and Power Private Limited's corporate guarantee is necessary for the implementation of the Resolution Plan. It is, therefore, prayed that serial no. 3 of para 6.9 of the order dated 16.06.2021 be clarified or modified.

4. Mr. Mainak Bose, learned Counsel appearing for Respondent No. 3 submits as follows:

a. The present Applicant does not have a *locus standi* to maintain the present application since the Applicant is seeking discharge of a corporate guarantee given by a third party and not by the Applicant.

b. The corporate guarantor, which is a fully owned subsidiary of the corporate debtor, owns 30 acres of land. Respondent No. 3 has a charge on the property of which discharge is sought. Respondent No. 3 has the corporate guarantee from this corporate guarantor.

c. This land was given on lease by the corporate guarantor to the corporate debtor for a period of forty-one years, starting on 24.02.2010, at a monthly rent of Rs.2000/-. over which the factory has been set up. If the guarantee is discharged, it will automatically become the owner of 30 acres of land. Based on the location, it appears to be valued at about 100 crores. This is the reason for seeking discharge of the corporate guarantee.

d. He submits that the deliberations done prior to the approval of the Resolution Plan cannot be the basis for modification of the Resolution Plan. Therefore, making a reference to those minutes is not proper. Further, meeting of the monitoring committee is equally irrelevant since what has been sought by the Resolution Applicant is beyond the scope of the approved Resolution Plan.

e. If Respondent No. 2, which has a 92.46% voting share, wishes to discharge the corporate guarantee, it is up to the said Respondent. The decision of Respondent No. 2 to discharge corporate guarantee does not cast any obligation on the other financial creditors regardless of how insignificant its voting share is.

f. Page 426 sets out the waivers, reliefs and exemptions. Clause 2 states that the corporate guarantee of Vaishnavi Metal and Power Private Limited will be released pursuant to the transfer of the lease rights. Before that is the recitals clause where it is stated that non-receipt of approval will not impact the effectiveness of the implementation of the Resolution Plan. Therefore, it cannot be said that the release of Vaishnavi Metal and Power Private Limited's corporate guarantee is necessary for the implementation of the Resolution Plan.

g. Clause 4.2.9 and 4.2.10 of the Resolution Plan at pages 416 and 417 of the application, it has been provided that the Corporate Debtor continues to be the lessee. Under the head "release of security and encumbrances" under steps for implementation of the plan, the release refers to the assets of the corporate debtor only.

h. Further, while passing the order the Adjudicating Authority has mentioned that why this direction is required is not clear. Further at para 6.10 under the head "Extinguishment of Claims/Entitlements" at page 327 of the application, the Adjudicating Authority has referred to ***Lalit Kumar Jain v. Union of India & Ors.,***[1] and has observed that approval of the Resolution Plan will not, *per se,* operate as a discharge of the guarantor's liability. The same approval has been made at Serial No.6 on page 333 of the Application.

i. The Applicant is praying for modification of an approved Resolution Plan on the basis of recording of the stand of one of the members of the CoC in the meeting of the Monitoring Committee in the course of implementation of the Resolution Process.

5. In response to Mr. Mainak Bose's submissions, Ms. Manju Bhuteria submits in rejoinder as follows:-

[1] 2021 SCC OnLine SC 396, decided on 21.05.2021.

a. As per Mr. Bose's submission, what happened before approval of the Resolution Plan is of no relevance. However, it was on the basis of this decision that the Prospective Resolution Applicants were asked to submit a revised resolution plan with RP for his evaluation, which would be placed before the CoC members for their consideration through e-voting. It is only after this discussion that the present plan came to fruition.

b. Further, Mr. Bose submitted that the release of Vaishnavi Metal and Power Private Limited's corporate guarantee is necessary for the implementation of the Resolution Plan because in the recitals it is stated that non-receipt of approval will not impact the effectiveness of the implementation of the Resolution Plan. However, the Resolution Plan on page 408 of the application clearly indicates that the Resolution Applicant requires various waivers etc. for the smooth functioning of the Resolution Plan.

c. Furthermore, the Resolution Plan has been approved by a majority of 92.46%. If Respondent No. 3 had any objection regarding the corporate guarantee, it should have objected and approached the Adjudicating Authority. It did not do so. No Resolution Applicant would pay this much amount if the corporate guarantee is not released. That is why in the ninth CoC meeting it was decided that the four other corporate guarantees would not be released. Respondent No.3 did not raise any objection at any point of time regarding the corporate guarantee of Vaishnavi Metal and Power Private Limited.

6. We have heard learned Counsel appearing for the Applicant and Respondent No. 03 and perused the records. Other Respondents do not have any objection to the grant of prayers.

7. The relief that has been sought for is the clarification of serial no. 2 of para 6.9 of the order dated 16.06.2021 and direction to release corporate guarantee given by Vaishnavi Metal and Power Private Limited to Respondent No.3.

8. One of the objections raised by Respondent No.3 is that the Applicant does not have a *locus standi* to maintain the present application since the Applicant is seeking discharge of a corporate guarantee given by a third party and not by the Applicant. However, the said corporate guarantee is the subject matter of the Resolution Plan that has been approved by the CoC upon deliberation.

9. It is apparent that some of the corporate guarantees had been excluded from the Resolution Plan by the decision of the CoC in its ninth meeting[2] which received approval from 100% of the CoC. The corporate guarantees excluded by the CoC only are not to be released. If Respondent No.3 had any objection against the release of corporate guarantee given by Vaishnavi Metal and Power Private Limited it should have raised this point when other corporate guarantees were being discussed or at any time before approval of the Resolution Plan. Further, the said Respondent has read and ratified the minutes of the ninth CoC meeting in the tenth CoC meeting held on 14.12.2020 through Agenda Item No.1.

10. At no point of time before the approval of the Resolution Plan by this Adjudicating Authority has the Respondent No.3 raised any objection against the release of the said corporate guarantee before approval of the Resolution Plan.

11. Further, upon the Resolution Plan containing the release of corporate guarantee by Vaishnavi Metal and Power Private Limited being approved by this Adjudicating Authority, the Resolution Applicant has the locus to maintain the present application. Moreover, vide para 8.9 of the order dated 16.06.2021, this Adjudicating Authority had given liberty to move any application, if required, in connection with the implementation of this Resolution Plan.

12. The second objection made by Respondent No. 3 is that the deliberations prior to the approval of the Resolution Plan cannot be the basis for modification of the Resolution Plan. Firstly, the deliberations being referred to herein are those that have formed the basis of the Resolution Plan approved by this Adjudicating Authority. In our opinion, the same can be referred to at a later point of time in order to substantiate the stance that the parties had before the approval of the Resolution plan.

13. Second, no modification in the Resolution Plan has been sought for by the Applicant herein. The Resolution Plan already provides for the release of corporate guarantee by the Financial Creditors for, at page 35 the Resolution Plan envisages that "*As per the*

[2] Page 281, I.A. (IB) No. 616/KB/2021.

terms as set out in ***Part - V (Timeline and Steps of Events towards Implementation of the Proposed Plan****), the Financial Creditors shall redeliver and shall cause to be delivered to the Resolution Applicants, all documents (including loan agreements, security documents, title deeds, lease deeds, lease agreements with M/s Vaishnavi Metals & Powers (P) Ltd, demand promissory notes, records, powers of attorneys, post-dated cheques, other negotiable instruments, encumbered with the Financial Creditors in original and all other documents) in relation to such assets which are owned by the Corporate Debtor with such Financial Creditors for the benefit of any other creditors of the Corporate Debtor. Further, each creditor of the Corporate Debtor, as may be required shall execute or issue discharge certificates, no-objection certificates and all other documents and take all such actions as may be reasonably required by the Corporate Debtor or the Resolution Applicant for the release of the Encumbrances, security interests and charges contemplated in this paragraph".* What is being sought by the Applicant herein is specific orders in respect of serial no. 2 at para 6.9 of the order approving the resolution plan dated 06.06.2021. Therefore, the objection raised by Respondent No. 3 that the deliberations prior to the approval of the Resolution Plan cannot be the basis for modification of the Resolution Plan is misconceived, and is rejected.

14. Mr. Mainak Bose has raised objections about the valuation of the said land. He submits that the value of the said land is about Rs.100 Crore. However, Respondent No.3 had observed that the value of the said land should be Rs.12.10 crore as against the value of Rs.1.48 crore which is recorded in the minutes of the eleventh CoC meeting dated 02.01.2021 under Agenda Item No. 2.

15. This observation made by Respondent No.3 had been forwarded by the Resolution Professional to the valuers. The Resolution Professional also sought legal opinion on the matter and discussed it with the CoC. It appears from the minutes of the eleventh CoC meeting dated 02.01.2021 that this agenda was put to vote[3] and the valuation

[3] Page 469, I.A.(IB) No. 616/KB/2021.

report and fair liquidation values submitted by each of the registered valuers were approved by 92.46% votes which has not been challenged by the said Respondent.

16. In our opinion this objection with respect to the valuation of the land at this stage, that too without any supporting document, is not sustainable.

17. In so far as clarification of the relevant part of the order is concerned, there has been no order on the relief sought, since, while examining the Resolution Plan, this Adjudicating Authority had no clarity as to why the release of the Corporate Guarantee was being sought. Therefore, this Adjudicating Authority had observed that "*why this direction is required is not clear*". Having received the clarification through the present application, the release of the corporate guarantee of Vaishnavi Metals & Power Pvt. Ltd. seems vital.

18. From the present application and after hearing the very precise submissions of Ms. Manju Bhuteria, the learned Counsel appearing for the Applicant, it would appear that the Resolution Plan's underlying premise was that the corporate guarantee given by Vaishnavi Metal and Power Private Limited would be released and extinguished once the Resolution Plan was approved. Most importantly, the objection to release of the said corporate guarantee is being raised for the first time only now. There is a clear and present danger that the Resolution Plan will be unworkable without release of the said corporate guarantee. We are, therefore, inclined towards allowing the prayer made.

19. We hereby allow the prayer. Serial no. 2 of para 6.9 of the order dated 16.06.2021 should be read as follows:-

<table>
<tr><td rowspan="2">2.</td><td colspan="2">Corporate Guarantee of Vaishnavi Metals & Power Pvt. Ltd.</td></tr>
<tr><td>Corporate Guarantee of Vaishnavi Metals & Power Pvt. Ltd. to be released pursuant to the transfer of the lease right.</td><td>Granted</td></tr>
</table>

20. With the aforesaid direction, **I.A. (IB) No. 616/KB/2021** stands disposed of.

21. Certified copy of this Order be issued on demand to the concerned parties, upon due compliance of requisite formalities.

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

Harish Chander Suri
Member (Technical)

Rajasekhar V.K.
Member (Judicial)

12.08.2021

SR (LRA)