

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI**

Company Appeal (AT) (Ins.) No. 803 of 2020

IN THE MATTER OF;

**Mr. C.E. Fernandes,
S/o Late Shri Mariyan Elias,
R/O Vemalayam,
397, Hoshangabad Road,
Bhopal-462026.**

....Appellant

Versus

**Mr. Naveen Sood, Resolution Professional
For GEI Industrial Systems Ltd.,
D-501, Shehnai Residency,
Opposite Amar Vilas Hotel,
AB Road, Indore-452011.**

...Respondent No.1

**Committee of Creditors of
GEI Industrial Systems Ltd.
B-5/50, 3rd Floor, Safdarjung Enclave,
New Delhi-110029**

...Respondent No. 2

PRESENT

For Appellant: Mr. Davesh Bhatia, Advocate.

**For Respondent: Mr. Naveen Sood, Advocate for RP
Ms. Anushree Kapadia, Mr. Gaurav Mathur
Ms. Anvi Majumdar, Advocates for R-2 (CoC)**

**JUDGMENT
(25.07.2022)
(Virtual Mode)**

[Per.: Dr. Alok Srivastava, Member (Technical)]

This appeal arises from the order dated 20.8.2020, passed by the Adjudicating Authority (NCLT, Indore Bench), in I.A. No. 103 of 2020 in CP (IB) 35/2017 (hereinafter called 'Impugned Order;') and has been filed under section 61 of the Insolvency and Bankruptcy Code, 2016 (hereinafter called 'IBC') by the Appellant, who is the promoter of the corporate debtor (in short 'CD').

2. By the Impugned Order, the Adjudicating Authority has directed the proposed Resolution Applicant to approach the Committee of Creditors (CoC) for deciding his eligibility under section 29A to submit a resolution plan for consideration, and aggrieved by the said order, the Appellant has prayed for setting aside the Impugned Order and issuing directions to the Adjudicating Authority to decide the question of law and fact with respect to the MSME status of the corporate debtor in order to establish his eligibility under section 29A to furnish a resolution plan in CIRP of the CD.

3. The Appellant has stated in the appeal that he is the promoter of the CD, which is an MSME unit, and has therefore submitted a resolution plan as Resolution Applicant in the Corporate Insolvency Resolution Process (in short 'CIRP') of the CD GEI Industrial Systems Ltd., for the resolution of the corporate debtor. He has *Company Appeal (AT) (Ins.) No. 803 of 2020*

further claimed that the Adjudicating Authority had given a direction to the Committee of Creditors/Resolution Professional vide order dated 5.3.2020 to decide whether the corporate debtor was an MSME but in the absence of a clear decision regarding the MSME status of the CD, the proposed resolution plan submitted by him did not receive serious consideration by the CoC. He has stated that his proposed resolution plan could not be taken forward as the proposed investor withdrew his support due to the condition created by the covid pandemic and he was not given extension of time to submit a fresh resolution plan, and in the meanwhile action for liquidation of the CD was initiated. Faced with such a situation, the appellant filed an IA No. 103 of 2020 before the Adjudicating Authority, praying to provide clarity regarding MSME status of the corporate debtor, whereupon his prayer was not decided by the Adjudicating Authority, but instead he was advised to approach the CoC/RP by the Impugned Order.

4. We heard the arguments of both the parties and perused the record.

5. In arguments, the Learned counsel for Appellant has contended that the corporate debtor has been an MSME since the year 2007 and he had submitted a resolution plan for consideration *Company Appeal (AT) (Ins.) No. 803 of 2020*

in the CIRP of the corporate debtor which was not considered by the CoC taking the view that since the corporate debtor was not a MSME unit, the Appellant was ineligible under section 29-A of the IBC for submitting proposed resolution plan. Aggrieved by such an action of the RP/CoC, he approached the Adjudicating Authority, who vide order dated 5.3.2020 in IA 529 of 2020 directed the Resolution Professional/CoC to re-examine the issue of MSME status of the CD and apprise the Adjudicating Authority. He has further argued that the Resolution Professional re-examined the issue of MSME status of the CD, and filed an affidavit dated 2.2.2020 (attached at pp 151-155 of the appeal paperbook) before the Adjudicating Authority in which he claimed that the corporate debtor was classified as MSME prospectively w.e.f. 1.7.2020.

6. Thus, he has claimed, an ambiguity was created regarding the MSME status of the corporate debtor, which became an issue for discussion in the CoC meetings. He has referred to the minutes of 7th CoC meeting dated 6.12.2019 (attached at pp. 18-24 in reply of the CoC/Respondent No. 2, diary no. 23064 dated 29.10.2020), wherein it is recorded that *‘the CoC was directed by the Hon’ble NCLT to re-look the resolution proposal as submitted by Mr. Fernandes, provided that it does not hit the provisions of Section 29A of IBC and is law compliant; consider other options and submit a Company Appeal (AT) (Ins.) No. 803 of 2020*

report within one-month decision taken in this regard.” He has further submitted that in the 9th meeting of the CoC, the issue about the MSME status of the corporate debtor again weighed heavily with the members of CoC and the observations of the representatives of ICICI Bank and Axis Bank are recorded in the minutes of the said meeting, which show that these representatives were not willing to accept the corporate debtor as an MSME enterprise, and in such a situation, the CoC did not look at the appellant’s proposed resolution plan with any seriousness which caused serious prejudice in consideration of the resolution plan submitted by him. He has thus submitted that the matter of the MSME status of the corporate debtor should have been decided by the Adjudicating Authority rather than leaving it in the hands of CoC/Resolution Professional, but his request was not acceded to, and hence he has come in appeal.

7. The Learned Counsel for the CoC/Respondent No. 2 has argued that the Impugned Order requires the Resolution Applicant to approach CoC, and hence the proposed Resolution Applicant/Appellant did approach the CoC and Resolution Professional regarding the corporate debtor’s status as MSME unit. He has further submitted that the Resolution Professional had submitted an affidavit before the Adjudicating Authority, as was *Company Appeal (AT) (Ins.) No. 803 of 2020*

required of him, regarding the MSME status of the corporate debtor, which was based on the letters provided by the District Industries Centre, Bhopal, wherein it was clearly stated that investment made by the corporate debtor during the years 2007-2010 was in excess of Rs. 10 crores and therefore the corporate debtor should be considered a medium enterprise. He has also referred to para 8 of the additional affidavit of the Resolution Professional to show that the corporate debtor was considered as eligible to be classified as MSME unit, prospectively w.e.f. 1.7.2020.

8. The Learned counsel for the CoC/Respondent No. 2 has referred to the minutes of the 9th meeting of CoC held on 1.02.2020 (attached at pp. 33-46 in the reply on behalf of Respondent No. 2, filed vide diary no. 23064 dated 29.10.2020) wherein it is mentioned that the resolution plan was duly considered by the CoC and a resolution, relating to approval of the modified plan dated 30.1.2020 including addendum dated 10.2.2020 presented by Mr. Fernandes, was put to vote after due consideration and nowhere in the minutes, any comment is recorded regarding the ineligibility of Mr. Fernandes to present the resolution plan under section 29A. He has further pointed out that the said resolution was put up for electronic voting and 70.60% votes were cast against the resolution plan, with the result it could not be approved by the CoC. He has finally submitted *Company Appeal (AT) (Ins.) No. 803 of 2020*

that in such a situation, the Appellant cannot have any grievance as his resolution plan was duly considered by the CoC without any reference to his ineligibility under section 29A of the IBC.

9. The Resolution Professional, who has appeared in person, has referred to the minutes of the 7th CoC meeting held on 6.12.2019, 9th CoC meeting held on 10.2.2020 and finally the 10th CoC meeting held on 16.6.2020, in which the issue of ineligibility of the Appellant to submit a resolution plan, being promoter of the corporate debtor was discussed, and finally in the 10th meeting of CoC, in accordance with information received from the District Industries Centre, Bhopal regarding MSME status of the corporate debtor, the modified resolution plan presented by the Appellant was duly considered and put to vote, when it was rejected with a voting percentage of 70.60%. He has also pointed out that in an e-mail dated 12.6.2020, the Appellant had withdrawn the Resolution Plan submitted by him, since the investor backing the resolution plan had changed his mind. He has claimed that the resolution plan submitted by the Appellant was discussed by the CoC in its various meetings in great detail and the members of CoC also provided extensive suggestions for modification of the plan in the 7th CoC meeting and a modified plan was submitted by the Appellant on 10.2.2020 which was duly

considered by the CoC on merits without any reservation about the eligibility or otherwise of the Appellant under section 29A.

10. We now look at the Impugned Order, which has been challenged by the Appellant. The portion of the Impugned Order with which the Appellant appears to be aggrieved is as follows:-

“We direct Proposed Resolution Applicant to approach COC instead of this Bench. IA No. 181 of 2018 is now fixed for argument for passing of an order of Liquidation as the Committee of Creditors and RP did not receive any Resolution Plan worth to be considered by them.”

11. It is noted that the CIRP was initiated against the corporate debtor GEI Industrial Systems Ltd. vide order dated 20.7.2017. While the CIRP was continuing, resolution plans were sought from proposed resolution applicants, and during this process the appellant Mr. C.E. Fernandes, who is a promoter of the corporate debtor, was considered ineligible to submit a resolution plan. Aggrieved by this action of the CoC/Resolution Professional, the Appellant filed I.A. No. 595/2019 wherein the following order was passed by the Adjudicating Authority:-

“The Parties are represented through their respective Learned Counsel.

The promoter and unsuccessful Resolution Applicant has filed the present Intervention IA No. 529 of 2019 and sought permission to intervene in the matter by opposing the proposed liquidation of the corporate Debtor. He further sought a Company Appeal (AT) (Ins.) No. 803 of 2020

direction from this Adjudicating Authority that may be issued to the Resolution Professional as well as the Committee of Creditors for reconsideration of Resolution Plan submitted by him, which is not hit by Section 29A of the Insolvency and Bankruptcy Code, 2016.

xx xx xx xx

In view of the above stated contention, we feel appropriate to direct to the Resolution Professional as well as the Committee of Creditors to re-examine the issue and apprise of this court by the next date of hearing.”

12. Thereafter the Resolution Professional filed an additional affidavit (attached at pp.151-155 of the appeal paperbook) before the Adjudicating Authority on 22.6.2020, wherein he stated that the corporate debtor would be eligible to be classified as MSME prospectively w.e.f. 1.7.2020. This averment was based on the information received from District Industries Centre, Bhopal vide letter dated 23.5.2019 (attached at pg. 139 of the appeal paperbook) and letter dated 27.5.2019 (attached at pg. 140 of the appeal paperbook). The Resolution Professional also took into account the total investment in the plant and machinery by the corporate debtor to be as Rs. 45.90 crores, and also the definition of MSME which had been modified vide gazette notification dated 1.6.2020 for classification of the corporate debtor as an MSME w.e.f. 1.7.2020.

13. We note from the minutes of the 7th CoC meeting that the Appellant submitted a resolution plan which was considered by the *Company Appeal (AT) (Ins.) No. 803 of 2020*

CoC (minutes attached at pp.18-24 in the reply of Respondent No.2 /CoC) at item no. 6, and the minutes record as follows:-

“6. TO CONSIDER RESOLUTION PLAN SUBMITTED BY MR. C.E. FERNANDES

xx xx xx xx

Mr. Fernandes also told the CoC that he is at an advanced stage of discussions with the strategic investor. Since the strategic investor does not wish to get involved in the CIRP process, his identity has not been disclosed presently.

The CoC noted the details of the resolution plan and a discussion ensued. The CoC members raised a number of queries which were replied to by Mr. Fernandes and Mr. Anil Chawla.

The CoC told Mr. Fernandes that the members are willing to look at his resolution plan with a positive mindset. The plan must, however, clearly spell out sums payable to various stakeholders including to secured and unsecured financial creditors, operational creditors, and towards CIRP costs etc. further, the CoC was of the view that the plan would carry more weight if it were to be modified as follows:

- *Increase the amount offered;*
- *Offer to bring some part of the offered amount into an escrow account upfront post sanction of the plan by Hon’ble NCLT.*

The CoC requested Mr. Fernandes to give the above suggestions a thought. It also noted that the resolution plan in its current form is not fully law compliant. Mr Fernandes was requested to ensure that the plan complies with all the provisions of IBC, CIRP Regulations and other applicable laws and to re-submit the same to the RP by incorporating required changes.”

14. Thereafter, the CoC in its 8th meeting held on 17.1.2020 deliberated on the modified resolution plan dated 8.1.2020 presented by Mr. C.E. Fernandes and also took note of the eligibility of Mr. Fernandes to submit a resolution plan. The CoC also deliberated on various features of the revised plan at length. In this connection, the minutes of the CoC meeting (at page 30 of the reply of CoC) record as follows:-

“The CoC deliberated on various features of the revised plan at length. The members were of the view that the amount being offered in the Resolution Plan to secured financial creditors is meagre in comparison with their total outstanding dues and also less than what they would get in case of liquidation. Also, the distribution pattern among various classes of creditors was not commensurate with their respective share in case of liquidation. The members, therefore, requested the RA to modify the Resolution Plan and re-submit the same for consideration of the CoC.

Xx xx xx xx

The RA was told by the members in clear terms that resolution Plan dated 8.1.2020 in its current form is not acceptable and needs to be modified to incorporate aforesaid changes and also must be made compliant with provisions of the IBC to be considered for further discussions and approval.

The RA contended that till the RA receives a confirmation from RP regarding Section 29A compliance, he will not be sure about his eligibility and therefore, he may not like to submit a modified resolution plan. This was unanimously opposed by the CoC. The CoC told the RA that since it cannot be conclusively said as to when DIC will provide the required confirmation; waiting for such confirmation, followed by submission of plan and subsequent internal approval process of banks, would needlessly lead to avoidable delay and hence is not acceptable. The RA was therefore requested to submit

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his modified plan providing, if he so desires, that the plan being submitted is subject to confirmation of his eligibility under Section 29A of IBC.

The RA was also told by the members that such modified Resolution Plan must be submitted latest by 31st January, 2020 and that in case no modified plan is received by the given date, it would be assumed that the RA has no modified resolution Plan to submit and the CoC shall be at a liberty to decide further course of action including approaching Hon'ble NCLT for liquidation of the Company.

In view of the foregoing deliberations, item nos. 5 to 8 of Agenda for the meeting forming part of notice were not discussed.”

15. Again, in the 9th meeting of CoC held on 10.2.2020, the CoC deliberated on the feasibility and viability of modified resolution plan dated 30.1.2020 presented by Mr. C.E. Fernandes. The minutes record that while the representatives of ICICI bank and Axis Bank did raise the issue of ineligibility of Mr. C.E. Fernandes under section 29-A of the IBC, the CoC as a body went ahead to consider the modified resolution plan presented by Mr. Fernandes. Thereafter the proposed resolution plan was put for electronic voting and the result of the electronic voting is tabulated at page 43 of the reply of Respondent No. 2/CoC, whereby the resolution plan was rejected with a voting share of 70.60%. Thus it is unambiguously clear from the aforementioned consideration of the proposed resolution plan of Mr. C.E. Fernandes in its many modified forms which were duly discussed by the CoC in detail. We are, therefore,

not persuaded by the argument of Learned Counsel of the Appellant that as the eligibility under section 29A of the IBC was under cloud, the CoC did not look at his proposed resolution plan with any seriousness.

16. We further note that the Appellant vide e-mail dated 12.6.2020 (attached at pp. 149-150 of appeal paperbook) withdrew the proposed resolution plan, stating as follows:-

“I shall like to put on record that the Resolution Plan dated 30th January, 2020 (including Addendum dated 10th February, 2020) is hereby withdrawn by me and should not be taken up for consideration by the honourable CoC. The investor who was backing the resolution Plan is having second thoughts in view of changed circumstances after Covid-19. I am prevented from travelling and meeting the investor. Nevertheless, I am working on the Resolution Plan and hope to submit a modified Resolution Plan in the next few weeks.”

17. The minutes of the 10th meeting of CoC dated 16.6.2020, which took place just a few days after this email communication, records the views of representatives of IDBI bank, ICICI bank, City NA bank, State Bank of India, Axis Bank, Kotak Mahindra Bank, Hongkong and Shanghai Banking Corporation Limited and Omkara Assets Reconstruction Company Pvt. Ltd. decided as follows:-

“The CoC requested the RP to submit a report encapsulating these deliberations with Hon’ble NCLT at the earliest and request them for expeditious disposal of the case as a considerable time has already been lost post completion of Company Appeal (AT) (Ins.) No. 803 of 2020

stipulated CIRP period, resulting in increasing CIRP costs and consequent erosion of underlying asset valuations of the CD.”

18. It is worth noting that the CIRP against the corporate debtor was initiated vide order dated 20.7.2017 and the 10th meeting of the CoC took place on 16.6.2020, which is after almost 3 years of the initiation of the CIRP. This time period spent in the CIRP is much more than the time period stipulated under the IBC. Moreover, the CoC, which is constituted of the financial creditors of the corporate debtor, decided in the 10th meeting of the CoC to go for CD's liquidation, directing the Resolution Professional to take next steps as considerable time had already been lost after the completion of stipulated CIRP period, which has resulted in increase in CIRP costs and erosion of assets value of the corporate debtor. As sufficient opportunity had been given to Mr. C.E. Fernandes for presenting a feasible and viable resolution plan but he eventually failed and withdrew his proposed plan, the next step under section 33 of IBC was undertaken by the Resolution Professional.

19. In the circumstances and discussion as detailed in the foregoing paragraphs, we are of the very clear view that the CoC, without any prejudice regarding the eligibility of the Appellant under section 29A of IBC, did consider the resolution plan submitted by

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Mr. C.E. Fernandes and offered suggestions for its modifications/improvements. The withdrawal of the resolution plan vide e-mail dated 12.6.2020 meant that there was no resolution plan left before the CoC for consideration, and since almost three years had elapsed from the initiation of CIRP on 20.7.2017 till the 10th meeting of CoC, the provisions under section 33 of the IBC came into play and were duly considered by the Adjudicating Authority. We, therefore, do not find any substance in the grievance of the Appellant. The appeal, being devoid of merit, is accordingly dismissed.

20. There is no order as to costs.

(Justice Rakesh Kumar Jain)
Member (Judicial)

(Dr. Alok Srivastava)
Member (Technical)

(Barun Mitra)
Member (Technical)

New Delhi
25th July, 2022

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