

**IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH, COURT NO. II
KOLKATA**

I.A. (IB) No. 471/KB/2024

In

C.P. (IB) No. 1540/KB/2019

***An application under Rule 11 of The National Company Law
Tribunal Rules, 2016,***

IN THE MATTER OF:

Jai Kishore Gupta

... Applicant/Operational Creditor.

Versus

**1. Balaji Paper and Newsprint
Private Limited**

**2. Mrs. Rachna
Jhunjhunwala, Resolution
Professional of Balaji Paper
and Newsprint Private
Limited**

... Resolution Professional/Respondent.

Date of Pronouncement: 10.04.2024

CORAM:

**SMT. BIDISHA BANERJEE, HON'BLE MEMBER (JUDICIAL)
SHRI D. ARVIND, HON'BLE MEMBER (TECHNICAL)**

Appearances:

**For Operational Creditor: Mr. Shiv Shankar Banerjee, Adv.
Ms. Arijita Ghosh, Adv.**

**For Respondent No. 2: Mr. Pranay Agarwal, Adv.
Ms. Sweta Mazumdar, Adv.**

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ORDER

Per: D. Arvind, Member (Technical)

1. The Court is congregated through a blended mode.
2. The Learned Counsels were heard at length.
3. This application has been filed by one **Jai Kishore Gupta** proprietor of M/s. Lalta Prasad Shaw & Co. for recalling of an Order dated 12.01.2024 wherein the National Company Law Tribunal approved the Resolution Plan presented before it in I.A./1842/KB/2023 in C.P. No. 1540/KB/2019 relating to Resolution Plan of the Corporate Debtor Balaji Paper and News Print Private Limited. The Applicant has sought for following reliefs:
 - a. *To pass an Order recalling the order dated 12th January, 2024 passed by this Hon'ble NCLT.*
 - b. *To pass an Order declaring the entire CIRP void.*
 - c. *To pass an Order directing a new CoC to be constituted.*
 - d. *To pass an Order allowing the petitioners to obtain a certified copy of the Resolution Plan and minutes of all CoC meetings held.*
 - e. *To pass an Order directing the Learned Registrar to prepare report and thereafter, a further order be passed directing a central investigation agency Serious Fraud Investigation Office (SFIO) or any other central agency to investigate into the matter.*

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f. To pass any other order/orders, that The Hon'ble Tribunal may deem fit and proper in the interest of justice and equity.

4. Facts of the Case:

- 4.1.** Balaji Paper and News Print Private Limited (hereinafter referred to as Corporate Debtor/CD/Respondent. The Respondent was engaged in manufacturing and supplying of craft paper, printing paper etc.
- 4.2.** The Applicant herein is an Operational Creditor involved in selling wastepaper to various others including the Corporate Debtor.
- 4.3.** The Corporate Debtor after purchasing tons of waste papers from the Applicant herein failed to clear invoices worth Rs. 9,65,35,795/- (Nine Crore Sixty-Five Lakh Thirty-Five Thousand and Seven Hundred Ninety-Five Only).
- 4.4.** The Applicant in his capacity as a partner in Eastern Agencies (also an Operational Creditor whose claim is of Rs. 1,75,49,488/- has also been admitted by the Resolution Professional) a partnership firm where the Applicant and his Family Members are the partners and together has an admitted claim of Rs.

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11,36,85,243/- as admitted by the erstwhile Resolution Professional.

4.5. The Resolution Plan was approved with 100% voting share in favour of the plan. The Resolution Plan provided payment of Rs. 10 Lakhs only against an admitted combined claim of Rs. 11,36,85,243/- of the applicant as well as other operational debts totalling to Rs. 43,84,80,083/-. Thus, only 0.23% of the admitted claim of the Operational Creditor has been provided in the plan as against provision of 88.35% of the claims of the secured financial creditors, which according to the applicant is not only arbitrary but also mala fide with an intention to deprive reasonable and legitimate allocation to the Operational Creditor and hence the applicant is seeking reliefs claimed in para 3 of this Order.

5. Applicant's submissions:

5.1. Learned Counsel for the Applicant submits that the Respondent No. 2 has deliberately under-valued the assets of the Corporate Debtor just to defraud the claims of the Operational Creditor in collusion with Committee of Creditors, who comprised of only two financial creditors (Banks).

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- 5.2.** The Learned Counsel further submits that the Corporate Debtor has availed term loan from Allahabad Bank and for the same Personal Guarantees were given by one Anil Kumar Agarwal, one Meeki Agarwal, one Manish Kumar Agarwal and one Ritu Agarwal. In addition to above, Corporate Guarantees were also given by Nila Tie-up Pvt. Ltd., Sarathi Suppliers Pvt. Ltd., Mahadev Suppliers Pvt. Ltd, which are corporate guarantees.
- 5.3.** Ld. Counsel submits that the Resolution Professional/CoC has neither invoked aforesaid Personal Guarantees and Corporate Guarantees given against loan taken by the Corporate Debtor nor included it in information memorandum.
- 5.4.** It is his submission that by including the personal guarantees and corporate guarantees the assets of the Corporate Debtor could have been maximized and the interest of the Operational Creditor could have been reasonably covered.
- 5.5.** The Ld. Counsel further submits that the Corporate Debtor and Personal Guarantors have also transferred the assets and properties of their family members immediately after the admission of Insolvency Petition No.1540/KB/2019, of the Corporate Debtor.

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- 5.6.** The CoC, which comprised of only two banks did not protest against such illegal sale/transfers made by guarantors. It is, thus, submitted that the Committee of Creditors and the Resolution Professional have failed and/or neglected to exercise the commercial wisdom, and as a result of their collusion, the applicant is left with a paltry sum.
- 6.** We would note that during the course of argument, both the parties appeared, however, the Respondents have not filed any Reply Affidavit till date. We have duly considered the written and oral submissions of the applicant and oral submissions of the Respondents and the documents available to us.
- 7. Analysis and Findings:**
- 7.1. In this application three challenges have been made to the approved resolution plan which are as under: -**
- (i)** The Corporate Debtor has been undervalued deliberately to allocate less value for Operational Creditors.
- (ii)** To personal and corporate guarantees given to bankers (“FC”) have not been invoked resulting in lesser maximisation of wealth of the Corporate Debtor which

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led to highly disproportionate allotment of a plan value of the Operational Creditors.

- (iii)** The Personal Guarantors' and the Corporate Debtors' have transferred their assets to others immediately after the commencement of CIRP against which no action has been taken by the Resolution Professional / Financial Creditors' resulting in grave injustice to Operational Creditor allocation in terms of funds.

The applicant has alleged collusion between Financial Creditors, Corporate Debtors, Suspended Board and Resolution Professional in order to allocate only 0.23% of the admitted claim of the Operational Creditors', whereas the Financial Creditors through CoC allotted to themselves nearly 89% of the plan value.

7.2. Valuation: -

- (i)** The valuation of the Corporate Debtor cannot be challenged at this stage by anyone when the resolution plan has already been approved by us.
- (ii)** It is settled law that as long as the valuer so appointed, has applied an internationally accepted standard and has basis for applying a particular standard over another, then, the same is a "professional" judgment of

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such a valuer and the CoC, in its “commercial wisdom” may agree or disagree with such a valuation. Such decision of the CoC cannot be challenged. This position of law is noted by the Hon’ble NCLAT in ***Mandip Singh (Suspended Director, Satnam Agri Products Ltd. v. Mahesh Bansal, Liquidator of Satnam Agri Products Ltd.*** reported at **(2022) ibclaw.in 511 NCLAT**, wherein the Appellate Authority held that it is settled position of law that question of valuation carried out by two independent Registered Valuers duly registered with IBBI cannot be challenged by the Appellants as the same being a question of fact is normally not interfered by Courts.

- (iii)** If the CoC disagree, it would direct for fresh valuation. Where the CoC agrees, the decision of the CoC in this regard is final and there is no scope for judicial review.
- (iv)** We have also noted that the applicant has not provided any basis for challenge to the valuation. In view of above, we reject this allegation as legally and factually not tenable.

7.3. Personal Guarantees and Corporate Guarantees: -

- (i)** We find that as on date no application has been preferred by Financial Creditors under Section 94 and 95 of Insolvency and Bankruptcy Code for initiation

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Corporate Insolvency Resolution Process (hereafter referred to as “CIRP”) against the Corporate Debtor.

- (ii)** We are of the view that it is the duty of the Financial Creditors and the Resolution Professional, to invoke personal guarantees as well as corporate guarantees furnished for the loans and advances taken by the Corporate Debtor for the purpose of maximisation of wealth of the Corporate Debtor.
- (iii)** In this case the Financial Creditors have taken 89 per cent of the plan value by allocating only 0.23 per cent to the Operational Creditors. The admitted claim of the Operational Creditors is Rs. 43,84,80,083/- whereas they have been paid a paltry sum of Rs. 10 lakhs.
- (iv)** If personal guarantees given by the suspended board and corporate guarantees given by the corporates had been invoked and applications under Sections 94 and 95 of IB, Code are pursued to initiate corporate insolvency resolution process of such guarantors that would have resulted in maximisation of wealth of the corporate debtor, which is one of the key objectives of IB, Code. Such an act would have led to more money available for distribution. In such of an event, the balance of interest of all stakeholders including the

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Operational Creditors in this case could have been achieved.

7.4. Transfer of assets of Personal Guarantors to others:

- (i)** Transfer of assets by the personal guarantors and the corporate guarantors immediately, after the commencement of the CIRP, has been alleged. This is without any basis as the applicant has not produced any evidence whatsoever on such alleged transfers made by the Personal Guarantors and Corporate Guarantors immediately after commencement of the CIRP of the Corporate Debtor.
- (ii)** Therefore, without proper basis and supporting for such alleged illegal transfers, this application on that ground is not maintainable.
- (iii)** In view of above, we find no reason for recalling the Order dated 12.01.2024 passed by this Tribunal and, consequently, the relief(s) sought in (a) to (e) cannot be granted.
- (iv)** However, we direct the resolution professional/CoC consisting of Financial Creditors to file an application under Section 94 in respect of corporate guarantees given by the Nila Tie-Up Pvt. Ltd., Sarathi Suppliers Pvt. Ltd., Mahadev Suppliers Pvt. Ltd. and under

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Section 95 in respect of personal guarantees were given by one Anil Kumar Agarwal, one Meeki Agarwal, one Manish Kumar Agarwal and one Ritu Agarwal. Said Anil Kumar Agarwal and Ritu Agarwal the suspended directors of the corporate debtor within a period of 30 days from the date of receipt of this Order.

- (v)** We have also noted that applications and avoidance transactions have been filed, though the resolution plan states that no application for avoidance transactions have been filed till date against the Corporate Debtor, at the time of filing the application for approval of resolution plan.

- (vi)** However, it is contended in point 4.5 at page 16 of the Resolution Plan as approved by the CoC that the surplus cash and amounts as maybe recovered from the ex-promoters pursuant to the NCLT Orders on the preferential transaction/Avoidance application of the Resolution Professional shall be available to the committee of creditors and any recovery such transaction by the order of the NCLT shall accrue to Financial Creditors in proportion to the amount as proposed in the Resolution Plan. It is further clarified that any application pending on respect of such transaction maybe continued by the Financial Creditors or as may be decided by the Committee of

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Creditors and any legal expenditure or the associated cost related to PUFF application, shall be borne by the said financial creditors or as may be decided by the CoC.

- (vii)** In this case, the admitted claim of the Operational Creditor is Rs. 43,84,80,083/- which is nearly 43 per cent of the total debt, out of which only 0.23 per cent has been allocated. The reasons for such a massive haircut, particularly to Operational Creditors would need thorough examination and we would expect RP to examine and file appropriate avoidance applications, if not filed already, to recover any money transferred illegally for the purpose of maximisation of wealth of the Corporate Debtor. Upon realisation of amount pursuant to PUFFE application allocations, of the same maybe done by the CoC. It goes without saying that if the repayment plan to be provided on application under Section 94 & 95 of IBC, 2016 is sufficient to meet the balance 12 % debt of Financial Creditor then the entire recovery from PUFFE applications may be allocated to Operational Creditor in proportion to the value of debt owed to them treating Operational Creditors as a “Separate Class” for the purpose of distribution, after deducting cost of such PUFFE application incurred. This direction is issued in terms

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of Section 60(5) of IBC, 2016 read with Rule 11 of NCLT
Rules in the interest of justice.

- 8.** Accordingly, this application is **disposed** on above terms.
- 9.** 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.
- 10.** Certified copy of this order may be issued, if applied for, upon compliance of all requisite formalities.

D. Arvind
Member (Technical)

Bidisha Banerjee
Member (Judicial)

This Order is signed on 10th April, 2024.

Ar. [Steno] / Bose, R. K. [LRA]