

**THE NATIONAL COMPANY LAW TRIBUNAL
CHANDIGARH BENCH, CHANDIGARH
(Exercising powers of Adjudicating Authority under
the Insolvency and Bankruptcy Code, 2016)**

**IA No. 1748/2023 & 2357/2023
In
CP (IB) No. 239/Chd/Hry/2021**

Under Section 60(5) of IBC, 2016

In the matter of:-

Reem Tanners Private Limited

...Petitioner/Operational Creditor

With

Drish Shoes Limited

...Respondent/Corporate Debtor

In the matter of IA No. 1748/2023

Indreshwar Singh Paul

Erstwhile Promoter/Director

Resident of:

House No. 351, Sector 21,
Panchkula-134116

...Applicant

Versus

1. Mohit Chawla

Resolution Professional

In the matter of M/s. Drish Shoes Ltd.

Office: 2935-36, Sector 22-C

Chandigarh-160022

2. Bank of India

Through its Authorized Officer

Main Branch, SCO 81/82, Sector 17-B

Chandigarh

...Respondents

In the matter of IA No. 2357/2023

Drish Shoes Workers Union

Vill Rajpura, Bharatgarh Road, Nalagarh

Through President/authorized representatives Mr. Shridhar

IA No. 1748/2023 & 2357/2023

In

CP (IB) No. 239/Chd/Hry/2021

Dass s/o Shri Kapilcharan
Vill-Dhanna, P.O Bhatia, Teh-Nalagarh, Distt Solan
H.P. 174101

Vs.

M/s. Drish Shoes Limited

Through its Resolution Professional Shri. Mohit Chawla,
Resolution Professional,
SCO 2935-36, Level-1, Sector 22C, Chandigarh

Order delivered on: 22.12.2023

**Coram: HON'BLE MR. HARNAM SINGH THAKUR, MEMBER (JUDICIAL)
HON'BLE MR. SUBRATA KUMAR DASH, MEMBER (TECHNICAL)**

Present:

**For the Applicant in
IA No. 1748/2023**

: Mr. Aalok Jagga, Advocate
Ms. Manisha, Advocate

**For the Respondent No. 2 in
IA No. 1748/2023**

: Ms. Ekta Chawdhary, Advocate
Mr. Varun Katyal, Advocate

For Resolution Professional

: Mr. Harsh Garg, Advocate
Mr. Pulkit Goyal, Advocate

**Per: Harnam Singh Thakur, Member(Judicial)
Subrata Kumar Dash, Member (Technical)**

ORDER

IA No. 1748/2023

1. This application filed by the erstwhile Promoter Director against the Resolution Professional/respondent No. 1 and Bank of India/respondent No. 2 with a prayer to set aside the 19th CoC proceedings dated 27.07.2023 approving the Resolution Plan and also to allow the applicant to submit his Resolution Plan under the current CIRP process for consideration of CoC. The application further prays for condonation of delay in submitting the same

due to the pendency of the OTS proposal. In this application, the applicant has stated as under:

- i. The applicant/Erstwhile Promoter Director of the corporate debtor, i.e., Drish Shoes Limited-MSME, which was declared as a Non-Performing Asset by the bank on 09.11.2021. Subsequently, M/s. Reem Tanners Private Limited, one of the suppliers of the corporate debtor filed an application under Section 9 and CIRP was initiated in the case of the corporate debtor on 12.05.2022.
- ii. The Resolution Professional completed the procedures under the CIRP process and in the 19th meeting dated 27.07.2023, the proposal of Resolution Plan of M/s Saboo Tor Private Limited was approved by the sole member of the CoC, i.e., Bank of India.
- iii. It is stated by the applicant that he had intended to submit an application under Section 12A of the IBC. In this connection, a letter to the Assistant General Manager, Bank of India, Chandigarh Branch dated 05.07.2022 (Annexure A-4) has been referred.
- iv. Furthermore, a reference has been made to the reply of respondent No. 2-bank dated 27.07.2022. It is further stated that the applicant carried on the negotiations with the bank and raised its offer on 27.03.2023 INR 67.50 Crores under OTS as reflected by the applicant. It is stated that the proposal of OTS was Rs. 11 Crores more than that of the H-1 bidder which was

placed before the CoC member in its 18th meeting held on 29.06.2023.

- v. Subsequently, in its 19th meeting dated 27.07.2023, the CoC approved the Resolution Plan. In this connection, the applicant has relied upon the decision of the Hon'ble NCLAT in the matter of ***Saravana Global Holdings Ltd. & Anr. vs. Bafna Pharmaceuticals Ltd. & Ors., CP CA (AT) (INS) No. 203 of 2019 dated 04.07.2019*** and the judgment passed in the matter of ***PLBB Products Pvt. Ltd. vs Piyush Periwal & Ors., Company Appeal (AT) (Insolvency) No. 160 of 2021 & IA No. 1117 of 2021.***
- vi. It is submitted by the applicant that the conduct of the Resolution Professional is not in accordance with the provisions of law as the applicant was offering more value than the H-1 bidder and the Resolution Professional who have published for the invitation of Expression of Interest again in view of the communication received by the applicant.
- vii. It is further stated that as the bank did not take a decision on the OTS proposal given by the applicant, it was prevented from submitting its own Resolution Plan beforehand and the same should, therefore, be considered by the CoC.

2. In its reply, respondent No. 1 stated that-

- 2.1 As there is no proof as of now with regard to the status of the corporate debtor and as such the applicant should be put to

strict proof with regard to the MSME status of the corporate debtor.

- 2.2 The applicant mainly relied upon the two judgments passed by the Hon'ble NCLT, New Delhi titled as ***Saravana Global Holdings Lid. (supra) and PLBB Products Pvt. Ltd. (supra)*** contending therein that "the applicant being the director "Power Suspended" of the corporate debtor which is registered as MSME is not required to compete with the other resolution applicants in order to regain the control of the corporate debtor. However, the facts and the circumstances of the aforesaid judgments are much different from the facts and circumstances in the case in hand even in the first judgment in para no.22 the Hon'ble NCLAT had given the preference to the directors of corporate debtor of MSME unit vis-à-vis the resolution applicant in view of the exceptional circumstances of that case as the resolution plan of the CD has already been approved by CoC and AA and in appeal the same was challenged by one of the prospective resolution applicant; however, in the case in hand CoC has already a successful resolution applicant and the IA applicant who was an active participant in all the COC meetings of the Corporate Debtor and thus did not submit his resolution plan inspite of the fact that the Form G was republished for 3 times during the CIRP process of the corporate debtor and now when the viable resolution plan was approved by the CC in its commercial wisdom then the present application was filed with

malafide intention to delay the CIRP process for which the applicant should be never allowed to do so and no special preference should be given to the applicant being the director (power suspended) of MSME CD in the resolution plan. Only on this short ground, the present application is liable to be dismissed.

2.3 It is submitted that the successful resolution applicant had given a comprehensive resolution plan and the CoC in its commercial wisdom approved the resolution plan after complete deliberation and in the present application the applicant is comparing the resolution plan with the OTS offer given to the Bank i.e. BOI, contending therein that the SRA's total value of the plan is Rs 56.50 crores which is less by Rs 11 Crores what is being offered by the applicant/promoter. Through aforesaid contention the applicant is misleading this Hon'ble adjudicating authority by concealing the fact that the total plan value is approx. Rs 61 Crores. However, this comparison is completely out of context as per as the CIRP proceedings are concerned. By way of OTS, the applicant had offered an amount for comprehensive settlement of the loan of the corporate debtor which includes personal and corporate guarantees as well, whereas in the resolution plan the successful resolution applicant only deals with the assets of the corporate debtor. For the sake of comparison, the only case of the applicant is that he is offering 11 crores more than the SRA which it had offered under the

successful full resolution plan, which has been approved by the CoC.

2.4 It is further submitted that as per section 29 A (g) if the promoter of the corporate debtor indulged into the preferential/fraudulent transaction for which the order has been passed by the adjudicating authority then such promoter is ineligible to submit the resolution plan even if the CD is MSME.

3. The reply was filed by Respondent No. 2 stating that-

3.1 The Form G was earlier published 3 times and being the suspended director of the corporate debtor was well aware about the same as he has attended each and every meeting of the CoC but did not submit any resolution plan during the CIRP process.

3.2 It is further stated that the present application has been filed just to delay and frustrate the entire CIRP proceedings. Further, time is the essence in any resolution process and the Apex Court has held in as laid down by the Hon'ble Apex Court in the matter of ***Kridhan Infrastructure Put. Ltd. Vs Venkestesan Shankaranarain & Ors, bearing Civil Appeal No. 3299 of 2020*** decided on 01.03.2021 ***and Committee of Creditors of Essar Steel India Ltd., Vs Satish Kumar Gupta and others*** decided on 15.11.2019.

3.3 It is averred that the proposal of the Applicant was not considered by the COC and the said fact was informed to the Applicant via mail dated 28.07.2023. Further, the upfront amount

of Rs.1.30 crores deposited by the Applicant in no lien account was returned via RTGS as requested by the Applicant vide mail dated 27.07.2023.

3.4 It is submitted that the commercial wisdom of the COC cannot be challenged by the Applicant or any other person in terms with law laid down by Hon'ble Apex court in ***Committee of Creditors of Essar Steel India Ltd. (supra)***.

3.5 It is further submitted that the contention of Applicant that he is offering Rs11.00 cores more by way of OTS than the amount of SRA is also misleading and not tenable.

3.6 It is submitted that in the garb of the OTS the aim of the Applicant is to avoid personal and corporate guarantees, whereas in resolution plan the successful resolution applicant only deal with the assets of the corporate debtor.

4. In its rejoinder to respondent No. 1, it is stated that after various meetings with the creditor bank, the applicant has raised its proposal for settlement considerably which was finally increased to R.s 67.50 Crores on 28.03.2023. The applicant's proposal was a better proposal to regain control equivalent to the effect of a Resolution Plan but the same was kept pending even till the 18th CoC meeting held on 29.06.2023.

4.1 Emphasis is given on the pendency of the OTS proposal from 05.07.2022 which was subsequently enhanced on 28.03.2023. It is pointed out that the Hon'ble Supreme Court, in the case of ***Swiss Ribbons Versus Union of India 2019 (4) SCC 70*** decided on 25.01.2019 has held that "in case if there is an

arbitrary decision on the application, submitted to the creditors u/s 12-A, the NCLT can exercise Judicial review. Therefore, action on a process u/s 12-A is not immune from judicial review”.

4.2 Further, it is stated that the judgment of ***Kalpraj Dharamshi vs. Kotak Investment Advisors Civil Appeal Nos. 2943-2944, 3138-3139, 2949-2950 of 2020 and Civil Appeal Nos. 847-848/2021 (D. No. 24125 of 2020)*** decided on 10.03.2021 is not applicable as there is no exercise of commercial wisdom on the proposal being part of process u/s 12A as no decision has been taken thereon. Commercial wisdom is only regarding the decision, but here in the present case, there is no decision on proposal u/s 12A.

4.3 It is also stated that the cited Judgment of ***Saravana Global Holding Limited (Supra)*** not only talks about entitlement Of MSME to have preference while consideration of ? resolution plan, but also emphasizes on the entitlement and preference to be given to MSME to regain control over the Corporate Debtor. The Judgment has been misread and misinterpreted by Respondent No. 1. Moreover, in view of the RBI guidelines dated 08.06.2023, holding OTS to be one of the effective plans to settle the debt of the Financial Creditor, has statutory favor in terms of Section 35A of the Banking Regulation Act, 1949, it cannot be said that the proposal can be kept pending while further proceeding to carry out voting and approve a resolution plan with no decision to be taken on the proposal U/s 12A

submitted by the suspended Director, which is Rs. 11 crores more than the resolution plan as the OTS proposal is for Rs.67.50 crores whereas the resolution plan is for Rs.56.42 crores. Commercial wisdom in the present case, does not apply when there is no decision taken on the proposal U/s 12A.

4.4 It is further submitted that the assertion of the RP is contrary to Regulation 35A of the CRP Regulations, 2016, which uses the word that the resolution professional shall formulate an opinion that definitely cannot be equated with the adjudication and decision to be eventually given by the NCLT/Adjudicating Authority. Thus, as of today, in absence of any decision on the aforesaid application, which has been much belatedly, only to take out this defense intentionally, is unsustainable and misleading. Till the time there is no decision on the aforesaid application, no benefit of the same can be taken into consideration.

5. In rejoinder to respondent No. 2, it is stated that the accounts of the respondent bank are in contravention to the RBI guidelines dated 08.06.2023 which clearly suggest that settlement is also a valid resolution of the debt. It is further stated that the banks not taking a decision on the OTS proposal is also in contravention of the essence of the Code which lays down that the proceedings under the Code are strictly time-bound. By not taking a decision, it is alleged that the bank has made a deemed rejection which is in violation of the law laid down by the Hon'ble Supreme Court in the case of **Swiss**

Ribbons (supra). It is further alleged that by its action, the bank is responsible for the loss of Rs. 11 Crores to a Government Institution.

6. We have heard the learned counsel for the parties and carefully perused the records available.

7. In the present case, the issue to be decided is whether the CoC's approval of the Resolution Plan filed by another party is in keeping with the provisions of the IBC especially when the OTS proposal by the applicant was pending before the bank.

8. In this connection, we refer to the following extracts from the communications between the applicant and the respondent bank:

i. Letter dated 05.07.2022

"As conveyed, we are interested to pursue the One Time Settlement route to pay our dues to you.

Kindly advise the maximum amount you to wish to have under your extant rules against this route"

ii. Letter dated 14.03.2023

A) (i) *We offer a total net sum of Rs. 64.5 crores by way of OTS against sale of all assets of Drish Shoes Ltd. - land, buildings, all machines and all stocks.*

(ii) *In comparison, the highest offer as H1 from CIRP process is Rs. 56.42 crores.*

B) (i) *We have somehow managed to garner with great difficulty through our own sources, friends and relations a total sum of Rs. 1.30 crores which we would submit within a couple of days' notice once you are sending our OTS request to the Head.*

Office.

(ii) *This amount, whether from us or friends and relations would be put into a no-lien account by the bank to be adjusted against*

OTS amount, if our request is accepted, or returned from the no-lien account, if our request is not accepted. Please confirm your understanding of the same.

We humbly request you to accept this upfront amount even though other banks are accepting OTS proposals with even 1% upfront amount.

(iii) Within one month of NCLT approval under Section 12-A and your giving us an approval letter that provides as per our mutual discussions and requests, we would further deposit Rs. 6.45 crores being 10% of the OTS offer.

(iv) Within further two months, i.e., total 3 months of NCLT approval under Section

12-A and your approval letter, we would deposit additional amount of Rs. 34.0 crores. We would try our best to increase this amount.

(V) We would pay interest on the remaining Rs. 22.75 Cr or whatever amount is left to make a total of Rs. 64.5 Cr. We have made a separate provision for this interest payment so that our NPV remains at Rs. 64.5 Cr.

C) We are convinced that Reem Tanners withdrawing its application from NCLT under Section 12-A is the most straightforward way of getting your outstanding paid. CIRP process could be more long drawn.

In case of 12-A, we would assist you to get NCLT approval within 3 months or less after your Board's approval.

iii. Letter dated 28.03.2023

(A) (i) We make a final and last most offer of a total net sum of Rs. 67.5 crores (Rupees Sixty Seven crores fifty lacs) by way of OTS against sale of all assets of Drish Shoes Ltd. - land, buildings, all machines and all stocks.

(ii) In comparison, the highest offer as H1 from CIRP process is Rs. 56.42 crores.

(B) (i) We have somehow managed to garner with great difficulty through our own sources, friends and relations a total up front sum of Rs. 1.30 crores (Rupees One crore thirty lacs). Within two days of your giving us the 'No lien Account' details we would deposit Rs. 1.3 crore into the 'No lien Account (it) This amount, whether from us or friends and relations would be put into a no-lien account by the bank to be adjusted against OTS amount if our request is accepted, or returned from the no-lien account if our request is not accepted. Please confirm your understanding of the same

(iii) Within one month of NCLT approval under IBC Section 12-A and your giving us an approval letter that provides as per our mutual discussions and requests, we would further deposit Rs. 6.75 crores being 10% of the OTS offer.

(iv) Within further two months, i.e., total 3 months of NCLT approval under Section 12-A and your approval letter, we would deposit additional amount of Rs. 35.0 crores. We would try our best to increase this amount.

(v) We would pay interest on the remaining Rs. 24.45 crores or whatever amount is left after 3 months of 12-A approval date. We have made a separate provision for this interest payment so that our NPV remains at Rs. 67.50 Cr.

(C) In case of section 12-A. we would assist you to get NCLT approval within 2-3 months or less after your Board's approval.

9. We note from the communications between the parties, it is apparent that the applicant did negotiate with the banks over a period of time in order to regain control over the corporate debtor. We also note the fact that the account of the corporate debtor is an old account and the parties are known to each other for a long time. We however, refrain from passing any judgement

on the acceptability of the proposals, as we are of the view that this falls under the Bank's Jurisdiction.

10. In view of this, we hold that it is the prerogative of the bank to take a commercial decision as to whether the OTS offered by the applicant is to be accepted or not. The bank has a right to carry out due diligence in terms of finding out the capability of the applicant to carry out its commitment, in its OTS proposal and draw its own conclusion. This commercial decision of the bank cannot be interfered with, merely because the applicant made a higher offer.

11. Prima facie, it appears that the offer made by the applicant is not backed by credible financial disclosure and it appears to be tentative. We note the fact that there are several judicial decisions of the Hon'ble Apex Court and also the Hon'ble NCLAT, wherein it is held that all settlements have to be encouraged. In this connection, we refer to the decision of the Hon'ble NCLAT in the matter of **Sanjeev Mahajan vs. India Bank (Erstwhile Allahabad Bank) & Anr. Civil Appeal Diary No. 21855/2022** decided on 31.10.2022, the relevant part of the decision is extracted hereinbelow:

*"The Hon'ble Supreme Court in **ES Krishanmurthy & Ors. vs. M/s. Bharath Hi Tech Builders Pvt. Ltd. Civil Appeal No. 3325 of 2020**" decided on 14.12.2021 in paragraphs 28 & 29:-*

"28. Undoubtedly, settlements have to be encouraged because the ultimate purpose of the IBC is to facilitate the continuance and rehabilitation of a corporate debtor, as distinct from allowing it to go into liquidation.

xxxx

29. xxxx

“Thus, while the Adjudicating Authority and Appellate Authority can encourage settlements, they cannot direct them by acting as courts of equity.....”

(Emphasis Supplied)

12. We also refer to the judgment of the **Hon'ble Supreme Court in Bijnor Urban Cooperative Bank Limited, Bijnor and Ors. us. Meenal Agarwal and Ors.- 2021 SCC OnLine SC 1255** decided on 15.12.2021 wherein the Hon'ble Supreme Court has laid down the following in paragraph 30:-

xxxx

Ultimately, such a decision should be left to the commercial wisdom of the bank whose amount is involved and it is always to be presumed that or the financial institution/ bank shall take a prudent decision whether to grant the benefit or not under the OT'S Scheme, having regard to the public interest involved and having regard to the factors which are narrated hereinabove.

(Emphasis Supplied)

13. We have also considered the decision of Hon'ble NCLAT in **Saravana Global (supra)**, wherein it is held that “*the exceptional circumstances, if the corporate debtor is MSME, it is not necessary for the promoters to compete with other Resolution Applicants to regain the control of the corporate debtor*”. While we have no quarrel with the principle laid down in the said decision, we point out that the Hon'ble NCLAT itself refers to “exceptional circumstances”, which do not exist in the case at hand.

14. We, therefore, hold that though, the acceptable principle is to encourage settlement, the decision for accepting or rejecting the settlement is

squarely within the domain of the lending bank and no interference is called for from any Authority in this regard. After going through the facts of the present case, we are of the view that no irregularity has been committed by the lending bank in not accepting the OTS offer. We, therefore, do not accede to the prayers of the applicant.

15. In the result, IA No. 1748/2023 is dismissed and disposed of accordingly.

IA No. 2357/2023

16. This application filed by the Drish Shoes Workers Union against Drish Shoes Limited, represented through its Resolution Professional, Mohit Chawala with a prayer to admit the claim of the applicant for an amount of Rs. 3,14,31,842/- as submitted before the respondent vide application dated 05.06.2022.

17. The brief facts of the case are:-

The applicant being workmen are registered under the Trade Unions Act, 1926 in the state of Himachal Pradesh. The applicant falls under sub-clause (b) of Clause 1 of the priority list for the distribution of assets. The respondent while ascertaining the calculation had thoroughly ignored the documents appended with the claim more particularly the pay slips which clearly shows the relationship of the employer and employee as well as the last drawn salary. The impugned action on the part of the respondent for denying the legitimate claim to the tune of Rs3,14,31,842/-. The claim on account of the salary for the period of 12 Months has duly been corroborated with the salary slip.

The claim is on account of Gratuity, bonus, leave encashment is statutory entitlement of the worker.

18. The reply was filed by the respondent wherein it is stated that their claim of 82 workers for an amount of Rs. 3,14,31,842/- to erstwhile IRP. In their claim form, the workers had filed a claim for the pending Salary, Gratuity, Bonus and leave encashment. The workers have submitted their claim for 12 months towards the salary from the period from June 2021 to May 2022. It is pertinent to mention here that the RP issued a notice dated 31.07.2021 wherein all the employees and workers were notified of the layoff in the absence of regular business of 45 days from 03.08.2021 to 16.09.2021. The RP has calculated the full and final dues of the workers till 30.09.2021 and based on the same, the IRP admitted the dues pertaining to the Salary, Gratuity, Bonus and Leave encashment and as such admitted the claim of workmen to the extent of Rs. 1,85,62,360/- and rejected the claiming for remaining amount vide order dated 23.08.2022.

19. The rejoinder was filed by the applicant wherein it is stated that the curtailment in the claim amount of the workers is in violation of principles of natural justice and the action of the Resolution Professional is void ab initio. Further, no reasons have been stated by the RP for the reduction of the amount. It is a continuing cause of action in the interest of justice. The said amount is not only going to affect them but also their families.

20. We have heard the learned counsel for the petitioner and have perused the records carefully.

21. We have gone through the aforementioned e-mail dated 23.08.2022 intimating the applicant about the admission of a part of their claims. Only the

names, the amounts of claims and the amounts admitted have been mentioned in the said email without giving any justification for the calculation of claims made by the Resolution Professional. Such kind of summary rejection of claims, especially that of workman and employee, is not envisaged under the IBC. The Resolution Professional, therefore, is directed to go through the claims made and ask for further explanation(s)/supporting documents, if required, and give a detailed calculation of the amounts accepted under different heads like Salary, Gratuity and Leave encashments for each of the entities. The Resolution Professional is directed to complete this exercise within 03 weeks of this order.

22. In the result, the Appeal is allowed and disposed of accordingly.

Sd/-

(Subrata Kumar Dash)
Member (Technical)

December 22 ,2023

TBG/PKA

Sd/-

(Harnam Singh Thakur)
Member (Judicial)