

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

COMPANY APPEAL (AT) (INSOLVENCY) NO. 689 of 2021

(Arising out of the Order dated 26th July, 2021 passed by the Learned Adjudicating Authority (National Company Law Tribunal, New Delhi, Principal Bench), in I.A. 999(PB)/2021 in IB-60(PB)/2018)

IN THE MATTER OF:

Kalinga Allied Industries India Private Limited

Having its Registered Office at:

CCC/23, Civil Township,

Rourkela Sundargarh,

Orrisa – 769004.

...Appellant

Versus

1. Committee of Creditors

(Bindals Sponnge Industries Limited)

Through Punjab National Bank

At Plot No. J/3, Revenue Plot No. – 1561 (P),

Jagamara, Khandagiri,

Bhubaneshwar (Orissa) – 753030.

...Respondent No. 1

2. Mr. Dinesh Sood (Resolution Professional)

Having its office at:

C/o Yogakshem Insolvency Professionals LLP,

UGF, 1/15 Tilak Nagar,

New Delhi – 110018.

...Respondent No. 2

Present

**For Appellant: Mr. Abhijeet Sinha & Mr. Rakesh Wadhwa,
Advocates.**

For Respondent No. 1: Mr. Mohit Nandani, Advocate for R-1.

For Respondent No. 2: Mr. Mukesh Kumar, Advocate for R-2.

J U D G E M E N T

[Per; Shreesh Merla, Member (T)]

1. Aggrieved by the Impugned Order dated 26.07.2021 passed by the Learned Adjudicating Authority (National Company Law Tribunal, New Delhi, Principal Bench) in IA No.999(PB)/2021 in IB-60(PB)/2018, the Successful Resolution Applicant/M/s. Kalinga Allied Industries India Private Limited preferred this Appeal under Section 61 of the Insolvency and Bankruptcy Code, 2016, (hereinafter referred to as ‘The Code’). By the Impugned Order, the Adjudicating Authority has allowed the Application preferred by the Committee of Creditors (‘CoC’) seeking a direction to the Resolution Professional (‘RP’) to call for a Meeting at the CoC and consider the Resolution Plan of M/s. Hindustan Coils Limited, (‘HCL’) M/s. Kalinga Enterprises Private Limited (‘KEPL’) and M/s. New Lakshmi Steel & Power Private Limited or any other entity and sought for additional 30 days to consider and approve the most suitable Plan. While allowing the Application, the Adjudicating Authority has observed as follows:

“...The counsel, appearing for the successful resolution applicant, submits that there is no scope for the CoC to reconsider the same once the plan is approved and improving of the value is not the question. In view of the fact that there is lot of passage of time and the approval of the plan has been delayed for various reasons and hence they should be given an opportunity to proceed and take over the unit. After hearing the submissions made by both the counsels, the legal point that arises here is that whether the financial creditors who are the constituents of the CoC, have the power or it is within their scope to withdraw a consent for the plan and try for other offers so that there is a maximization of value

of the assets by inviting fresh offers. In view of the same, we are also of the considered view that the CoC is well within its powers to reject a plan, improve a plan and also withdraw a plan in their commercial wisdom and hence the decision on the part of the financial creditors to reconstitute the CoC and to construe better plans, is well within their powers and the same cannot be denied by this Bench. In view of the same this application is allowed and CoC is directed to consider fresh applications, fresh Expression of Interests from the prospective investors or companies and try their level best to maximize the value of the assets. In view of the same, the RP is directed to call for the CoC and consider proposals submitted by the CoC. We also further direct the RP to revalue the land, to go for fresh valuation of the land and machinery with a qualified person. Taking into consideration the present market value. The RP should exercise maximum care and caution in appointing the valuers and in case this Bench feels the valuation is not properly done, this Bench will not hesitate to order valuation afresh under the supervision of this Tribunal, therefore, we reiterate that the valuation of the fixed assets and also tangible and intangible assets, shall be done with utmost care so that the exact market values are presented to the CoC.”

2. Submissions of the Learned Counsel appearing on behalf of the

Appellant:

- Learned Counsel for the Appellant/ the Successful Resolution Applicant (‘SRA’) submitted that the Appellant herein was not a party in the IA; that this Tribunal in ‘Kalinga Allied Industries India Pvt. Ltd.’ Vs. ‘Hindustan Coils Ltd. & Ors.’¹, preferred by the Appellant/M/s. Kalinga Allied Industries India Private Limited against the Impugned Order dated

¹ Comp. App. (AT) (Ins.) No. 518/2020

27.02.2020, whereby, the IA preferred by HCL was allowed, directing the Application with the proposed Plan of HCL to be placed before the CoC for consideration, has observed that the Adjudicating Authority cannot entertain an Application of a person who has not participated in the Corporate Insolvency Resolution Process ('CIRP') even when such a person is ready to pay more amount in comparison to the SRA, that this Order was never challenged and therefore no new Application can be entertained if a person has not participated in the CIRP.

- It is also argued that the Resolution Plan approved by the CoC is a 'Contract' and becomes binding between the CoC and the SRA; that the CoC cannot withdraw approval of the Resolution Plan as more than three years has lapsed and moreover it cannot bypass the Order of this Tribunal dated 11.01.2021. It is contended that the Adjudicating Authority has erroneously directed the new party to participate in the CIRP when it was never a part of the CIRP since the inception.

3. Submissions of the Learned Counsel appearing on behalf of the first

Respondent:

- Learned Counsel for the first Respondent submitted that the CoC can withdraw and recall its consent given to a 'Resolution Plan' prior to the approval by the Adjudicating Authority and placed reliance on the Judgements of this Tribunal in '*Siva Rama Krishna Prasad*' Vs. '*S. Rajendran, Official Liquidator of M/s. Krishna Industrial Corporation Ltd.*

& Ors.’², and in ‘*Gulabchand Jain*’ Vs. ‘*Ramchandra D. Choudhary, Resolution Professional of Vijay Timber Industries Pvt. Ltd.*’³ in support of his submissions.

- Learned Counsel also relied on the Judgements of the Hon’ble Apex Court in ‘*K. Sashidhar*’ Vs. ‘*Indian Overseas Bank & Ors.*’⁴, ‘*Committee of Creditors of Essar Steel India Ltd.*’ Vs. ‘*Satish Kumar Gupta & Ors.*’⁵, and in ‘*Kalpraj Dharmashi & Anr.*’ Vs. ‘*Kotak Investment Advisors Ltd. & Anr.*’⁶, in support of his argument that the Commercial Wisdom of the CoC is non-justiciable and hence it is in the domain of the CoC to decide even if at a later stage, which Resolution Plan is more suitable.
- It is also contended that the scope of IBC is ‘Maximisation of Value of Assets’ and therefore if HCL has offered a higher amount, the CoC can consider a Plan of a third party in its Commercial Wisdom. The objective of the Code is to respect the Commercial Wisdom of the CoC and that the Adjudicating Authority was justified in passing the Impugned Order.

4. Submission of the Learned Counsel appearing on behalf of the second

Respondent:

- It is the case of the second Respondent/RP of the ‘Corporate Debtor’ that after deliberating the modified Resolution Plan in two Meetings, the CoC

² Comp. App. (AT) (Ins.) No. 751/2020

³ Comp. App. (AT) (Ins.) No. 142/2021

⁴ (2019) 12 SCC 150

⁵ (2020) 8 SCC 531

⁶ 2021 SCC OnLine SC 204

in its tenth Meeting held on 25.06.2019 approved the modified Resolution Plan incorporating the revised distribution of the Resolution offer amount of Rs.45Cr./- and above. Vide Order dated 22.10.2019, the Adjudicating Authority has directed the RP to consider the Resolution Plan of M/s. Kalinga Allied Industries India Private Limited who had offered the Resolution amount of Rs.55.43Cr./- as against the offer of Rs.45Cr./- of the Appellant herein. RP sought clarification from KEPL but despite giving several opportunities, the Resolution Plan offered by KEPL was non-compliant with the provisions of the Code and hence the same was not put up by the RP to the CoC for approval.

- Subsequently, the Appellant had modified its Resolution Plan by enhancing the offer by Rs.11Lakhs/- and the CoC in its thirteenth Meeting held on 11.11.2019 approved the Resolution Plan with the revised offer. In compliance with the Order dated 27.02.2020 of the Adjudicating Authority, the RP forwarded the final Resolution Plan received by him from HCL on 26.05.2020 to the 'Financial Creditors'. This Tribunal vide Order dated 11.01.2021, set aside the Order dated 27.02.2020.

Assessment:

5. The main issue which arises in this Appeal is whether the CoC after having approved the Resolution Plan on 11.11.2019 can seek direction to consider the new Resolution Plan of a third party who was not a part of the CIRP Proceedings,

and seek to withdraw their approval after more than two years of the approval of the first Resolution Plan.

6. It is a fact that the CoC had approved the Resolution Plan on 11.11.2019 and the Application for approval of the Plan under Section 31 of the Code was filed before the Adjudicating Authority in January 2019. Vide Order dated 27.02.2020, the Adjudicating Authority had directed the RP to consider the new Resolution Plan of HCL. The SRA preferred an Appeal challenging this Order dated 27.02.2020, which was allowed by this Tribunal in '*Kalinga Allied Industries India Pvt. Ltd.*' (*Supra*). It was directed that no new Application ought to be entertained if a person has not participated in the CIRP. The matter was heard on remand by the Adjudicating Authority when the CoC filed an Application I.A. 999/2021 to withdraw their approval after more than two years of its approval. It is significant to mention that the Order dated 11.01.2021 passed by this Tribunal was never challenged by the CoC and has hence since attained finality.

7. Learned Counsel for the first Respondent/CoC placed reliance on the Judgements of the Hon'ble Apex Court in '*K. Sashidhar*' (*Supra*), '*Committee of Creditors of Essar Steel India Ltd.*' (*Supra*), and '*Kalpraj Dharmashi & Anr.*' (*Supra*), in support of his submission that Commercial Wisdom of CoC is non-justiciable. The Hon'ble Supreme Court in a catena of Judgements has held that the jurisdiction of the Tribunal is limited as far as the Commercial Wisdom of the CoC is concerned unless and until there is any material irregularity or is against

the provisions of Sections 30(2) of the Code. In the instant case, the question is not whether the Commercial Wisdom of the CoC is justiciable or not, the question here is whether the Adjudicating Authority can direct the CoC to consider the Resolution Plan of a person who was not a part of the CIRP and also whether the submitted Resolution Plan is binding as between the CoC and the SRA and in such a situation where once the Plan is submitted to the Adjudicating Authority, for approval, can it be withdrawn after two years have lapsed. At this juncture, we find it relevant to place reliance on the ratio of the Hon'ble Supreme Court in *'Ebix Singapore Pvt. Ltd.' Vs. 'Committee of Creditors of Educomp Solutions Ltd. & Anr.'*⁷, in which the Hon'ble Apex Court discussing modification and withdrawals by SRA has observed as follows:

“243. This Court is cognizant that the extraordinary circumstance of the COVID-19 pandemic would have had a significant impact on the businesses of Corporate Debtors and upon successful Resolution Applicants whose Plans may not have been sanctioned by the Adjudicating Authority in time, for myriad reasons. But the legislative intent of the statute cannot be overridden by the Court to render outcomes that can have grave economic implications which will impact the viability of the IBC.

244. The residual powers of the Adjudicating Authority under the IBC cannot be exercised to create procedural remedies which have substantive outcomes on the process of insolvency. The framework, as it stands, only enables withdrawals from the CIRP process by following the procedure detailed in Section 12A of the IBC and Regulation 30A of the CIRP Regulations and in the situations recognized in those provisions. Enabling

⁷ 2021 SCC OnLine SC 707

withdrawals or modifications of the Resolution Plan at the behest of the successful Resolution Applicant, once it has been submitted to the Adjudicating Authority after due compliance with the procedural requirements and timelines, would create another tier of negotiations which will be wholly unregulated by the statute. Since the 330 days outer limit of the CIRP under Section 12(3) of the IBC, including judicial proceedings, can be extended only in exceptional circumstances, this open-ended process for further negotiations or a withdrawal, would have a deleterious impact on the Corporate Debtor, its creditors, and the economy at large as the liquidation value depletes with the passage of time. A failed negotiation for modification after submission, or a withdrawal after approval by the CoC and submission to the Adjudicating Authority, irrespective of the content of the terms envisaged by the Resolution Plan, when unregulated by statutory timelines could occur after a lapse of time, as is the case in the present three appeals before us. Permitting such a course of action would either result in a down-graded resolution amount of the Corporate Debtor and/or a delayed liquidation with depreciated assets which frustrates the core aim of the IBC.

245. *If the legislature in its wisdom, were to recognize the concept of withdrawals or modifications to a Resolution Plan after it has been submitted to the Adjudicating Authority, it must specifically provide for a tether under the IBC and/or the Regulations. This tether must be coupled with directions on narrowly defined grounds on which such actions are permissible and procedural directions, which may include the timelines in which they can be proposed, voting requirements and threshold for approval by the CoC (as the case may be). They must also contemplate at which stage the Corporate Debtor may be sent into liquidation by the Adjudicating Authority or otherwise, in the event of a failed negotiation for modification and/or withdrawal. These are matters for legislative policy.*

246. *In the present framework, even if an impermissible understanding of equity is imported through the route of*

residual powers or the terms of the Resolution Plan are interpreted in a manner that enables the appellants' desired course of action, it is wholly unclear on whether a withdrawal of a CoC-approved Resolution Plan at a later stage of the process would result in the Adjudicating Authority directing mandatory liquidation of the Corporate Debtor. Pertinently, this direction has been otherwise provided in Section 33(1)(b) of the IBC when an Adjudicating Authority rejects a Resolution Plan under Section 31. In this context, we hold that the existing insolvency framework in India provides no scope for effecting further modifications or withdrawals of CoC-approved Resolution Plans, at the behest of the successful Resolution Applicant, once the plan has been submitted to the Adjudicating Authority. A Resolution Applicant, after obtaining the financial information of the Corporate Debtor through the informational utilities and perusing the IM, is assumed to have analyzed the risks in the business of the Corporate Debtor and submitted a considered proposal. A submitted Resolution Plan is binding and irrevocable as between the CoC and the successful Resolution Applicant in terms of the provisions of the IBC and the CIRP Regulations. In the case of Kundan Care, since both, the Resolution Applicant and the CoC, have requested for modification of the Resolution Plan because of the uncertainty over the PPA, cleared by the ruling of this Court in Gujarat Urja (supra), a one-time relief under Article 142 of the Constitution is provided with the conditions prescribed in Section K.2."

(Emphasis Supplied)

8. Though the main issue raised in 'Ebix Singapore Pvt. Ltd.' (Supra) is with respect to withdrawal/modification of a Resolution Plan by an SRA, the Hon'ble Supreme Court has clearly laid down that 'the NCLT is Residuary Jurisdiction [under Section 60(5)(c)] though vide, is nonetheless defined by the text of the Code. Specifically, the NCLT cannot do what the IBC consciously did not

provide it the power to do'. Further, the Court observed that 'this Court must adopt an interpretation of the NCLT is Residuary Jurisdiction which concurs with the broader goals of the Code'. '*Ebix Singapore Pvt. Ltd.*' (*Supra*) has observed that strict timelines have to be adhered to and that the Adjudicating Authority lacks the authority to allow the withdrawal/modification of the Resolution Plan by an SRA, as this would defeat the very objective of the statute. In the instant case, though it is not the SRA which is seeking withdrawal, the effect of the CoC seeking withdrawal of an already approved Resolution Plan would have identical repercussions with respect to 'timelines' as the same would have the effect of restarting the CIRP Process from the valuation stage when all the statutory timelines have long since been exhausted. The principle with respect to 'timelines' is applicable to the facts of this case. At the cost of repetition, it is crystal clear that any modification or a withdrawal (by SRA or otherwise) after approval by the CoC and submission to the Adjudicating Authority, '*irrespective of the content*' of the terms envisaged by the Resolution Plan, would only lead to further delay and defeat the very scope and objective of the Code. The existing framework does not provide any scope for effecting any further modifications or withdrawals of the CoC approved Resolution Plan by the SRA or the Creditors. The Adjudicating Authority can interfere only if the Plan is against the provisions of the Code. Once the Plan is submitted to the Adjudicating Authority, it is binding and irrevocable as between the CoC and the SRA in terms of the provisions of the Code. This Tribunal in '*Steel Strips Wheels Ltd.*' Vs. '*Shri Avil*

*Menezes Resolution Professional of AMW Autocomponent Ltd. & Ors.*⁸, placing reliance on '*Ebix Singapore Pvt. Ltd.*' (*Supra*), observed that any consideration of a belated Plan would breach both the timelines as well as the finality of a Resolution Plan approved by the CoC on an earlier date. The contention of the Learned Counsel for the first Respondent that the Code provides for 'Maximisation of the Value of Assets' and therefore a higher value offered is to be considered, is untenable, as in the instant case, the maximum timeline permissible for completion of the said process has lapsed and the CIRP has been ongoing since 11.05.2018 and more than four years have lapsed since then. The decisions relied upon by the Respondents in '*Siva Rama Krishna Prasad*' (*Supra*) and in '*Gulabchand Jain*' (*Supra*), are not applicable to the facts of this case as the issues raised in those cases is with respect to withdrawal of the approval by the CoC to the Resolution Plan, recommending Liquidation of the 'Corporate Debtor'. In this case, the CoC sought fresh consideration for another Plan after completion of all timelines. It is pertinent to mention that these Judgements are prior to the ratio laid down by the Hon'ble Apex Court in '*Ebix Singapore Pvt. Ltd.*' (*Supra*). It is the case of the Intervenors that I.A. (IB) No. 815/2021 in C.P. IB No.-60(PB)/2018 is still pending Adjudication before the Adjudicating Authority and that the Appellant has no vested right for consideration of its Resolution Plan as they only continue to remain a prospective Resolution

⁸ CA AT (Ins.) No. 89/2022

Applicant. At this juncture, it is significant to mention that the Order passed by this Tribunal in '*Kalinga Allied Industries India Pvt. Ltd.*' (*Supra*), has set aside the Order of the Adjudicating Authority observing as follows:

“With the aforesaid, we are of the view that when the Application for approval of Resolution Plan is pending before the Adjudicating Authority at that time the Adjudicating Authority cannot entertain an Application of a person who has not participated in CIRP even when such person is ready to pay more amount in comparison to the successful Resolution Applicant. If a Resolution Plan is considered beyond the time-limit then it will make a Company Appeal (AT) (Ins.) No. 518 of 2020 never-ending process. Thus, impugned order is not sustainable in law as well as in fact. The impugned Order is hereby set aside.”

9. This Order has attained finality and no fresh consideration of any Resolution Plan at this stage can be entertained. It is reiterated that the 'Maximisation of Value of Assets' ought to be 'within the specified timelines' and if it is not a 'timebound process', the entire scope and objective of the Code would fail merely because there is another higher offer made by a third party, the CoC cannot consider another Plan of a third party who did not participate in the CIRP Proceedings. For all the ongoing reasons, this Tribunal is of the earnest view that once Plan is submitted for approval, it is binding between the CoC and the SRA, unless there is any material irregularity or is against the provisions of Section 30(2) of the Code the Adjudicating Authority cannot, in its limited jurisdiction, interfere.

10. Hence, this Appeal is allowed and the Impugned Order dated 26.07.2021 passed by the Learned Adjudicating Authority is set aside. No order as to costs.

[Justice Anant Bijay Singh]
Member (Judicial)

[Ms. Shreesha Merla]
Member (Technical)

**Principal Bench,
New Delhi
19th December, 2022**

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