

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH- I
KOLKATA**

I.A. (IB) No. 20/KB/2021

in

CP (IB) No. 533/KB/2018

In the matter of:

Under section 60(5) of the Insolvency and Bankruptcy Code, 2016 read with rule 11 of the National Company Law Tribunal Rules, 2016.

And

In the matter of:

Jain Constructions Private Limited

... Financial Creditor

Versus

Kariwala designers Private Limited

CIN: U74994WB2011PTC157676

...Corporate Debtor

And

In the matter of:

Anand Kariwala

... Applicant

versus

1. Mr. Partha Pratim Ghosh, Resolution Professional

2. The Committee of Creditors of Kariwala Designers Private Limited

... Respondent

Coram:

Mr. Rajasekhar V.K. : Member (Judicial)

Mr. Balraj Joshi : Member (Technical)

Appearances (via videoconferencing):

For the Applicant : Ms. Swapna Chaubey, Advocate
Mr. Sidhartha Sharma, Advocate
Ms. Ujjaini Chatterjee, Advocate
Ms. Shalini Basu, Advocate

For the Resolution Professional : Mr. Jishnu Chowdhury, Advocate
Ms. Ankita Baid, Advocate
Mr. Partha Pratim Ghosh, R.P.

For the CoC

: Mr. Chayan Gupta, Advocate
Mr. Ajit Kumar Gupta, Advocate

Date of hearing: 12 November, 2021

Date of pronouncement: 17 February, 2022

ORDER

Per: Rajasekhar V.K., Member (Judicial)

1. *Preamble*

- 1.1. This Court convened through videoconferencing.
- 1.2. The present I.A. has been filed under section 60(5) of the Insolvency and Bankruptcy Code, 2016 (“Code”) by a member of the suspended Board of Director of the Corporate Debtor.
- 1.3. This Adjudicating Authority *vide* order dated 24 October, 2019 admitted the Corporate Debtor into Corporate Insolvency Resolution Process (“CIRP”) on an application made by Jain Construction Private Limited appointed Mr. Chhedi Rajbir as the Interim Resolution Professional (“IRP”).

2. *Submissions of Ms. Swapna Choubey, learned Counsel appearing on behalf of the Applicant*

- 2.1. The Applicant received notices for the first, second and third Committee of Creditors (“CoC”) meetings held on 20 November, 2019, 18 December, 2019 and 27 January, 2020. The IRP was replaced by the Respondent No. 1 and the Applicant did not receive any notice for CoC meetings.
- 2.2. Thereafter in the month of September, 2020, the Applicant received a notice for handing over the vehicle of the Corporate Debtor. It was only after the receipt of such notice that it came to the knowledge of the Applicant that several CoC meetings were held and the Applicant was not given any notice of such meetings.
- 2.3. On enquiry, the Applicant was informed that a Resolution plan had been received and the same was under consideration before the CoC.

- 2.4. The respondent No. 1 refused to share the Resolution Plan, upon such denial, the Applicant approached the Adjudicating Authority for direction upon the Respondent No. 1 to serve the Resolution Plan upon the Applicant. The Respondent No. 1 shared the Resolution Plan and issued notice for the 9th CoC meeting.
- 2.5. On perusal of the Resolution Plan, the Applicant observed that the Resolution Applicant had submitted a Plan for Rs.4,32,00,000/- (Rupees Four Crore Thirty-Two Lakh only), whereas the Corporate Debtor had an immovable asset i.e. the show room situated at 188B, Manicktala Road, Kolkata- 700054 that had been assessed for a Circle Rate of Rs.4,32,00,000/- (Rupees Four Crore Thirty-Two Lakh only) for 4162 square feet and an additional sum of Rs.32,03,955/- (Rupees Thirty-Two Lakh, Three Thousand Nine Hundred and Fifty-Five only) for 748 square feet for car parking space.
- 2.6. It is submitted that the market rate of a property is always much higher than the circle rate and in the present case the market rate could be above Rs.6Crore.
- 2.7. The Resolution Applicant has proposed to make a payment of Rs.3,40,00,000/- (Rupees Three Crore Forty Lakh only) to the sole Financial Creditor and had ignored the very essence of the Code i.e. maximisation of the value of the assets of the Corporate Debtor and to balance the interest of all the stakeholders completely.
- 2.8. The Resolution Applicant is a financial consultancy firm and have no prior knowledge of experience of the business of the Corporate Debtor.
- 2.9. The Resolution Plan is faulty and biased and apart from the secured Financial Creditor all the other Creditors are being deprived of their dues.
- 2.10. The sale of the immovable property of the Corporate Debtor could fetch approximately Rs.5,00,00,000/- but the Corporate Debtor is being transferred as a going concern at a lesser sum.
- 2.11. That the Resolution Plan is being submitted in order to hand over the Corporate Debtor to Mr. Sanjay Kariwala, who claims to be the 100% shareholder of the Corporate Debtor and a Petition under section 240-241 of the Companies Act, 2013 is pending.

3. *Submission of Mr. Jishnu Chowdhury, learned Counsel appearing on behalf of the Resolution professional*

- 3.1. It is submitted that the Applicant was informed of the appointment of the Respondent No. 1 on the email address 'sharadkariwala@gmail.com'. That Mr. Sharad Kariwala is the Applicant's son who had attended the first CoC meeting but it was found that Mr. Sharad Kariwala was not a member of the suspended Board of Directors and hence he was not permitted to attend the other CoC meetings.
- 3.2. The other members of the suspended Board of Directors viz. Mr. Sanjay Kariwala and Mohit Kariwala attended the CoC meetings and notices were circulated to all the suspended Board of Directors and notice was also sent to registered email address of the Corporate Debtor.
- 3.3. The Resolution Plan was shared with the Applicant after the Applicant submitted the Non-Disclosure Agreement.
- 3.4. With regard to the Circle Rate of the Manictala Asset of the Corporate Debtor. The valuations were obtained from following sources:
- 3.4.1.** valuation of land and building were obtained from Sekh TArík Anowar and Prodipto Das;
- 3.4.2.** Valuations of plant and machinery were obtained from Shyamal Kumar Chakraborty and Gautam Kumar Jain;
- 3.4.3.** Valuations of security and financial assets were obtained from Santanu Brahma and Pijush Karmakar;
- 3.4.4.** Further, in view of a disparity between two valuers in respect of security and financial assets, valuation was also obtained from Debayan Patra.
- 3.5. Immovable properties, moveable properties and financial assets were separately valued by two registered valuers and the average of the two valuations were considered as the fair value/liquidation value. The fair value and liquidation value were worked on after the CoC was informed of the valuation reports. The Circle Rate cannot be the only factor for calculating the calculation of immovable properties.

- 3.6. The Resolution Plan is not faulty or biased and that the interests of the stakeholders have been balanced.
- 3.7. It is denied that the CIRP has been conducted in a fraudulent manner or in order to transfer the business of the Corporate Debtor from the present promoters to a group controlled by Sanjay Kariwala.
- 3.8. The learned Counsel submitted that a Resolution Plan need not match with the liquidation value. In support of his contention, the learned Counsel has placed reliance on **Maharashtra Seamless Limited v. Padmanabhan Venkatesh and Others**¹ (paragraph 26-27) and **State Bank of India v. Accord Life Spec Private Limited & Ors.**²
4. **Submissions of Mr. Chayan Gupta, learned Counsel appearing on behalf of the Committee of Creditors.**
- 4.1. The Applicant has no locus standi to file the I.A. The CoC has approved the Resolution Plan and the commercial wisdom of the CoC cannot be questioned by an Applicant, who is a member of the suspended Board of Directors of the Corporate Debtor.
- 4.2. The present I.A. has been filed due to the disputes and differences between the members of the suspended Board of Directors of the Corporate Debtor.
- 4.3. The I.A. has been filed with the malafide intention of driving the Resolution Applicant away so that the Corporate Debtor is sent into Liquidation.
- 4.4. Notices of all the CoC meetings were given to the members of the suspended Board of Directors including the Applicant and it was the Applicant who chose not to appear in the meetings of the CoC. The email address provided by the Applicant was that of Sharad Kariwala who was not a member of the suspended Board of Directors, hence notices for the meetings were not sent to him as Mr. Sharad Kariwala would not have been prejudiced.
- 4.5. The learned Counsel has relied on **Burdwan Central Cooperative Bank & Anr. v. Asim Chatterjee & Ors.**³ and **Om Prakash Mann v.**

¹ MANU/SC/0066/2020 dated 22 January 2020

² MANU/Sc/0461/2020 dated 28 February 2020

³ (2012) 2 SCC 641 dated 18 January 2012

Director of Education (Basic) and Ors.⁴ wherein it has been held that unless a person is deprived of his rights the principle of natural justice is not violated.

4.6. The Corporate Debtor is not a manufacturing concern and is only into trading and retailing of sarees, which is not considered to be entailing skills requiring high level of technical or business expertise hence, the contention that the Resolution Applicant does not have any prior knowledge or experience in the line of business of the Corporate Debtor is ill-founded.

4.7. The Resolution Applicant has proposed to infuse Rs.75,00,000/- (Rupees Seventy-Five Lakh only) as working capital.

4.8. The commercial wisdom of the CoC in approving the Resolution Plan cannot be challenged by the Applicant or any other person, as laid down by the Hon'ble Supreme Court in **Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta and Others**⁵ (paragraphs 54 to 94 and 141 to 147)

5. Reply of the Applicant to the submissions made by the Respondents

5.1. The learned Counsel for the Applicant submitted that in the judgment of **Maharashtra Seamless (supra.)**, the Resolution Applicant had agreed to clear the dues of the Operational Creditors at par with the Financial Creditors and had complied with section 30(2)(b) of the Code.

5.2. But in the instant case, the Resolution Plan did not comply with section 30(2) and (4) of the Code. The Operational Creditors and the unsecured Financial Creditors were deprived of their legitimate dues.

6. Analysis and Findings

6.1. The main issues to be considered are:

6.1.1. Whether the Applicant has a *locus standi* to object against the approval of the Resolution Plan?

6.1.2. Whether the Adjudicating Authority can interfere with the commercial wisdom of the CoC?

⁴ (2006) 7 SCC 558 dated 29 August 2006

⁵ (2020) 8 SCC 531 dated 15 November 2019

- 6.2. Firstly, after the admission of the Corporate Debtor into Corporate Resolution Insolvency Process, the Board of Directors of the Corporate Debtor are suspended and their powers are transferred to the Interim Resolution Professional as envisaged in section 17(1)(b) of the Code. Thereafter, the Interim Resolution Professional/Resolution Professional takes over the reins of the Corporate Debtor and manages the Corporate Debtor for its benefit. The function of the suspended Board of Directors is limited to assisting and cooperating with the Interim Resolution Professional/Resolution Professional for the smooth resolution of the Corporate Debtor.
- 6.3. But this limited function does not bar the suspended Board of Directors to object the act of the Resolution Professional if the act of the Resolution Professional is prejudicial to the Corporate Debtor, or is in violation of any law or procedural requirement.
- 6.4. Now in regard to the issue of the commercial wisdom of the CoC and whether the Adjudicating Authority has authority to interfere with the same, there is a catena of judgments that rule in the negative. The Adjudicating Authority is bound to act within the four corners of section 30(2) of the Code.⁶
- 6.5. We have perused the Resolution Plan submitted by ARSK Consultants Private Limited and AMPI Finance Private Limited. The Resolution Plan is in compliance with section 30(2) of the Code and hence the Resolution Plan has been approved by this Adjudicating Authority.
- 6.6. The Applicant raised a contention that the Resolution Plan does not maximise the assets of the Corporate Debtor and thereby violating the object of the Code and hence the Resolution Plan should be rejected. The Applicant has failed to consider that the object of the Code in totality that is not only to maximise the assets of the Corporate Debtor but the primary objective is to give the Corporate Debtor a new lease of life. That is why the stress is given in reviving the Corporate Debtor as a going concern, if possible and the liquidation followed by the dissolution is supposed to be the last resort.
- 6.7. Further, the Hon'ble Supreme Court in its judgment **Ebix Singapore (P) Ltd. v. Committee of Creditors of Educomp Solutions**

⁶ Kalpraj Dharamshi and Another v. Kotak Investment Advisors Limited and Another, (2021) 10 SCC 401 dated 10 March, 2021

Limited⁷ held that inordinate delays cause commercial uncertainty, degradation in the value of the Corporate debtor and makes the insolvency process inefficient and expensive.

- 6.8. Hence, when a Resolution Plan has been submitted to revive the Corporate Debtor as a going concern and is in compliance of the Code, there is no reason to reject the same, and certainly it cannot be done on the basis of a perceived grievance by a member of the Suspended Board who has not taken any positive step to participate in the meetings of the CoC.
7. Under the aforementioned circumstances, we are not inclined towards granting the prayers. Resultantly, we dismiss the **IA No. 20/KB/2021**.
8. 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.
9. Certified Copy of this order may be issued, if applied for, upon compliance of all requisite formalities.

Balraj Joshi
Member (Technical)

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by Rajasekhar V K
Date: 2022.02.17
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Rajasekhar V.K.
Member (Judicial)

17 February, 2022

GGRB (LRA)

⁷ 2021 SCC OnLine SC 707 dated 13 September, 2021