IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, C-IV

IA No. 3374 of 2022
IN
CP No. (IB) 178/ (MB)/ CV-IV/ 2021

In the matter of Application under section 30(6) for approval of Resolution Plan under section 31(1) of the Insolvency and Bankruptcy Code, 2016.

In the matter of :

Mr. Manoj Kumar Agarwal

Resolution Professional
of the Corporate Debtor

In the matter of :

STCI Finance Limited

…Financial Creditor

Versus

DSK Southern Projects Private Limited

…Corporate Debtor

Order delivered on 17.02.2023

Coram:

Shri Prabhat Kumar	Shri Kishore Vemulapalli
Hon'ble Member (Technical)	Hon'ble Member (Judicial)

Appearances (via videoconferencing):

For the Applicant	:	Mr. Shyam Kapadia, Ld. Counsel, Mr. Sankalp Srivastav i/b Mr. Aniruth G. Purusothaman for the

		Resolution Professional of the Corporate Debtor.
		Mr. Manoj Agarwal, Resolution Professional Present in Person.
For the Corporate Debtor	:	Mr. Deepak Deshpande, Ld. Counsel.

<u>*ORDER*</u>

Per: Kishore Vemulapalli, Member (Judicial)

1. The Bench is convened by videoconference today.

2. This is an Application under Section 30(6), 31 and 60(5) of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the Code) seeking the approval of the Resolution Plan by the Resolution Applicant.

3. The Corporate Insolvency Resolution Process (CIRP) of the Corporate Debtor was initiated by this Bench by an order dated 09.12.2021 under section 7 of the Insolvency and Bankruptcy Code 2016 (hereinafter referred to as 'the Code') (Admission Order) and Mr. Manoj Kumar Agarwal, was appointed as Interim Resolution Professional, who was continued as Resolution Professional (RP) of the Corporate Debtor vide resolution passed by CoC its 1st meeting held on 11.01.2022.

4. The IRP published a public announcement as per Section 13 & 15 of the Code, inviting claims from the creditors of the Corporate Debtor. The RP issued Form-A dated 17.12.2021 published on the website of the IBBI and made Public Announcement in "Financial Express" (Ahmedabad, Bengaluru, Chandigarh, Chennai, Delhi, Hyderabad, Kochi, Kolkata, Lucknow, Mumbai – English Language) and "Loksatta" and "Vartha Bharati" (Pune Edition – Marathi Language) and in "Vartha Bharati" (Bengaluru Edition) on 18.12.2021 calling the creditors to submit their claims.

5. During the period of CIRP, the RP issued Form-G on 02.02.2022 and 02.03.2022, inviting Expressions of Interest (EOI). In the 5th COC meeting held on 27.05.2022, the applicant apprised the members of CoC about the Provisional list and Final list of Prospective Resolution Applicants (hereinafter referred to as 'PRAs'). The Final list of PRAs as published by the applicant on 15.4.2022 is as under:

   a. Consortium of Ashdan Properties Private Limited and NNP Buildcon Private Limited.
   b. Consortium of Shiv Charan, Bharti Agarwal, Pushplata Bai.
   c. Bommidala Enterprises Private Limited
   d. Mani Compusoft Private Limited

6. In the 10th CoC meeting held on 22.08.2022, the Resolution Plan submitted by Consortium of Shiv Charan, Bharti Agarwal, Pushplata Bai (hereinafter referred to as 'Successful Resolution Applicant or SRA') was approved by 100% of CoC members with voting rights.

7. The valuers, appointed for conducting valuation of Corporate Debtor, determined the liquidation value and fair value and the average of Fair Value(s) of all the assets and that the Liquidation Value(s) of all the assets as determined by valuer(s) is Rs. 3922.98 Lakhs and Rs. 2990.90 Lakhs, the details of which are given as under:

Rupees in Lakhs	**Valuer 1**		**Valuer 2**		**Average**	
	FV	**LV**	**FV**	**LV**	**FV**	**LV**
Land and Building	**Anand Kumar**		**Svee Valuation and Advisory LLP - B S Narayanswamy**			
	3,975.13	2,981.35	3,868.29	2,997.92	3,921.71	2,989.64
	Shreyas Ohara		**Ashish Kalamkar**			
Specified Financial Assets	1.26	1.26	1.27	1.27	1.27	1.27
Total	**3,976.39**	**2,982.61**	**3,869.56**	**2,999.19**	**3,922.98**	**2,990.90**

8. The Resolution Professional admitted Creditor's claims, the details of which are as follows:

Sr. No.	**Nature of Creditors**	**Amount Claimed (In Lakhs)**	**Amount Admitted (In Lakhs)**	**Amount provided in the Plan (In Lakhs)**
1	Secured Financial Creditor	4500.23	4500.23	2794.00
2	Unsecured Financial Creditor	5162.33	5162.33	5.00

3	Operational Creditors	-	-	1.00
4	Other Creditors	-	-	-
5	Workmen and Employees	-	-	-
6	Statutory Dues	-	-	-
7	Other Debts and Dues	-	-	-
Grand Total		**9662.56**	**9662.56**	**2800.00**

9. The summary of the payments proposed to be made under the Resolution Plan dated 16.07.2022, as modified vide addendum dated 09.08.2022 and 24.08.2022 are as follows:

Sr. No.	Description	Amount (In Crores)	Timeline for payment
1.	Estimated Insolvency Resolution Process Costs	At actuals	90 days from the date of approval of Resolution Plan l by the Hon'ble Tribunal
2.	Secured Financial Creditors (62.09% of admitted claim)	27.94	Rs. 8.34 Crores to be paid within 90 days of the date of approval of the Resolution Plan by the Hon'ble NCLT and the balance amount of Rs. 19.60 Crores to be paid after removal of attachment of property by ED under PMLA Act by 3 Equal Quarterly payment of Rs. 6.53 Crores from the 30th Day

			of Removal of attachment. The same shall be paid by 3 equal quarterly instalments of Rs. 6.53 Crores each.
3.	To the Operational Creditors	0.01	90 days from the date of approval of the Resolution Plan by the Hon'ble Tribunal
4.	Payment to the Unsecured financial creditors	0.05	90 days from the date of approval of the Resolution Plan by the Hon'ble Tribunal
5.	Payment to other than operational and financial creditors (other than related parties claims) (It is presumed that the liquidation value payable to them is Nil)	0.00	-
TOTAL PAY-OUTS UNDER THE RESOLUTION PLAN		**28.00**	

10. It is proposed in the Resolution Plan that, consequent to sale of the Corporate Debtor as a going concern, all the claims or demands made by, or liabilities or obligations owned or payable to any actual or potential creditors of the Corporate Debtor including the Government Dues (including but not limited to liabilities, interest and penalties, duties, etc. on account of income-tax, tax deduction at source, tax col lection at source, GST, custom duty, Excise, value added tax. Service tax, wealth tax, cess, DGFT dues, Power

dues, RERA, Inspector, factories, etc.) whether direct or indirect, whether admitted or not, due or contingent, asserted or unasserted, crystallized or uncrystallised, known or unknown, secured or unsecured, disputed or undisputed in relation to any period prior to payment of the Sale Consideration and consequent sale of the Corporate Debtor shall stand permanently extinguished.

11. The Applicant has submitted that the Resolution Plan submitted by Consortium of Shiv Charan, Bharti Agarwal & Pushplata Bai is approved by 100% of the members of the Committee of Creditors has been examined and the Resolution Plan:

   i. provides for payment of Insolvency Resolution Process Costs in a manner specified by the board in priority to the payment of other debts of Corporate Debtor;
   ii. provides for payment of the debts of the Operational Creditors in such manner as specified by Regulation 38 (1) of the IBBI (Insolvency Resolution Process for Corporate Persons Regulations) 2016;
   iii. provides for management of the affairs of the Corporate Debtor after the approval of the Resolution Plan; and
   iv. does not contravene any of the provisions of the law for the time being in force.

12. It has been further submitted that no transaction(s) were found falling under the provisions of section 43, 45, 50 & 66 of the Code, hence no application(s) was filed before Adjudicating Authority.

13. The Resolution Plan is not subject to any contingency and is filed 04 days before the expiry of the period of CIRP provided in section 12 of the Code,

as this Bench had granted an extension in the CIR Period vide its order dated 11.08.2022 from 08.06.2022 to 05.09.2022.

14. The Applicant has filed application along with Form 'H' prescribed under Regulation 39(4) of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 and has appended a tabular summary of Applicant's determination of compliance of the Resolution Plan with various provisions and regulations under the Code and CIRP Regulations.

Section of the Code / Regulation No.	Requirement with respect to Resolution Plan	Clause of Resolution Plan	Compliance (Yes / No)
25(2)(h)	Whether the Resolution Applicant meets the criteria approved by the CoC having regard to the complexity and scale of operations of business of the CD?		Yes
Section 29A	Whether the Resolution Applicant is eligible to submit resolution plan as per final list of Resolution Professional or Order, if any, of the Adjudicating Authority?		Yes
Section 30(1)	Whether the Resolution Applicant has submitted an affidavit stating that it is eligible?		Yes

Section 30(2)	Whether the Resolution Plan- (a) provides for the payment of insolvency resolution process costs?	Page No.03 Point No. A(a) of the addendum No.1 of the Revised Financial Proposal	Yes
	(b)provides for the payment to the operational creditors?	Page No.14 Point No. 4.2.3 & 4.6 of the Resolution Plan	Yes
	(c) provides for the payment to the financial creditors who did not vote in favour of the resolution plan?	Point No. A of the Revised Financial Proposal by RA	Yes
	(d) provides for the management of the affairs of the corporate debtor?	Page No.29 Point No. 6.2.1 & 7 Page No. 32	Yes
	(e) provides for the implementation and supervision of the resolution plan?	Point No. 7 Page No. 32. Point No. 9 Page No. 37 & Addendum to the	Yes

	(f) contravenes any of the provisions of the law for the time being in force?	Resolution Plan Point No.02 No	
Section 30(4)	Whether the Resolution Plan (a) is feasible and viable, according to the CoC? (b) has been approved by the CoC with 66% voting share?	Yes	Yes
Section 31(1)	Whether the Resolution Plan has provisions for its effective implementation plan, according to the CoC?	Point No. 7 Page No. 32. Point No. 9 Page No. 37 & Addendum to the Resolution Plan Point No.02	Yes

Regulation 35 A	Where the Resolution Professional made a determination if the Corporate Debtor has been subjected to any transaction of the nature covered under sections 43,45,50 or 66, before the one hundred and fifteenth day of the insolvency commencement date, under intimation to the Board?	Page No. 37 & Point No.08 c and Page 5 Point No. 19 of Addendum	Yes
Regulation 38 (1)	Whether the amount due to the operational creditors under the resolution plan has been given priority in payment over financial creditors?	Page No.14 Point No 4.2.3	Yes
Regulation 38(1A)	Whether the resolution plan includes a statement as to how it has dealt with the interests of all stakeholders?	Page No. 14 & Point No 4.2.3 of Addendum to the Resolution Plan Point 1.	Yes
Regulation 38(1B)	(i) Whether the Resolution Applicant or any of its related parties has failed to implement or contributed to the failure of implementation of any resolution plan approved under the Code. (ii) If so, whether the Resolution Applicant has submitted the statement giving details of such non-implementation?	Relevant Para of the undertaking	No

Regulation 38(2)	Whether the Resolution Plan provides: (a) the term of the plan and its implementation schedule? (b) for the management and control of the business of the corporate debtor during its term? (c) adequate means for supervising its implementation?	Page No.29 Point No. 6.2.1 & 7 Page No. 32 Point No. 7 Page No. 32. Point No. 9 Page No. 37 & Addendum to the Resolution Plan Point No.02	Yes
38(3)	Whether the resolution plan demonstrates that – (a) it addresses the cause of default? (b) It Is Feasible And Viable? (c) it has provisions for its effective implementation? (d) it has provisions for approvals required and the timeline for the same? (e) the resolution applicant has the capability to implement the resolution plan?	Page No.07 Point No. 1.2.3 Page No.11 Point No. 4 Page No.27 Point No. 5.2 Page No.25 Point No. 4.17 and Page 27 Point No. 5.2 Yes	Yes Yes Yes Yes Yes
39(2)	Whether the RP has filed applications in respect of	Not applicable	Yes

	transactions observed, found or determined by him?		
Regulation 39(4)	Provide details of performance security received, as referred to in sub-regulation (4A) of regulation 36B.	Yes	Yes

15. The Resolution Professional has filed an Additional Affidavit dated 13.01.2023 after filing of present application submitting that-

i. That the applicant had issued letter dated 16.02.2022 to the Income tax officer Pune, which was hand delivered informing about the CIRP process and asking him to file a claim. However, no claim in relation to ‘amount of tax deducted source and not paid by the Corporate Debtor’ amounting to Rs 1,20,43,595/- has been filed by the department.

ii. The money recovered or recoverable from the Co-Borrower M/s. D S Kulkarni Developers Limited, which is also undergoing CIRP, is not relevant to the instant application and the same shall be dealt with as per law.

iii. The plan is not open ended in so far as it provides for payment of balance 70% of resolution money upon release of attachment of assets by the enforcement directorate. In this regard, he has relied upon decision of Hon’ble Supreme Court in *Maharashtra Seamless Limited vs Padmanabhan Venkatesh & ors.in Civil Appeal No:4242/2019 that* ***“COC’s ‘commercial wisdom’ is non- justiciable, except on limited grounds as are available for challenge under Section 30(2) or Section 61(3) of IBC”.***

iv. That relief under *Clause 'k'* under the heading reliefs in the Resolution Plan even if not allowed will not invalidate the Resolution Plan and it is otherwise specifically taking care of by section 32A of the Code.

16. During hearing, the counsel for Resolution Applicant also clarified that;

a. The statement at para 4.1.1 the RA that "*this plan is based on the information memorandum-January 2022 and data provided by RP and any material deviation there from will entitle him to approach this Court for appropriate relief*" does not make the plan conditional and the Resolution Applicant is bound to implement the plan.

b. The liability from CIRP date till NCLT approval date is considered as CIRP cost and the same shall be accounted for accordingly.

ORDER

17. The Interlocutory Application No. 3374 of 2022 is allowed. The Resolution Plan submitted by the Consortium of Shiv Charan, Bharti Agarwal and Pushplata Bai is hereby approved, subject to the orders in the following para(s). It shall become effective from this date and shall form part of this order. It shall be binding on the Corporate Debtor, its employees, members, creditors, including the Central Government, any State Government or any local authority to whom a debt in respect of the payment of dues arising under any law for the time being in force is due, guarantors and other stakeholders involved in the Resolution Plan.

a. The RA has sought at least six-month period after the final payment of resolution money to assess the status of license. It is a duty of RA, more particularly when it claims to have sufficient experience in the business of Corporate Debtor, to assess this requirement at the time of submission of plan itself and no further concession can be considered.

b. Clause 'L' of Para 11 of the Resolution plan has asked NCLT to cause a notification to all beneficiary of guarantee issued by the Corporate Debtor. It is clarified that any such notification, if required, shall be issued by the monitoring committee.

c. Clause 'M' of Para 11 of the Resolution plan has stipulated that the counter parties to any agreement shall have no right to suspend the agreements with the Corporate Debtor and shall not terminate these agreements because of previous delay/failures by the Corporate Debtor to make payment. It is clarified that these agreement(s) shall be subject to mutual consent of both the parties for its future application.

d. At clause 'R' of Para 11 of the Resolution plan, the Resolution Applicant has stipulated waiver of liabilities due to promoters or promoter group or connected persons and has sought that dues from such persons shall remain outstanding, due and payable to the Corporate Debtor. It is clarified that such claim shall be subject to right of set off available to such person against the amount/sums due from the Corporate Debtor and shall also be subject to any finding of the Enforcement Directorate/EOW in relation to such amounts.

e. In so far as attachment of Corporate Debtor assets by the Enforcement Directorate is concerned, these assets are protected by the provisions contained u/s 32A (1) & 32A (2) of the Code, which provides for immunity to such assets and offence(s) after the resolution of Corporate

Debtor provided such assets have been acquired prior to commencement of Corporate Insolvency Resolution Process. Accordingly, the Enforcement Directorate shall release the attachment on such assets, which have been acquired prior to commencement of Corporate Insolvency Resolution Process. The Enforcement Directorate shall also discharge the Corporate Debtor from the offences alleged to have been commissioned prior to commencement of Corporate Insolvency Resolution Process.

f. The approval of the Resolution Plan shall not be construed as waiver of any statutory obligations of the Corporate Debtor and shall be dealt by the appropriate Authorities in accordance with law. Any waiver sought in the Resolution Plan, shall be subject to approval by the Authorities concerned. Further, any application for renewal or extension or restoration of any license or approval or connection from any authority shall be subject to payment of prescribed fee and/or deposit(s) and adherence to the procedure stipulated by such authority, however such authority shall not refuse/deny approval/extension/restoration merely on ground of previous defaults/non-compliance of the Corporate Debtor.

g. In terms of the judgement of Hon'ble Supreme Court in the matter of ***Ghanshyam Mishra and Sons Private Limited v. Edelweiss Asset Reconstruction Company Limited,*** "on the date of approval of the Resolution Plan by the Adjudicating Authority, all such claims, which are not a part of resolution plan, shall stand extinguished and no person will be entitled to initiate or continue any proceedings in, respect to a claim, which is not part of the resolution plan."

> *"95. (i) Once a resolution plan is duly approved by the adjudicating authority under sub-section (1) of Section 31, the claims as provided in the resolution plan shall stand frozen and will be binding on the corporate debtor and its employees, members, creditors, including the Central Government, any State Government or any local authority, guarantors and other stakeholders. On the date of approval of resolution plan by the adjudicating authority, all such claims, which are not a part of the resolution plan shall stand extinguished and no person will be entitled to initiate or continue any proceedings in respect to a claim, which is not part of the resolution plan;*
>
> *(ii) 2019 Amendment to Section 31 of the I&B Code is clarificatory and declaratory in nature and therefore will be effective from the date on which the Code has come into effect;*
>
> *(iii) consequently, all the dues including the statutory dues owed to the Central Government, any State Government or any local authority, if not part of the resolution plan, shall stand extinguished and no proceedings in respect of such dues for the period prior to the date on which the adjudicating authority grants its approval under Section 31 could be continued."*

In the view of the above judgement the applicant is entitled to waivers/ concessions/ reliefs as expressly provided under the Code and under any other law for the time being in force.

18. The Memorandum of Association (MoA) and Articles of Association (AoA) shall accordingly be amended and filed with the Registrar of Companies

(RoC), concerned for information and record. The Resolution Applicant, for effective implementation of the Plan, shall obtain all necessary approvals, under any law for the time being in force, within such period as may be prescribed.

19. The moratorium under Section 14 of the Code shall cease to have effect from this date.

20. The Applicant and the Monitoring Committee shall supervise the implementation of the Resolution Plan and the Applicant shall file status of its implementation before this Authority from time to time, preferably every quarter.

21. The Applicant shall forward all records relating to the conduct of the CIRP and the Resolution Plan to the IBBI along with copy of this Order for information.

22. The Applicant shall forthwith send a copy of this Order to the CoC and the Resolution Applicant for necessary compliance.

23. The Interlocutory Application No. 3374/2022 is accordingly allowed and disposed of.

Sd/-

PRABHAT KUMAR
MEMBER (TECHNICAL)

Sd/-

KISHORE VEMULAPALLI
MEMBER (JUDICIAL)

17.02.2023.