

**IN THE NATIONAL COMPANY LAW TRIBUNAL,
MUMBAI BENCH – I**

IA No. 443 of 2021

And

IA 1847 of 2021

IN

CP (IB) No. 1399/MB/C-I/2017

In the Application of IA No. 443 of 2021

Under Section 60(5) of the Insolvency and Bankruptcy
Code, 2016 (“code”) r/w Rule of the NCLT Rules,
2016

IA 443 of 2021

Formation Textiles LLC

...Applicant

Versus

Bank of Baroda & Ors.

...Respondents

IA 1847 of 2021

Bank of Baroda

...Applicant

Versus

Formation Textiles LLC

...Respondents

In the matter of

Bank of Baroda

...Financial Creditor

Versus

Mandhana Industries Limited (GB Global)

...Corporate Debtor

Order Delivered on : 06.07.2023

Coram:

Hon'ble Member (Judicial)

: Mr. Kishore Vemulapalli

Hon'ble Member (Technical) : Mr. Shyam Babu Gautam

Appearances:

For the Formation Textiles LLC : Mr. Amrut Joshi, Mr. Prakhar Tandon, Mr. Nikhil Mishra, Mr. Agam Maloo and Mr. Irfan Khan, Advocates i/b Sudha Dwivedi & Associates.

For for the Committee of Credirors : Mr. Gopal Jain, Sr. Advocate a/w Mr. Bishwajit Dubey, Mr. Madhur Kanoria, Mr. Anush Mathkar, Ms. Ashutosh Singh i/b Cyril Amarchand Mangaldas.

For Erstwhile Resolution Professinal : Ms. Pooja Mahajan a/w Ms. Shrishti Agnihotri, Advocates.

For Successful Resolution Applicant : Mr. Daval Salve, Advocate.

ORDER

Per Coram:

1. The present application filed by the applicant company namely Formation Textiles LLC, a company incorporated and based in United States of America (erstwhile Resolution Applicant), herein after referred to as an Applicant-Formation Textiles LLC) to set aside the resolution dated 10.12.2019 passed by CoC under the Chairmanship of the resolution professional approving the decision of

invoking/forfeiting the amount deposited by the Applicant-Formation Textiles LLC. Further, prayer has been made to direct the RP and the CoC to refund the Applicant-Formation Textiles LLC 93.82 crores along with 12% interest from the date of infusion i.e. debt of amount was infused by the applicant pursuant to implementation to earlier resolution plan submitted by it.

2. The case of the Applicant-Formation Textiles LLC is that the CIRP was initiated against Mandhana Industries Limited (GB Global) (Corporate Debtor) which was admitted on 29.09.2017. Applicant-Formation Textiles LLC submitted expression on 23.05.2018 followed by resolution plan and it deposited a sum of Rs. 5 crores towards earnest money.
3. During the 16th meeting of CoC held on 14.06.2018, one Finquest Capital Services Private Limited was declared as H1 bidder while formation was declared H2 bidder. Mr. Piyush Viradia on behalf of the Applicant-Formation Textiles LLC made allegation against the RP that the bid process was compromised, further claiming that the applicant- formation's bid was most competitive and superior. He insisted the RP to organise and open bid process or swiss challenge method for the bidding.

4. Subsequently, during 17th CoC meeting held on 20.06.2018, it was decided that the resolution plan of Finquest should be proceeded and the RP should proceed before the Adjudicating Authority for exclusion of certain period from the CIRP time line.

In the various same meeting held on 20.06.2018, the draft Forensic Audit Report was circulated amongst the members of the CoC and it was recorded that the RP has taken step by filing criminal proceedings against the former directors of Corporate Debtor/Mandhana Industries Limited (GB Global) 'MIL', It was also discussed that an application under Section 66 of the Code would also be filed. However, the copies of the same were not provided to the Applicant-Formation Textiles LLC then the prospective resolution applicant. Subsequently, on 22.06.2018, the final report of the Forensic Audit was submitted to the RP. Although this report was submitted on 22.06.2018, neither it was provided to the applicant-nor formation was informed about its existence. Despite this position, applicant formation was kept in dark and allow to bid in CIRP.

5. Applicant-Formation Textiles LLC sent an email revealing upward revision of offer made by them after exclusion of time by Adjudicating Authority on 25.06.2018, the CoC in its 18th CoC meeting agreed on

a revised bidding process between Applicant-Formation Textiles LLC and 'Finquest'.

6. On 27.06.2019, in its 19th meeting CoC declared 'Finquest' H1 bidder. The Applicant-Formation Textiles LLC being agreed file MA No. 651/2018 challenging the declaration of Finquest H1 bidder, intimating to the Adjudicating Authority that the formation was ready to revised its bid, if the Adjudicating Authority direct an open bidding process between Finquest and Applicant-Formation Textiles LLC.
7. After hearing the parties, the Adjudicating Authority allowed the application and directed formation and Finquest to "out bid each other in the presence of Resolution Professional and CoC at 3.00 pm on 04.07.2018."
8. During the 21st CoC meeting held on 04.07.2018 and out bidding process was conducted between the Applicant-Formation Textiles LLC and Finquest. After four rounds of bidding the Applicant-Formation Textiles LLC emerged as H1 bidder and was declared as a successful Resolution Applicant. The Revised resolution plan by CoC on 06.07.2018 with 80.92% of the voting share. The letter of intent was issued by the RP to Applicant-Formation Textiles LLC on 07.07.2018 which was accepted by formation on 09.07.2019.

9. Before the approval of the resolution plan under section 31 of the Code, by an Adjudicating Authority it was only on the direction of the CoC and in terms of resolution plan approved by the CoC, Applicant-Formation Textiles LLC furnished performance bank guarantee of Rs.50 crores on 11.07.2018 in a trust and retention account of Bank of Baroda as security for a period of 12 months from the date of issuance of letter of intent. Further, much before the approval of the resolution plan by the Adjudicating Authority under Section 31, in October, 2018, Bank of Baroda invoked the Bank Guarantee towards earnest money of Rs. 5 crores.
10. It was only thereafter, the RP filed an application in terms of Section 30 (6) of the code before the Adjudicating Authority for approval of the resolution plan submitted by the applicant-formation. Simultaneously, an application being MA No. 692/2018 was filed by the RP under Section 66 alleging fraudulent and wrongful trading against the former Director/erstwhile management of Corporate Debtor/ Mandhana Industreis Limited 'MIL'.
11. The resolution plan submitted by Applicant-Formation Textiles LLC was approved by Adjudicating Authority 20.11.2018.
12. Thereafter, Mr. Piyush Viradia along with its Advisors met the Resolution Professional and her team on 10.12.2018 for formalities of

handing over, focussing primarily on documentation required for Board of Director.

13. However, for the reason best known to the RP and the CoC, the assets records and premises were not handed over to the Applicant-Formation Textiles LLC nor the share of the Corporate Debtor. On 03.01.2019, RP sent an email to applicant formation with its revised time line for implementation of the Resolution Plan, wherein Rs. 55 crores paid towards Performance Bank Guarantee and earnest money was shown adjusted from the equity capital infusion requirement of Rs. 76 crores. It was clearly stated that Applicant-Formation Textiles LLC was required to infuse an additional sum of only Rs. 21 crores towards equity contribution. On the very next day i.e. 14.01.2019, in the meeting of the Financial Creditor of the Corporate Debtor/Mandhana Industries Limited (GB Global) held and it was recorded that the balance equity amount to be brought in by the Applicant-Formation Textiles LLC is Rs. 21 crores, which was arrived at after adjusting the sum of Rs. 55 crores from the total equity contribution of Rs. 76 crores. Thereafter, RP sent an email to applicant with the further revised time line for implementation of resolution plan on 09.01.2019. Pertinently this email also confirmed that Rs. 55 crores paid towards performance bank guarantee and

earnest money will get adjusted from the equity capital infusion requirement of Rs. 76 crores. It is also relevant to note that the minutes of meeting held on 21.01.2021 clearly record that according to the Bank of Baroda, “Rs. 55 crores are lying with Bank of Baroda and if Applicant-Formation Textiles LLC brings further Rs. 21 crores then it can take control of 70% of the equity and as such the control of the company automatically passes over to the Applicant-Formation Textiles LLC.

14. On 30.01.2019, the Applicant-Formation Textiles LLC infused sum of Rs. 38 crores and deposited the sum in the account of the Corporate Debtor/MIL. Thereafter, RP handed over control to the Applicant-Formation Textiles LLC on 31.01.2019, after having been satisfied that the applicant had infused the equity component of Rs. 76 crores, along with additional sum of Rs. 17 crores towards buying out lenders portion of equity. Thereupon, the new Board of Directors of MIL sent letters to the BSE and NSE on 01.02.2019, informing them that the relevant date for determining the list of shareholders of MIL for the purpose of reduction of share capitals would be 15.02.2019.
15. On 18.03.2019, Bank of Baroda sent a letter to Applicant-Formation Textiles LLC, affirming that it had received a cumulative amount of Rs. 93.82 crores from Applicant-Formation Textiles LLC and

pursuant to this, control and management of the Corporate Debtor has been handed over to Applicant-Formation Textiles LLC. Thereafter, on 02.04.2019 and 24.04.2019, NSE and BSE granted in principle approval for listing of 33.14 lakhs shares of MIL Textile respectively.

16. However, immediately thereafter, on 04.04.2019, Bank of Baroda changed its instance on affront equity infusion on 04.04.2019 and now contained that applicant-formation had brought in only 38 crores towards part payment of its equity component.
17. On 31.05.2019, BSE and NSE sent a letter to MIL informing that trading will recommence from 04.06.2019 and the Registrar of Companies issued a certificate approving the reduction of share capital of MIL under section 66 (1) of the Companies Act, 2013 on 20.06.2019. Thereafter, on 16.07.2019, Corporate Debtor/MIL submitted application with BSE and NSE for allotment of shares to the applicant. However, Bank of Baroda sent a letter to SEBI, NSE and BSE on 22.07.2019 requesting them not to allot the Corporate Debtor's/MIL's shares to the applicant-formation pending the hearing of the miscellaneous applications filed by the applicant and Bank of Baroda before NCLT.

18. On 25.06.2019, an application, bearing MA No. 2326/2019 was filed by the CoC seeking inter alia, an order directing Applicant-Formation Textiles LLC to implement its resolution plan along with all the actions envisaged therein, without any modification or deviation, in its entirety on an urgent basis with immediate effect and in a time bound manner.
19. In the alternative, the CoC prayed before the Adjudicating Authority for recommencement of the CIRP of the Corporate Debtor and for permission to invite fresh bids with the aim of reviving the Corporate Debtor as a going concern and to prevent it from going in to liquidation.
20. Thereupon, Applicant-Formation Textiles LLC, Advocates sent a letter to SEBI, NSE and BSE on 07.08.2019 responding to the allegation made in Bank of Baroda's letter dated 22.07.2019 and clarifying that the pendency of the Miscellaneous Applications had nothing to do with the allotment of the equity share to the applicant.
21. An additional affidavit was filed by the Applicant-Formation Textiles LLC in MA No. 2223/2019 on 18.09.2019. Thereafter, on 27.11.2019, amendment application was filed by formation for amendment of MA No. 2223/2019 seeking reduction of Rs. 200

crores and in the alternate praying for setting aside recalling of the plan approval order dated 30.11.2018.

22. On 05.12.2019, Adjudicating Authority noted that while separate hearing was required to decide the merits of the application filed by the CoC, as an interim major, the possession of the Corporate Debtor was ordered to be handed over to the CoC, which in turn was ordered to hand over the same to the erstwhile RP. Thus, NCLT passed an order whereby the control of the Corporate Debtor/MIL was to be transferred from Applicant-Formation Textiles LLC to the CoC and then to the RP upon the completion of inventory examination. This order was passed without prejudice to Applicant-Formation's right in MA No. 2223/2019 and 2326/2019.

23. In the meeting of CoC held on 10.12.2019, the decision to forfeit/invoke the performance security of formation/applicant was taken on the ground of its failure to implement the resolution plan and it was duly approved by 96.89% voting. Such decision was taken in a sense of Applicant-Formation Textiles LLC and without notice to it.

Thereafter, Applicant-Formation Textiles LLC came to know that the sum of Rs. 50 crores which had been lying in a fix deposit with Bank of Baroda, had been transferred to another account on 24.12.2019. Thereupon, on directions of the CoC, Applicant-

Formation Textiles LLC formally handed over control of the Corporate Debtor/MIL to CoC on 08.01.2020, who then handed it over to the RP.

24. It is only on 17.01.2020, the Resolution Professional sent a letter to Applicant-Formation Textiles LLC intimating that the committee of creditors in its meeting held on 10.12.2019 had approved the invocation/forfeiture of the performance guarantee on account its failure to implement the resolution plan.
25. Applicant-Formation Textiles LLC reply to the letter dated 17.01.2020, on 18.01.2020 and 24.01.2020 wherein it reiterated that the sum of Rs. 50 crores had admittedly been adjusted by the Resolution Professional and CoC towards equity contribution of Applicant-Formation Textiles LLC and therefore, the question of its invocation/forfeiture is not possible.
26. On the other hand, Learned Adjudicating Authority passed an order on 05.05.2020 allowing prayer made in MA No. 2326/2019 filed by CoC, whereby CoC had sought permission to call for a fresh bid for Corporate Debtor/MIL. Thereafter, on 11.02.2020 Applicant-Formation Textiles LLC filed application seeking rectification of the aforesaid order dated 05.02.2020.

27. The Learned Adjudicating Authority passed an order 28.02.2020 allowing the prayer of MA No. 532/2020 filed by Applicant-Formation Textiles LLC rectifying its order dated 22.02.2020, substituting the para 11, 12 and 13 of the original order. Additionally, vide this order amendment application no. 427/2020 was allowed amending prayer made in MA No. 2223/2019.
28. The Resolution Professional has filed a report with the Bombay Stock Exchange that the amount of Rs. 38 crores infused by the applicant which is reflected as current liability even though the Resolution Professional and the CoC wish to sell the company vide fresh bids. They have failed to refund the amount infused by the applicant-formation total of which comes to (Rs. 5 crores + Rs. 50 crores + Rs. 38.82 crores) total comes to the tune of Rs. 93.82 crores.
29. Subsequently, in December 2020, resolution plan of one viz Dev Land & Housing Private Limited (“DLH”) has been approved by 67.01% voting shares. Thereafter, during the hearing before the Adjudicating Authority, formation/applicant inform the Bench that they have filed another application seeking similar relief and accordingly the MA No. 2223/2019 and IA No. 244/2020 were not pressed.

30. On 19.05.2021, resolution plan of subsequent successful resolution applicant-DLH was approved by Adjudicating Authority, which was objected by applicant-formation, however, the same was rejected.

Case of Resolution Professional

31. The case of RP is that there was no representation or warranty provided by the RP or CoC, hence there was no question of misrepresentation. The captioned Interlocutory Application filed by Applicant-Formation Textiles LLC consists of Vexatious and Frivolous allegation to cover its own failure to implement the resolution plan. The present application filed by the Applicant-Formation Textiles LLC after withdrawal of its previous application, was to not only expand the scope of controversy but also to improve upon its case.
32. The RP claims that the Applicant-Formation Textiles LLC while submitting its resolution plan had specifically agreed to be bound by the terms of the process memorandum, which provided that the implementation of the resolution plan will be on an as is where is basis. The Resolution Applicant accepted not only to make its own independent appraisal of the company but also accepted that the risk of inadequacy error or mistake in the information provided in the

process memorandum, VDR, information memorandum or any other information furnished by or on behalf of the RP.

33. According to RP, there was no 'deliberate' non-disclosure of Forensic Audit Report as the said report was received by the RP from M/s T.R Chadha & Company on 22.06.2018 while the information memorandum was shared in the data room on 30.05.2018. As per RP, the said report was prepared specifically to assist the RP in identifying avoidance transaction under section 43,45,50 & 66 of the Code- the report was not prepared for purpose of diligence by the Resolution Applicant and not for purpose of inclusion in the information memorandum. Further, it has been claimed by the RP that the Forensic Audit of the Corporate Debtor has been conducted was very much in the knowledge of the Applicant-Formation Textiles LLC.

Further, as per RP's submission, the Forensic Audit Report was specifically informed to the applicant, pursuant to which its resolution plan even contained a provision that any cost for making an application by the RP under Section 43,45,50 & 66 of the Code, shall be treated as part of CIRP cost upto a cap of Rs. 25 lakhs duly netted off by any recoveries made in any such cases and that any recovery over and above Rs. 25 lakhs shall be transferred directly to the Financial Creditor.

34. After four months of hand over of Corporate Debtor/MIL, Applicant-Formation Textiles LLC raised grievances only when RP filed application before the Adjudicating Authority against the applicant-formation. Further, the case of RP is that regulation 36 (2) of CIRP Regulation does not make any reference to sharing of any Forensic or Transaction Audit Report with the Resolution Applicants for their due diligence. According to RP, Audit Report are procured in almost all CIRP Cases to assist RP in relation to avoidance transactions; if the intent was to include such reports in regulation 36(2) the Regulation would have said so. Such reports are not shared with prospective resolution applicant except where applicant specifically request the same for their assessment quo who will get the benefit of recoveries.

Case of the Committee of Creditors

35. The case of CoC is that applicant-formation's is merely using the Forensic Audit Report as a ground to further its cause of justifying its non-implementation of its resolution plan. There is no explicit obligation on the RP or the CoC to share the Forensic Audit Report with the Resolution Applicant, either under IBC or the CIRP Regulations.

36. The Applicant-formation left no stone unturned to acquire the Corporate Debtor even though the “Finquest” had been declared as H1 bidders in the first two rounds. Applicant-Formation Textiles LLC increase its plan value for initial INR 367 crores with 0% equity to INR 537 crores with 27% equity. Applicant-Formation Textiles LLC even approached this Tribunal seeking re-bidding. However, after CoC approved applicant-formation resolution plan, it started to renege from its obligation first by threatening to withdraw/reduce plan value and thereafter by in fact failing to implement the plan and filing an application seeking to recall of the plan approval order. Thus, the present case clearly falls in Section 17(3) and (4) of the Indian Contract Act, 1872, clearly establishing that it is in fact applicant-formation that defrauded the lenders, further, due to non-impementation of the resolution plan by applicant-formation, CoC has suffered huge losses, which necessitated the filing MA No. 1847/2021 under Section 60(5) (c) of IBC as these losses occurred as part of CIRP of the Corporate Debtor.
37. Further, case of CoC is that the letter of intent also prohibited Applicant-Formation Textiles LLC from terminating or withdrawing from the participation in the CIRP in any event whatsoever thereby confirming upon the RP and the CoC, the right to take all action

against it, as more particularly prescribed in the process memorandum.

Analysis of Law, On facts and circumstances

38. The following question fall for consideration:
- i. Whether CoC had jurisdiction to forfeit the total amount of 93.82 crores infused by the successful resolution applicant towards implementation of its resolution plan?
 - ii. Whether the applicant is entitled to refund of the aforesaid amount of Rs. 93.82 crores along with interest from the date of infusion from the Committee of Creditors (CoC)/Bank of India (erstwhile Bank of Baroda)?
39. In the present case, we find that steps have been taken twice for Corporate Insolvency Resolution Process. In the first step for CIRP, Applicant-Formation Textiles LLC company incorporated and based in USA was the successful Resolution Applicant, whose resolution plan was approved by CoC in July, 2018 and by the Adjudicating Authority by order dated 30.09.2018.
40. There was hiccup from very beginning which appears from the facts that the Forensic Audit Report was not disclosed to prospective Resolution Applicants, including the Applicant-Formation Textiles LLC at any stage. There was no knowledge to the prospective

Resolution Applicant including the applicant-formation that the RP had identified avoidance transactions under Section 43,45 & 66 of the Code.

41. After the (earlier) Resolution Plan submitted by the Applicant-Formation Textiles LLC by Adjudicating Authorities' order dated 30.09.2018, Applicant-Formation Textiles LLC had paid certain amount in various tranches in furtherance of the Resolution Plan and on the advice of the CoC. At the initial stage for submissions of the Resolution Plan, the Applicant-Formation Textiles LLC paid a sum of Rs. 5 crores towards earnest money. Before approval of Resolution plan under Section 31 of the Code by the Adjudicating Authority, on the directions of the CoC and in terms of the Resolution Plan approved by the CoC, the Applicant-Formation Textiles LLC furnished Performance Bank Guarantee of Rs. 50 crores on 11.07.2018 in a trust and retention account of Bank of Baroda (CoC) towards security.
42. It appears that Bank of Baroda encashed the earnest money of Rs. 5 crores in October, 2018. The email dated 03.01.2019 sent by RP to Applicant-Formation Textiles LLC shows that the total sum of Rs. 55 crores which was paid towards Performance Bank Guarantee (Rs. 50 crores) and earnest money Rs. 5 crores have been shown adjusted

towards equity capital infusion requirement of Rs. 76 crores. Pursuant to said email dated 03.01.2019 sent by RP, Applicant-Formation Textiles LLC was required to infused an additional sum of Rs. 21 crores towards equity contribution, which was arrived at after adjusting the sum of Rs. 55 crores.

43. It is not in dispute that a further sum of Rs. 38.82 crores were infused by Applicant-Formation Textiles LLC on 30.01.2019 and deposited the sum in the account of Corporate Debtor-MIL. Thereafter, the control of the Corporate Debtor-MIL was handed over to applicant-formation on 31.01.2019 by the RP.
44. It was because of Bank of Baroda's objections letter dated 04.04.2019 to SEBI, the equity infusion did not result into transfer of shares of Corporate Debtor-MIL to Applicant-Formation Textiles LLC who was the original (earlier) successful Resolution Applicant.
45. RP has taken the plea that the Applicant-Formation Textiles LLC had not acted in terms of its own resolution plan and the responsible for the same. Further, according to RP, the Applicant-Formation Textiles LLC had raised all the grievances before the Adjudicating Authority after the RP had filed application against the Applicant-Formation Textiles LLC.

46. The CoC's plea is that the Applicant-Formation Textiles LLC is merely using the Forensic Audit Report to further its cause of justifying its non-implementation of its resolution plan. There was no explicit obligation of the RP or the CoC to share the Forensic Audit Report to the Resolution Applicant, including an Applicant-Formation Textiles LLC.
47. It is not necessary to discuss as to who were in the fault due to which the first resolution plan could not proceed well towards the implementation. The fact remains that the CoC and RP while moved application before Adjudicating Authority on 25.06.2019 bearing MA No. 2326/2019 for directions on Applicant-Formation Textiles LLC to implement its resolution plan, and alternative prayer was made before the Adjudicating Authority for the re-commencement of the CIRP of the Corporate Debtor-MIL and for fresh permission to invite fresh bid with the aim of reviving the Corporate Debtor-MIL and to prevent it from going into liquidation.
48. Normally, in terms of Section 33 (3), where the Resolution Plan approved by the Adjudicating Authority under Section 31 is contravened by the concerned Corporate Debtor, then the person whose interest are prejudicially affected by such contravention, like CoC/Financial Creditor (Bank of Baroda herein), make an

application to the Adjudicating Authority for liquidation orders. In the present case for the reasons best known to the CoC and RP including the facts as noticed above, in the application bearing MA No. 2326/2019 (filed on 25.06.2019), the CoC alternatively prayed before the Adjudicating Authority for re-commencement of the CIRP of the Corporate Debtor and for permission to invite fresh bids with the aim of reviving the Corporate Debtor and to prevent it from going into liquidation. After hearing the parties, the Adjudicating Authority did not choose to pass order under Section 33(3) of the Code, Ordered the Applicant-Formation Textiles LLC to hand over the possession of the Corporate Debtor-MIL to CoC, which in turn was ordered to hand over the same to the erstwhile RP. Thus, pursuant to the Adjudicating Authority orders' dated 05.12.2019, the control of the Corporate Debtor-MIL was transferred from applicant-formation to CoC and then to the RP, without prejudice to applicant-formation's right in other miscellaneous number pending which we have subsequently withdrawn.

49. In the said CIRP, subsequently 2nd time Dev Land and Housing Private Limited (DLH) became the successful Resolution Applicant of the Corporate Debtor -MIL.

50. The aforesaid facts show that the CoC or the RP had not treated that the approved resolution plan had been contravened by the applicant-formation to attract liquidation under Section 33 (3) of the Code. The Adjudicating Authority had also not held that the Applicant-Formation Textiles LLC had contravened its resolution plan and thereby to pass an order under Section 33 (3) of the Code. Taking into consideration, the difficulties placed by the applicant-formation in implementing its resolution plan, it allowed Applicant-Formation Textiles LLC to exit; order to transfer the Corporate Debtor to the CoC who in turn was directed to hand over the same to RP and further allowed re-commencement of the Corporate Debtor.
51. For the reason aforesaid, in our opinion no penal action can be taken against applicant-formation on the ground of contravention of its resolution plan or its failure to implement it, having allowed by Adjudicating Authority to exit on the request of the CoC and RP. Therefore, no amount can be forfeited by the CoC/Bank of Baroda on penal ground.

Forfeiture of Performance Guarantee Can Only be in terms of conditions president in such guarantee:

52. The relevant clauses pertaining to performance guarantee as contained in clause 14 is extracted below:

“14. Performance Guarantee

14.6

the guarantee beneficiary shall, subject to the approval of the CoC, have the right to invoke the performance guarantee for a period of 30 days (thirty days) from the last date of PBG validity period and, without prejudice to clause 14.2 (performance guarantee), the performance guarantee can be invoked any time, if;

- a. any of the condition of the letter of intent or resolution plan are breached;*
- c. failure of the successful resolution applicant to implement the resolution plan to the satisfaction of the CoC...*

14.8 *The performance guarantee shall not be set off against or used as part of the consideration that the successful resolution applicant proposed to offer...*”

53. It has been noticed that the Adjudicating Authority after taking into consideration the stand taken by CoC, RP and the Applicant-Formation and also taking into consideration other relevant facts has not held that the resolution plan has been breached or has not been implemented within the time frame in terms of Section 31 (4) of the Code. On the other hand, the Adjudicating Authority on the request of the CoC and RP has allowed the Applicant-Formation Textiles LLC to exit from the race and re-commence the CIRP and has not ordered for liquidation on the ground of failure of Corporate Debtor-Successful Resolution Applicant (Applicant-Formation Textiles LLC)

to implement the resolution plan. The Adjudicating Authority has not held that Applicant-Formation Textiles LLC has contravened its resolution plan. Therefore, the provision of clause 14 (6) of the process memorandum cannot be invoked by the CoC/Bank of Baroda.

54. In the present case, by email dated 03.01.2019, the RP had intimated the Applicant-Formation Textiles LLC that the sum of Rs. 55 crores towards the Performance Bank Guarantee and earnest money has been adjusted by the CoC against the equity capital infusion of Rs. 76 crores. Thus, it is clear that CoC/Bank of Baroda has not invoked the performance guarantee in terms of Clause 14.6 of the process memorandum.

55. Clause 15 of process memorandum deals with default by successful Resolution Applicant and its consequences as under:

“15, DEFAULT BY SUCCESSFUL RESOLUTION APPLICANT AND ITS CONSEQUENCES”

15.1 In the event that the successful resolution applicant withdraws from the plan process at any time prior to resolution professional filing the application relating to approval of the successful resolution plan to the Adjudicating Authority, the guarantee beneficiary shall, subject to the approval of the CoC, have the right to invoke/encash the performance guarantee as well as the earnest money furnished by the successful resolution applicant. The amount received pursuant to

invocation/encashment of the performance guarantee and the earnest money, shall be kept in an escrow account and will be utilized by the company as per the new successful resolution plan approved by the CoC in accordance with clause 15.3 (default by successful resolution applicant and its consequences) below.

15.2 If the successful resolution applicant does not furnish the Performance Guarantee within the time lines stipulated in clause 10.2.1 (Insurance of Performance Guarantee) above, the guarantee beneficiary, subject to the approval of the CoC, shall have the right to invoke the earnest money submitted by successful resolution applicant as well as reject the resolution plan submitted by it.

15.3 It is hereby clarified that, upon the occurrence of the events mentioned in clause 15.1 and 13.2 (Default by Successful Resolution Applicant and its Consequences) above, the CoC reserved the right to vote and approve any such resolution plan, which has not been giving the next highest score as per the evaluation conducted by the CoC or CoC Advisor's in accordance with the terms of this process memorandum which shall then become the new successful resolution plan, and the qualified resolution applicant whose resolution plan is approved shall become the new successful resolution applicant; Accordingly, all terms of this process memorandum in relation to successful resolution plan and the successful resolution applicant shall become applicable to it. This is however, without prejudice to the right of the Resolution Professional and the CoC to re-invite new resolution plan pursuant to process memorandum at their sole decision.

15.4 In the event that, the successful resolution applicant does not comply with any other requirement as required for implementation of the successful resolution plan. The Resolution Professional in the CoC reserved the right to take any action against the successful resolution applicant in accordance with the process memorandum, resolution plan and/or under the applicable law, including but not limited to:-

(a) revoking letter of intent

(b) “the Resolution Professional with the consultation of the CoC, may cancel the resolution plan submitted by the successful resolution applicant, which would result in the petitions detailed under clause 15.3 (default by successful resolution applicant and its consequences”) set out above; and

(c) the guarantee beneficiary may invoke the performance guarantee and the earnest money, provided by the successful resolution applicant, while submitting the resolution plan, subject to the approval of the CoC”

56. It is not the case of the CoC or RP that the Applicant-Formation Textiles LLC had withdrawn from the resolution process prior to filing of the approval of the resolution plan. Therefore, Clause 15.1 is not attracted.

57. It is not a case of CoC that the Applicant-Formation Textiles LLC had not furnished the performance bank guarantee within the time line, and therefore, Clause 15.3 is also not attracted. For the very same

reason, Clause 15.3 is also not attracted. Thus, it cannot be alleged that there is a default by the Applicant-Formation Textiles LLC initial resolution applicant to attract consequences under Clause 15 of the process memorandum.

58. In view of the above, it is evident that neither of the events mentioned in Clauses 15.1 and 15.2 has occurred, resulting in a right of invocation/encashment accruing to the RP or CoC. The terms of process memorandum are to be read in tandem and in entirety and not in isolation with each other.
59. Further, accrual of any right of forfeiture shall also be contingent upon the settled position of law in this regard as well as omissions and default on the part of RP and CoC which results in a scenario where the contract herein resolution plan becomes voidable at the instance of the Applicant-Formation Textiles LLC. The non-accrual of any right of forfeiture as well as amount that can be forfeited under in case a forfeitable right subsist under the following two heads: (a) Contract was voidable at the end of applicant-formation owing to material non-disclosures; (b) No forfeiture was permissible in absence of fulfilments of terms of process memorandum as well as absence of any loss or damage.

60. As noted above, admittedly, the RP and CoC had not informed the applicant-formation of the Forensic Audit Report or about the inflated financial statements. They have categorically stated that the Resolution Applicant was supposed to conduct its own due diligence. It is pertinent to note the explanation of Section 29 of the Code as extracted below:

Explanation- For the purposes of this section, “relevant information” means the information required by the resolution applicant to make the resolution plan for the corporate debtor, which shall include the financial position of the corporate debtor, all information related to disputes by or against the corporate debtor and any other matter pertaining to the corporate debtor as may be specified.

A mere perusal of aforesaid explanation makes it evident that ‘relevant information’ under the said section includes all such information required by the Resolution Applicant to make the resolution plan for the Corporate Debtor, which shall include the financial position of the Corporate Debtor, all information related to disputes by or against the Corporate Debtor and any other matter pertaining to the Corporate Debtor as may be specified. Thus, an application under Section 66 alleging fraudulent and

wrongful trading on the part of the erstwhile management, having a direct impact on the financial position of Corporate Debtor, as well as correct financial statement of the Corporate Debtor, all come within the purview of meaning of relevant information under explanation below Section 29 of the Code and must form part of the information memorandum. The plea of the RP as well as the CoC that the same having not mandated under the regulation is ought to be rejected because provisions of the Code are substantive any regulation cannot be interpreted in a way which goes against the substantive provision of the Code. Further, the aforesaid material non-disclosures having direct nexus with the successful implementation of the resolution plan, RP as well as CoC are obligated under Section 29 of the Code to bring the same to the notice of the prospective Resolution Applicants, as and when the same are discovered

61. Thus, in the present case owing to such material none disclosures, the implementation of the resolution plan i.e. performance of contract was rendered voidable at the end of the applicant performance in terms of Section 2(g) of the Indian Contract Act. Further, in absence of any of the events/condition enumerated under the clauses of the process memorandum, the RP and CoC did not accrue any forfeitable

right quo the money infused by the Applicant-Formation Textiles LLC and thus ought to refund the same. For the said reason, the Adjudicating Authority at the quest of the CoC and RP allowed the Applicant-Formation to exist from the race of the resolution applicant.

Forfeiture in nature of penalty governed by Section 74 of Indian Contract Act and thus proof of loss or damage is a sine qua non, which is absent in present case.

62. Section 74 of the Indian Contract Act, 1872 deals with the majors of contracts, it is settled position of law that if forfeiture is of the nature penalty, Section 74 apply and where under the terms of the contract the party in breech has undertaken to pay a sum of money or to forfeit a sum of money which he has already paid to the party complaining of a breach of contract, the undertaking is of the nature of a penalty (*Maula Bux Vs. Union of India, (1969)2 SCC 545*)
63. In **Kailashnath Associates Vs. DDA, (2015) 4 SCC 136**, placing reliance on several others of its judgements, Hon'ble Supreme Court held that proof of loss or damage is sine qua non for payment of compensation for breach of contract even under Section 74 of the Indian Contract Act and that proof or loss or damage is not dispensed with under Section 74. However, the Hon'ble Supreme Court held

that where damage or loss is difficult or impossible to prove, Court is empowered to award liquidated amount named in contract, if its genuine pre-estimate of damage or loss or reasonable compensation for said loss or damage.

“34. In fateh chand Vs. Balkishan Dash (1964), 1 SCR: AIR 1963 SC 1405, this Court held: (SCR) pp. 526,527 & 530: AIR pp. 1410-12, paras 8, 10 & 15)

The section is clearly an attempt to aluminate the somewhat elaborate refinement made under the English common Law in distinguishing between stipulations providing for payment of liquidated damages and stipulations in the measure of penalty. Under the common law a genuine pre-estimate of damage by mutual agreement is regarded as stipulation naming liquidated damage and binding between the parties: a stipulation in a contract in terrorem is a penalty and a Court refused to enforce it, awarding to the aggrieved party only reasonable compensation. The Indian Legislature has sought to cut across the web of rules and representations under the English Common Law by enacting uniform principle applicable to all stipulations naming amounts to be paid in case of breach and stipulation by way of penalty.

Section 74 of the Indian Contract Act deals with the major damages in two classes of cases (i) where the contract names a sum to be paid in case of breach and (ii) where the contract contains any other stipulations by way of penalty. We are in the present case not concerned to decide whether a covenant of forfeiture of deposit for due performance of a contract falls within the first class. The measure of damages in case of breach of stipulation by way of penalty is by Section 74 reasonable compensation not exceeding the penalty stipulated for. In assessing damages, the Court has subject to limit of a penalty stipulated,

jurisdiction to award such compensation as it deems reasonable having regard to all the circumstances of the case. Jurisdiction of the Court to award compensation in case of breach of contract is unqualified except as to maximum stipulated; but compensation has to be reasonable, and that imposes upon the Court duty to award compensation according to settled principles. The section undoubtedly says that the aggrieved party is entitle to receive compensation from the party who has broken the contract, whether or not actual damage or loss is proved to have been caused by the breach. Thereby, it merely dispenses with proof of 'actual loss or damage' it does not justify the award of compensation when in consequence of the breach no legal injury at all has resulted, because compensation for breach of contract can be awarded to make good loss or damage which naturally arose in the usual course of things, or which the party new when they made the contract, to be likely to result from the breach.

Section 74 declares the law as to liability upon breach of contract where compensation is by agreement of the parties pre-determined, or where there is stipulation by way of penalty. But the application of the enactment is not restricted to cases where the agreed party claims relief as a plaintiff. The section does not confer a special benefit upon any party, it merely declares the law that notwithstanding any term in the contract pre-determining damages or providing for forfeiture of any property by way of penalty, the Court will award to the party aggrieved only reasonable compensation not exceeding the amount named penalty stipulated. The jurisdiction of the Court is not determined by the accidental circumstances of the parties in default being a plaintiff or a defendant in a suit. Use of the expression 'to receive from the party who has broken the contract' does not predicate that the jurisdiction to adjust amounts which have been paid by the party in default cannot be exercised in dealing with the claim of the party complaining of breach of contract. The Court has to adjudge in every case reasonable compensation to which the plaintiff is entitle from

the defendant on breach of the contract. Such compensation has to be ascertained having regard to the conditions existing on the date of the breach’.

64. On a conspectus of the above Authorities, the law on compensation for breach of contract under Section 74 can be stated to be as follows:

- i. where the sum is named in a contract as a liquidated amount payable by way of damages, the party complaining of breach can received as reasonable compensation such liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties and found to be such by the Court. In other cases, where a sum is named in a contract as liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the amount so stated. Similarly, in a case where the amount fixed is in the nature of penalty, only reasonable compensation can be awarded not exceeding the penalty so stated. In both cases, the liquidated amount or penalty is the upper limit beyond which the Court cannot grant reasonable compensation.
- ii. reasonable compensation will be fixed on well-known principles that are applicable to the law of contract, which are to be found inter alia in Section 73 of the Contract Act.
- iii. since Section 74 awards reasonable compensation for damage for loss caused by breach of contract, damage or loss caused is a sine qua non for the applicability of the Section.
- vi. the expression “whether or not actual damage or loss is proved to have been caused thereby” means that where it is possible to prove actual damage or loss, such proof is not dispensed with. It is only in cases were damage or loss is

difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss can be avoided.

NCLT decisions:

65. Placing reliance on Kailash Nath and Fateh Chand, learned NCLT Kolkata Bench, vide an order dated on 17.01.2023 passed in IA (IBC) 800(KB)/2022 in C.P (IB)/1284(KB)/2019 even at the stage of liquidation directed the liquidator to refund the earnest money as paid by the applicant.

In a decision rendered by NCLT Chandigarh Bench on 20.01.2023 in IA No. 433/2022 and IA No. 525/2021 in C.P (IB) No. 128/Chd/Hry/2017, noting that the Corporate Debtor having been sold to another company in re-auction and the entire sale consideration having been received, the NCLT held that no other amount could be forfeited by the liquidator. Learned NCLT was of the view that such forfeiture would amount to unjust enrichment, and therefore directed the liquidator to refund the amount held other than earnest money.

In yet another order passed by NCLT Kolkata Bench in IA (IBC) 930(KB)/2020 in C.P (IB) 3(KB)/2017, the learned Tribunal placing reliance on Kailash Nath and other Supreme Court judgements held that forfeiture of earnest money was contrary to the

law and the same was therefore liable to be set aside, and thus, the Tribunal directed not only to refund the earnest money but also interest from the date of forfeiture.

66. During the course of hearing, the Respondent/CoC referred and relied upon the decision of the Ebix Singapore (P) Limited Vs Educomp Solutions Limited (CoC) 2022 (2) SCC 401 and suggested that the case of the applicant-formation is covered by the said decisions and thereby applicant-formation is not entitled for refund Rs. 93.82 crores infused by it during the course of insolvency resolution process of the corporate debtor-MIL.

Analysis of facts and law:-

The decision of the Hon'ble Supreme Court in Ebix Singapore (P) Ltd Vs. Educomp Solutions Limited (CoC) supra is not applicable in the facts and circumstances of the present case for the reasons mentioned below:-

- i. In case of Ebix Singapore (P) Ltd. Vs Educomp Solutions Limited (CoC), Kundan Care, whose resolution plan had been previously approved by the CoC and was pending confirmation by the NCLT under Section 31 of the IBC, had filed an application under Section 60 (5) of the code for withdrawal of the resolution plan approved by the CoC with further progress, as apparent from paragraph 61, as extracted below:-

“61. On 17.12.2019, Kundan Care filed an application under Section 60 (5) IBC seeking permission of NCLT to withdraw its resolution plan, which had

been previously approved by the CoC and was pending confirmation by the NCLT under Section 31 IBC in its application, it prayed the following reliefs.

- (a) Allow the present application and permit the applicant to withdraw its resolution plan as submitted and approved by the CoC on 14.11.2019;*
- (b) Direct that the performance bank guarantee submitted by the applicant be cancelled/revoked/returned/refunded to the applicant;”*

67. In the said case, the Hon'ble Supreme Court while held that IBC is silent on whether a successful resolution applicant can withdraw the resolution plan, also held that the residual power of the Adjudicating Authority under the IBC cannot be exercised to create procedural remedies in the CIRP, enabling withdrawals or modifications of the resolution plan at the behest of the successful resolution applicant, once it is submitted to the Adjudicating Authority after due compliance of the procedural requirements and timelines, as that would create another tier of negotiations which will be wholly unregulated by the statutes.

68. In the present case of M/s. Formation Textiles LLC applicant, the plan was already approved by the Adjudicating Authority under Section 31 of the Code. The applicant-formation has acted upon the resolution plan and infused a sum of Rs. 93.82 crores in different trenches. Subsequently, the CoC and RP moved an applicant before the Adjudicating Authority on 25.06.2019 bearing MA No. 2326/2019 for directions on applicant-formation to implement its

resolution plan in totality, an alternative prayer was made before the Adjudicating Authority for the re-commencement of the CIRP of the Corporate Debtor-MIL and for fresh permission to invite fresh bids with the aim of reviving the corporate debtor-MIL and to prevent it from going into liquidation.

69. The Adjudicating Authority noticed the relevant facts and asked applicant-formation (the then successful resolution applicant), as to whether they be in a position to hand over the possession of the undertaking of the Corporate Debtor-MIL back to CoC in view of their applications challenging the very resolution plan itself.
70. The Banks who were members of the CoC also wanted to take over the possession of the Corporate Debtor-MIL from the applicant and restoration of the CIRP. This is apparent from order dated 05.12.2019 passed by the Adjudicating Authority are as follows:-

Heard the Counsel representing the successful Resolution Applicant and the CoC as well as the erstwhile RP.

There are three applications before us, one claiming the CIRP costs and another filed by the successful Resolution Applicant challenging the resolution plan on the ground that the entire information has not been provided to them for complying with the terms and conditions of the resolution plan. The other application filed by the Bank of Baroda on behalf of the consortium as among various other things to seek possession of the

undertaking and handover it to the third party with proper maintenance and to see that the value of the asset is not depleted.

On the earlier occasions when the matter was heard, the suggestion was made by this Bench to the successful Resolution Applicant whether they be in a position to handover the possession of the undertaking back to CoC in view their application challenging the very resolution plan itself.

Ld. Sr. Counsel for the successful Resolution Applicant had made it clear that they have no objection to handover the possession of the undertaking back to the CoC without prejudice to the rights and contentions.

Ld. Sr. Counsel representing the Banks also contends that the unit has been handed over to the Successful Resolution Applicant on “as is where is” condition and all the information that was required to be provided has already been provided and the successful Resolution Applicant had defaulted in making the payments as per the resolution plan.

In view of the allegations and counter allegations made against both the parties, a separate hearing is required to decide the merits of each application. In the meanwhile, as an interim measure, it is prudent on the part of this Bench, after going through an elaborate discussion during the course of the hearing that the possession be handed over to the CoC, who in turn will handover the same to the erstwhile RP.

Therefore, we hereby order that the successful Resolution Applicant shall hand over the possession to the CoC, after an independent agency or a person takes the inventory and examine the status and the working condition of the machines and then the CoC, in turn shall handover the same to erstwhile RP. The entire process of taking inventory and handing over the possession shall be video-graphed and shall be taken in the presence of both the parties.

For this purpose, we hereby order the restoration of the CIRP and the erstwhile RP shall continue as RP henceforth.

All the privileges, rights available to the RP under the CIRP under Section 14 mutatis mutandis shall be applicable until the proper decision is taken in this regard.

It is for the CoC and RP to decide whether they run the undertaking or handover to the third party.

We hereby direct the CoC and the RP to exercise maximum prudence and see that the value of the asset is not depleted and production is also continued and the unit runs as a going concern, so that the workers, employees and all the stakeholder's interest is protected.

71. The aforesaid facts show that the applicant had not asked for withdrawal of its resolution plan before its approval by the Adjudicating Authority under Section 31 of the IBC. On the other hand, the applicant had tried to implement the resolution plan and in good faith had infused a total amount of Rs. 93.82 crores towards such successful implementation of the resolution plan, however, it was Bank of Baroda which changed its stance in regard to upfront equity infusion on 04.04.2019 and due to such change in stance equity shares of the Corporate Debtor-MIL were not transferred to the applicant. As a result of these aforesaid acts on the part of the CoC, the applicant could not successfully implement its resolution plan and could never become the promoter of the Corporate Debtor-MIL.

72. It is also pertinent to note that it was only on the request of the Banks/CoC and the consequent on the directions of the Adjudicating Authority, possession of the Corporate Debtor-MIL was handed over by the applicant to the CoC and fresh CIRP was initiated quo the Corporate Debtor-MIL.
73. Therefore, we are of the earnest view that the judgement of the Hon'ble Supreme Court passed in Ebix Singapore (p) Ltd. Vs Educomp Solutions Ltd. (CoC) (supra) is not applicable in the case of applicant-formation. Hence, the stand taken by the CoC is completely misconceived and misplaced.
74. In view of above decisions, it is amply clear that RP and CoC/Bank of Baroda in the present case cannot forfeit the earnest money as well as the performance bank guarantee and other sums infused by the applicant-formation especially where subsequently a resolution plan by another entity has been approved. The subsequent approval of the resolution plan shows that the lender/CoC have suffered no loss or damage. In the aforementioned cases, where even at the stage of liquidation, when asset of the Corporate Debtor has further suffered substantial loss, the liquidator has been directed to refund the amount in view of the settled position of law with regard to forfeiture in the nature of penalty. The necessary corollary to the aforesaid is that the

RP and CoC in the present case, who have not suffered any loss and in terms of their own discretion deemed it fit in seeking approval of another resolution process and have consequently been able to approve another resolution plan, must not be allowed unjust enrichment by permitting forfeiture of not only the earnest money (Rs.5 crores) but also performance bank guarantee (Rs.55 crores) and such other sums infused towards the Corporate Debtor i.e. (Rs.38.82 crores) such unjust enrichment in face of settled position of law by the Hon'ble Supreme Court and decision of NCLT as well as in terms of the process memorandum, as discussed above, would be unattainable in the eye of law. Thus, we are of the considered opinion that the CoC/Bank of Baroda has no jurisdiction to forfeit the total amount of Rs. 93.82 crores infused by the Applicant-Formation in the Corporate Debtor-MIL, especially in view of the fact the subsequently another resolution plan has been approved and the CoC stands to loose nothing.

75. We hereby direct, the CoC/Bank of Baroda to refund the total amount of Rs. 93.82 crores infused by the Applicant-Formation with current rate of bank interest within four weeks.

IN THE NATIONAL COMPANY LAW TRIBUNAL,
MUMBAI BENCH – I

IA No. 443 of 2021 & IA 1847 of 2021

IN

CP (IB)/No. 1399/MB/C-I/2017

76. In view of the order passed in IA No. 443 of 2021, there is nothing to adjudicate in IA 1847 of 2021 filed by Bank of Baroda. Hence IA No. 1847 of 2021 is disposed of.

77. Ordered, accordingly.

Sd/-

SHYAM BABU GAUTAM
Member (Technical)
06.07.2023

Sd/-

KISHORE VEMULAPPALI
Member (Judicial)