

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT-III**

**I.A. No. 1140 of 2021
IN
C.P. No. 4513/IB/2018**

In the matter of an Application under Section
30(6) and Section 31(1) of the Insolvency and
Bankruptcy Code, 2016

In the matter of
M/s. S.K. Ganguli

... Operational Creditor

V/s.

D. Thakkar Construction Private Limited

... Corporate Debtor

I.A. No. 1140/2021

Mr. Ram Rattan Kanoongo

...Applicant/Resolution Professional

Order delivered on: 14.03.2022

Coram:

Hon'ble Ms. Suchitra Kanuparthi, Member (Judicial)
Hon'ble Shri Chandra Bhan Singh, Member (Technical)

Appearance: For the Applicant/RP: Mr. Shyam Kapaida, Advocate
For the Respondent: Mr. Sumit Khanna, Advocate

Per: Shri Chandra Bhan Singh, Member (Technical)

ORDER

1. This is an Application under Section 30(6) and Section 31(1) of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the Code) filed by the Resolution Professional seeking approval of the Resolution Plan submitted by the Resolution Applicant, which is approved by 70.65% of the voting share of the members of the Committee of Creditors (hereinafter referred to as 'CoC').
2. The facts leading to the Application are as under:

- i. Corporate Insolvency Resolution Process (CIRP) of the Corporate Debtor was initiated by this Bench by an order dated 27.03.2019 under section 9 of the Insolvency and Bankruptcy Code 2016 (hereinafter referred to as 'the Code') (Admission Order) and Mr. Ashish M. Chandak was appointed as Interim Resolution Professional. The IRP published a public announcement on 30.03.2019 inviting claims from the creditors of the Corporate Debtor.
- ii. The CoC in its 1st meeting held on 26.04.2020 decided to replace the IRP with Mr. Nimit Kalsi as the Resolution Professional (RP). This Tribunal by order dated 02.03.2020 confirmed the appointment of the Applicant as the RP. Further in the 9th CoC Meeting held on 31.12.2019, the CoC decided to change the RP and the Hon'ble NCLT vide its order dated 19.03.2020 replaced the erstwhile RP and appointed Mr. Ram Rattan Kanoongo (hereinafter referred to as 'Applicant') as the new RP of the Corporate Debtor.
- iii. The claims of Financial Creditors, Operational Creditors and Employees & Workmen as exist on the date of filing the present application is as follows:

I. Claims of Financial Creditors:

(in Crores)

Sr. No.	Financial Creditor	Amount Claimed	Amount Admitted	Voting (%) in the CoC
1	State Bank of India	134.89	133.82	40.62%
2	Union Bank of India	52.11	49.92	15.15%
3	Axis Bank	51.12	48.45	14.70%
4	Reliance Commercial Finance Ltd	11.78	11.78	3.58%
5	HDFC Bank Limited	1.49	1.49	0.45%
6	Mahindra & Mahindra Financial Services	0.59	0.59	0.18%

7	Non-Related Unsecured Financial Creditors (28 claimants)	19.40	19.40	5.89%
8	Edelweiss ARC (Unsecured)	64.01	64.01	19.43%
	TOTAL – A	335.40	329.46	
9	Related Party Unsecured Financial Creditors (20 claimants)	86.71	44.51	-
	TOTAL – B	86.71	44.51	-
	GRAND TOTAL – A + B	422.10	373.97	

II. Claims of Operational Creditors:

(in Crores)

Sr. No.	Operational Creditor	Amount Claimed	Amount Admitted
1	Claims of 60 Operational Creditors	100.67	89.46

III. Claims of Employees & Workmen:

(in Rupees)

Sr. No.	Employee	Amount Claimed	Amount Admitted
1	Akash Bhurse	35,000	35,000
2	Sachin Shivankar	85,000	85,000
3	Praful Tripude	25,000	25,000
4	Abrar Hussain	2,97,500	2,97,500
5	Rajesh Ingle	21,500	21,500
6	Pargat Singh Soori	80,200	800
7	Brajesh Gupta	50,926	34,600
	TOTAL	5,95,126	4,99,400

iv. The Applicant in compliance of the provisions of the Code and Rules framed there under conducted the CIRP of the Corporate Debtor.

3. The Applicant states that two Registered Valuers were appointed to determine the Fair Value and Liquidation Value of the Corporate Debtor:

- Abhishek Joshi (Valuer No. 1 for Land & Building)
- Atul Shukla (Valuer No. 2 for Land & Building)
- Prashant Phusate (Valuer No. 1 for Plant & Machinery)
- Hemant Ambalsarkar (Valuer No. 2 for Plant & Machinery)
- Vishnu Upadhyay (Valuer No. 1 for Financial Assets)
- Jayesh Shah (Valuer No. 2 for Financial Assets)

The Applicant states that the liquidation value and fair value as per the valuation reports submitted by the valuers is as under:

(Amount in Rs. Lakhs)

Particulars	FAIR VALUE			LIQUIDATION VALUE		
	Valuer 1	Valuer 2	Average	Valuer 1	Valuer 2	Average
Land	410.00	386.51	398.26	307.50	270.56	289.03
Building	156.60	143.26	149.93	117.45	100.29	108.87
Plant & Machinery	430.00	438.84	434.42	355.00	374.87	364.94
Non – Current	0.76	0.00	0.38	0.00	0.00	0.00
Long-term Loans & Advances	232.22	206.71	219.52	161.55	148.87	155.21
Inventory	90.98	90.40	90.69	50.22	43.90	47.06
Trade Receivables	399.47	477.63	438.55	239.68	356.02	297.85
Cash & Bank Balance	330.20	328.86	329.53	330.20	328.86	329.53

Short-term Loans & advances	152.28	129.96	141.12	138.19	94.44	116.32
TOTAL	2,202.62	2,202.17	2,202.39	1,699.79	1,717.81	1,708.80

4. Average Liquidation Value of the Corporate Debtor is Rs. 1,708.80 Lakhs and the average Fair Value is Rs. 2,202.39 Lakhs.
5. During the period of CIRP the RP issued Form-G on 29.08.2019 inviting Expressions of Interest (EOI), the last date for receiving the expression of interest was 14.09.2019 and the last date of submission of resolution plan was till 14.11.2019. The Applicant further submits that he received EOIs from 3 Prospective Resolution Applicants (PRAs).
6. The Applicant states that, upon taking charge by the Applicant, a Nationwide lockdown was declared on account of COVID-19 pandemic, which impacted the majority part of calendar year of 2020. In 11th CoC Meeting dated 20.06.2020, the members decided that the second advertisement for inviting EoI. Form G inviting EoI was published on 01.07.2020 in Business Standard (All India Edition), Sakal (Nagpur Edition) and Navshakti (Mumbai Edition), the last date for receipt of EoI was 16.07.2020 and last date of receipt of Resolution Plan was 17.08.2020. The copy of Form G dated 01.07.2020 was also published on IBBI Website.
7. The Applicant further states that, he received EOIs from 5 Prospective Resolution Applicants (PRAs) within the stipulated time period, however, only 3 Resolution Plans were received by the Applicant on 05.10.2020 which is the extended last date of receipt of Resolution Plan. The three Resolution Plans/ Financial bid as on 05.10.2020 were as follows:
- a) Mr. Anuj Shantilal Badjate
 - b) Mr. Sunil Gyanchandji Raisonni
 - c) Mr. Pravesh Pawan Jindal

8. The Applicant submits that, during the 20th Meeting of CoC held on 22.03.2021, the Resolution Plan submitted by Mr. Anuj Badjate was examined by legal counsel of the RP and found to be compliant with provisions of the Code.
9. The RP submits that after due verification of the eligibility of the successful Resolution Applicant in terms of Section 29(A) of the Code, the CoC in its 21st meeting held on 15.04.2021 considered the revised and final Resolution Plan of Mr. Anuj Badjate and approved the Plan with a voting share of 70.65% and compliance certificate was in Form “H” was issued by the Resolution Professional.
10. **The salient features of the Resolution Plan are as under:**
 - A. The Resolution Applicant Mr. Anuj Badjate is promoter of Badjate Group. They are engaged in the field of financial services for over five years founded in the year 1964, one of the company of Badjate Group viz. Badjate Stock & Shares Private Limited is registered member of NSE, BSE, MCX and CDSL. Currently headed by Mr. Anuj Badjate (Resolution Applicant) and they have presence in various cities of Maharashtra, West Bengal, Gujarat and New Delhi through branches and business partners. The Resolution Applicant confirmed that it is eligible to submit Resolution plan as per Section 29A of Insolvency and Bankruptcy Code.
 - B. The Resolution Applicant has proposed to takeover the management and ownership control of the Corporate Debtor by acquiring up to 100% shareholding of the Company, the details of the proposal are as follows:
 - C. The Resolution Plan proposes a total Consideration of **Rs. 20,00,00,000/-* (Rupees Twenty Crores Only)** as cash payment to all stakeholders.

11. The details of the proposed payments are as follows:

A) PAYMENT OF CORPORATE INSOLVENCY RESOLUTION PROCESS

- (i) The actual Corporate Insolvency Resolution Process Cost (hereinafter referred to as 'CIRP') is being met out of the resources the Corporate Debtor, there are no outstanding CIRP as on the day of submission of this Resolution Plan.
- (ii) In the event CIRP is outstanding as on the Effective Date, the outstanding CIRP shall be paid for in full out of the "total consideration. In that case the amounts payable to the creditors including but not limited to Operational Creditor, Financial Creditor, Employees and Workmen under this Resolution Plan may be adjusted accordingly.
- (iii) On the Effective Date, the Resolution professional shall provide a certified statement containing details of the CIRP to the Resolution Applicant.
- (iv) Section 30(2)(a) of the Code provides for the payment of the CIRP in priority to the payment of other debts of the Corporate Debtor. The CIRP shall be paid within 15 (Fifteen) days from the receipt of the certified copy of the approval of this Plan by NCLT.

B) PAYMENT OF OPERATIONAL CREDITORS (OTHER THAN WORKMEN AND EMPLOYEES)

The Applicant has submitted the total claim of Rs. 1,00,67,19,140/- towards the claim of Operational Creditors (Other than Employees and Workmen and including Government Authorities) and has further admitted Rs. 89,46,62,957/- as claims. However in the Resolution Plan proposes to pay Rs. 67,06,245/- to the Operational Creditors (Other than Employees and Workmen and including Government Authorities).

C) PAYMENT TO FINANCIAL CREDITORS

The Applicant has submitted that the total claim of Rs. 422.10 Crores towards the claim of Financial Creditors and has admitted Rs. 373.97 Crores.

(in Rs. Crores)

Sr. No.	Bank/ Financial Institutions	Amount Claimed	Claim Admitted	Amount to Paid
1	States Bank of India	134.89	133.82	9.49
2	Union Bank of India	52.11	49.92	3.53
3	Axis Bank	51.12	48.45	3.42
4	Reliance Commercial Finance Ltd.	11.78	11.78	1.35
5	HDFC Bank Ltd	0.59	0.59	0.66
6	Mahindra & Mahindra Financial Services	0.59	0.59	0.51
<u>7</u>	Non-Related Unsecured Financial Creditors (28 Claimants)	19.40	19.40	0.19
<u>8</u>	Edelweiss ARC (Unsecured)	64.01	64.01	0.10
	TOTAL - A	335.40	329.46	19.27
<u>9</u>	Related Party Unsecured Financial Creditors (20 Claimants)	86.71	44.51	0.00
	TOTAL - B	86.71	44.51	0.00
	GRAND TOTAL - A + B	422.10	373.97	19.27

D) PAYMENT TO EMPLOYEES AND WORKMEN OF THE CORPORATE DEBTOR

It is submitted by the applicant that the admitted claim of the Employees and Workmen of the Corporate Debtor is Rs. 4,99,400

and it has been proposed that Workmen & Employees, including their unpaid Provident Fund, Pension Fund and Gratuity Fund and all such other claims/benefits/due accrued/denied, shall be paid. Therefore, Rs. 4,99,400/- is to be paid to the Workmen & Employees out of the “Total Consideration” as in settlement of their claims.

E) DISBURSEMENT OF AMOUNT SHALL BE CARRIED OUT IN ACCORDANCE WITH AND IN THE ORDER OF PRIORITY SET OUT IN THE TABLE BELOW:

Sr. No.	Particulars	Category	Amount (in Crores)
1.	CIRP Costs		Has been fully Paid
2.	Financial Creditors	Secured Financial Creditors	
Consortium Lenders (i)			
A.	State Bank of India		9,49,73,125
B.	Union Bank of India		3,53,21,770
C.	Axis Bank Ltd.		3,42,78,014
Total			16,45,72,909
Equipment Finance (ii)			
D.	Reliance Commercial Finance Ltd.		1,35,03,231
E.	HDFC Bank Ltd		66,10,829
F.	Mahinda & Mahindra Financial Services Ltd.		51,66,877
Total			2,52,80,937
Total Secured Financial Creditor i.e. Consortium Lenders (i) + Equipment Finance (ii)			18,98,53,846
G.		Unsecured Financial	19,40,510

		Creditors (Un-related)	
H.		Unsecured Financial Creditors (Related)	0.00
I.		Unsecured Financial Creditors on Account of Corporate Guarantee	10,00,000
3.	Operational Creditors		
A.	Non-Govt Claimants		17,76,235
B.	EPFO		13,51,570
C.	Govt. Claimants		35,78,439
Total			67,06,244
4.	Employees & Workmen		4,99,400
GRAND TOTAL – 1 + 2 + 3 + 4			20,00,00,000

Schedule for payment of Total Cash Consideration to Stakeholders

Repayment Period (days from NCLT Approval)	Payment of Fixed Consideration (Rs. Crore)
Within 90 Days of NCLT Approval (3 months)	*4,50,00,000
120 days (4 months)	*1,50,00,000
151 days (5 months)	*1,50,00,000
182 days (6 months)	*1,50,00,000
212 days (7 months)	*1,50,00,000
243 days (8 months)	*1,50,00,000
273 days (9 months)	*1,50,00,000
304 days (10 months)	*1,50,00,000

334 days (11 months)	*1,50,00,000
365 days (12 months)	*1,50,00,000
365 days (12 months)	*2,00,00,000
Total Cash Consideration	*20,00,00,000

** This amount includes Rs. 3.10 crores of Fixed Deposits (FD) in the name of the CD held by Union Bank of India (UBI). An Application has been filed against UBI bearing IA 2080 of 2020 for violation of provisions of section 14 and for not releasing the said assets under the control of the Resolution Professional which is pending adjudication. It is submitted by the PRA that in case the said funds are either not released by UBI or any amount lesser than the said amount of FDs is realised by UBI, then the amount under the plan shall stand proportionately reduced.*

12. The Resolution Applicant proposes to appoint suitably qualified and experienced persons, key personnel and other officer for operations of the Corporate Debtor in terms of Section 30(2)(c). The Plan also provides for implementation of provision of the Resolution Plan as stated above as per Section 30(2)(d). The Resolution Applicant has given a declaration that the Resolution Plan does not contravene any provisions of the law for the time being in force. The Resolution Plan is in compliance of the Regulation 38 of the Regulations in terms of Section 30(2)(f) as under:

- a) Payment of CIRP cost will be made in priority over Financial Creditor (Regulation 38(1)(a)).
- b) Since the plan has been approved by 70.65% voting share of the CoC, this is in compliance of Regulation 38(1)(b) of the Regulations.
- c) Declaration by the Resolution Applicant that the Resolution Plan has considered the interest of all the stakeholders of the Corporate Debtor, keeping in view the objectives of the Code (Regulation 38(1A)).
- d) Declaration by the Resolution Applicant that neither the Resolution Applicant nor any of his related party has either failed or contributed to the failure of the implementation of any other approved Resolution Plan.

13. It is beneficial to refer to the observation of the Hon'ble Supreme Court in ***Committee of Creditors of Essar Steel India Limited Vs. Satish Kumar Gupta & Ors.: (2019) SCC OnLine SC 1478*** as under:

“67.

A successful resolution Applicant cannot suddenly be faced with "undecided" claims after the resolution plan submitted by him has been accepted as this would amount to a hydra head popping up which would throw into uncertainty amounts payable by a prospective resolution Applicant who successfully take over the business of the corporate debtor. All claims must be submitted to and decided by the resolution professional so that a prospective resolution Applicant knows exactly what has to be paid in order that it may then take over and run the business of the corporate debtor. This the successful resolution Applicant does on a fresh slate, as has been pointed out by us hereinabove.”

14. In view of the above ruling of the Apex Court, the Resolution Applicant takes over the Corporate Debtor with all its assets and liabilities as specified in the Resolution Plan subject to orders passed herein. As already indicated the Resolution Plan has been approved by the CoC in its meeting held on 15.04.2021 with 70.65% votes.

15. The counsel for the Applicant relied on the judgement of ***Ghanshyam Mishra and Sons Private Limited v. Edelweiss Asset Reconstruction Company Limited and Ors.: Civil Appeal No.8129 of 2019*** the Hon'ble Supreme Court held that it is not open to the Adjudicating Authority or Appellate Authority to reckon any other factor other than specified in Section 30(2) or 61(3) of the I&B Code. The Hon'ble Court observed as under:

“57....Indubitably, the remedy of appeal including the width of Jurisdiction of the appellate authority and ground of appeal, is a creature of statue. The Provisions investing jurisdiction and authority in NCLT or NCLAT as noticed earlier, have not made the commercial decision exercised by CoC of not approving the resolution plan or rejecting the same, justiciable. This position is reinforced from the limited grounds specified for instituting an appeal that too against an order “approving a resolution plan” Under Section 31. First, that the approved resolution plan is in

contravention of the provisions of any law for the time being force. Second, there has been material irregularity in exercise of powers “by the resolution professional” during the corporate insolvency resolution period. Third, the debts owed to operational creditor have not been provided for repayment in priority to all other debts. Fifth, the resolution plan does not comply with any other criteria specified by the Board. Significantly, the matters or grounds be it under Section 30(2) or Under Section 61(3) of the I&B Code – regarding testing the validity of the “approved” resolution plan by the CoC; not approving the resolution plan which has been disapproved or deemed to have been rejected by CoC in exercise of its business decision.”

16. In view of the above ruling of the Apex Court, the legislature has given paramount importance to the commercial wisdom of committee of creditors (CoC) and the scope of judicial review by the Adjudicating Authority (AA) is limited to the extent provided under section 31 of Code and of the Appellate Authority is limited to the extent provided under sub-section (3) of section 61 of the Code, is no more an untouched-matter.
17. The counsel for the Applicant relied on the judgement of ***Venus Recruiters Private Limited v. Union of India and Ors.: CM Appl. 36026/2019*** the Hon’ble Delhi High Court observed that:
- “74.....
The role of the RP is not adjudicatory but administrative in nature. Thus, the RP cannot continue beyond an order under Section 31 of the IBC, as the CIRP comes to an end with a successful Resolution Plan having been approved. This however subject to any clause in the Resolution Plan to the contrary, permitting the RP to function for any specific purpose beyond the approval of the Resolution Plan.”
18. In view of the above ruling of the Delhi High Court, it can be easily derived that, the Resolution Professional in case it is so proposed in the Resolution Plan will continue to discharge his duties regarding the pending applications to the main petition even though the Resolution Plan is approved.
19. In ***K. Sashidhar v. Indian Overseas Bank & Others: 2019 SCC Online SC 257 (2019) 12 SCC 150*** the Hon’ble Apex Court held that if the CoC had

approved the Resolution Plan by requisite percent of voting share, then as per section 30(6) of the Code, it is imperative for the Resolution Professional to submit the same to the Adjudicating Authority (NCLT). On receipt of such a proposal, the Adjudicating Authority is required to satisfy itself that the Resolution Plan as approved by CoC meets the requirements specified in Section 30(2). The Hon'ble Court observed that the role of the NCLT is 'no more and no less'. The Hon'ble Court further held that the discretion of the Adjudicating Authority is circumscribed by Section 31 and is limited to scrutiny of the Resolution Plan "as approved" by the requisite percent of voting share of financial creditors. Even in that enquiry, the grounds on which the Adjudicating Authority can reject the Resolution Plan is in reference to matters specified in Section 30(2) when the Resolution Plan does not conform to the stated requirements.

20. In **CoC of Essar Steel** (*supra*) the Hon'ble Apex Court clearly laid down that the Adjudicating Authority would not have power to modify the Resolution Plan which the CoC in their commercial wisdom have approved. In para 42 Hon'ble Court observed as under:

*"Thus, it is clear that the limited judicial review available, which can in no circumstance trespass upon a business decision of the majority of the Committee of Creditors, has to be within the four corners of section 30(2) of the Code, insofar as the Adjudicating Authority is concerned, and section 32 read with section 61(3) of the Code, insofar as the Appellate Tribunal is concerned, the parameters of such review having been clearly laid down in **K. Sashidhar** (*supra*)."*

21. In view of the discussions and the law thus settled, the instant Resolution Plan meets the requirements of Section 30(2) of the Code and Regulations 37, 38, 38(1A) and 39(4) of the Regulations. The Resolution Plan is not in contravention of any of the provisions of Section 29A of the Code and is in accordance with law. The Resolution Plan is feasible and viable. Adequate provision is provided for future claims of Operational Creditors if any the by Resolution Applicant. The CIRP cost has already been paid and will be paid if

any as certified by the Resolution Professional and CoC. The Resolution Plan balances the interest of all the stakeholders and thus it deserves to be approved.

22. We are of the considered opinion that the distribution of the payments to the Creditors, Financial or Operational, as the case may be, shall be subject to orders to be passed in the respective Interlocutory Application within the ambit of the Code. We are thus inclined to dispose of this Application in the following terms. Hence ordered.

ORDER

- i. The Interlocutory Application No. 1140 of 2021 is allowed. The Resolution Plan submitted by **Anuj Shantilal Badjate** is hereby approved. 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.
- ii. 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.
- iii. 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.
- iv. The moratorium under Section 14 of the Code shall cease to have effect from this date.

- v. 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.
- vi. 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.
- vii. In line with the judgement of Hon'ble Delhi High Court in the matter of ***Venus Recruiters Private Limited v. Union of India and Ors.*** and as proposed by the Resolution Professional during the course of hearing of the Resolution Plan, the Resolution Professional will pursue application u/s. 43, 45, 60 & 66 with the Adjudicating Authority. Resolution Plan stands modified to that extent.
- viii. Under Para. 15.2 of Resolution Plan – Licenses/ Approvals/ Contractual Rights and Benefits, the Resolution Applicant has sought time period of 2 years after date of application of Resolution Plan with regards to necessary approvals. This stand modified to a period of 1 year instead of 2 years in view of provisions of Section 31(4) of the code.
- ix. 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.
- x. The Applicant shall forthwith send a copy of this Order to the CoC and the Resolution Applicant for necessary compliance.

Sd/-
CHANDRA BHAN SINGH
MEMBER (TECHNICAL)

Sd/-
SUCHITRA KANUPARTHI
MEMBER (JUDICIAL)

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI SPECIAL BENCH
COURT-III**

IA 931/2021 in C.P.(IB)-4513/(MB)/2018

Under Section 60(5) of the Insolvency &
Bankruptcy Code, 2016

In the matter of

Edelweiss Asset Reconstruction
Company Limited

....Applicant

Versus

Ram Ratan Kanoongo,

.... Respondent/
Resolution Professional

In the matter of

S.K. Ganguli

..... Financial Creditor

Versus

D Thakkar Constructions Private Limited

..... Corporate Debtor

Order delivered on: **14.03.2022**

Coram:

Hon'ble Ms Suchitra Kanuparthi, Member (Judicial)

Hon'ble Shri Chandra Bhan Singh, Member (Technical)

For the Applicants : Mr. Kaushal Parse, Advocate.

For the Respondent(s) : Mr. Shyam Kapadia, Counsel.

Per: Chandra Bhan Singh, Member (Technical).

ORDER

1. The present IA 931/2021 in CP(IB)-4513/(MB)/2018 has been filed by M/s Edelweiss Asset Reconstruction Company Limited acting in the capacity of Trustee of EARC (Applicant)

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who is the Financial Creditor for a corporate guarantee dated 23.01.2015 which was given by the Corporate Debtor. In this Application the Applicant, M/s Edelweiss Asset Reconstruction Company has objected to the classification of the Applicant in a class separate from other unsecured Creditors as done by the Respondent No.1 who is the Resolution Professional and consequent distribution and allocation of funds made in the Resolution Plan by the Resolution Applicant.

2. The Bench notes that the Resolution Plan is already before this Bench for consideration, after the approval of the CoC with the requisite majority. The Bench further notes that the Applicant being one of the members of the CoC, in its commercial wisdom has decided to abstain from voting. The concern of the Applicant is that as an unsecured Financial Creditor the admitted claim is Rs.64,00,55,634/-. However, under the Resolution Plan the offer is a meagre sum of Rs.10 Lakh amounting to 0.16 per cent of the admitted claim whereas other unsecured Financial Creditors are proposed to be offered one percent of their admitted claims. The Applicant also feels that its claim has been conveniently reduced by almost 99.84 per cent in an unjust manner.
3. In this regard the Bench notes that in the present case there are three classes of Creditors in the category of Unsecured Financial Creditors:
 - (a) Unsecured Financial Creditors who have disbursed funds directly to the Corporate Debtor and are 'unrelated parties'. This category constitutes 28 claimants and in terms of Section 21(6A) of the Code,

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an authorised representative has been appointed for this class of Creditors.

(b) Unsecured Financial Creditors who have disbursed funds directly to the Corporate Debtor who are 'related parties'. There are 20 such claimants and the Code does not provide for a voting right, hence in the CoC they do not have any authorised representation.

(c) Unsecured Financial Creditors who have not disbursed funds but have 'corporate guarantee' of the Corporate Debtor. The Applicant falls in this category of unsecured financial creditors.

4. It is pertinent to note here that the IBC itself differentiates between the creditors even if they are similarly placed. For instance, Section 30(2)(b) of the Code provides for different treatment and pay-out to a Financial Creditor who has voted in favour and a Financial Creditor does not vote in favour of a Resolution Plan. The Code provides that in the event a Financial Creditor does not vote in favour of the Resolution Plan, it should be offered an amount more than the liquidated value irrespective of what is being paid to the other similarly placed Financial Creditors who have voted in favour of the Plan. Here the Bench notes that the Applicant, M/s Edelweiss Asset Reconstruction Company Limited has abstained from voting and, therefore, has not voted in favour of the Resolution Plan. It is in this context that the amount offered to him is Rs.10 Lakh which is more than the liquidation value.

5. The Applicant contends that it has about 19.4% voting share in the CoC and that the recoveries in the Resolution Plan is

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not commensurate with its voting percentage. The Bench here would like to mention that there is no provision in the Code which mandates that a Financial Creditor is to be compensated in the ratio of percentage of its voting share as a CoC member. It is a settled law that the amount offered by the prospective Resolution Applicant to the CoC members is a matter of deliberation, discussion and depends on the market forces where the acceptance, rejection, any amendment depends on the CoC's commercial wisdom and such decision is non-justiciable. It should be appreciated here that the decision of distribution among the CoC members is within the ambit of the commercial wisdom and the collective decision of the CoC. All that the Adjudicating Authority is to see here is, whether the Resolution Plan provides for :-

- (i) The payment of insolvency resolution process costs in a specified manner in priority to the repayment of other debts of the Corporate Debtor,
- (ii) The repayment of the debts of Operational Creditors in prescribed manner,
- (iii) The management of the affairs of the Corporate Debtor,
- (iv) The implementation and supervision of the resolution plan,
- (v) The plan does not contravene any of the provisions of the law for the time being in force,
- (vi) Confirms to such other requirement as may be specified by the Board.

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6. The Bench notes that all of this has been followed in the Resolution Plan while taking a decision on the Resolution Plan by the CoC and the Resolution Professional. The Adjudicating Authority cannot overstep the decision of the CoC which has the prerogative with the requisite majority to decide on the *inter se* distribution among the Creditors based on commercial wisdom of the majority of creditors who determine through negotiations with the prospective Resolution Applicant as to how and in what manner the corporate resolution has to take place.
7. Moreover, the Bench notes that since the Applicant has abstained from voting on the Plan, the vote is treated as 'negative/ dissenting' and accordingly in terms of Section 53 of the Code the dissenting Financial Creditors are to be offered their respective liquidation value which is 'NIL' for the Applicant in the present case. However, the Applicant in the Resolution Plan has been offered Rs.10 Lakh which is more than the liquidation value of 'NIL'.
8. In this regard reliance has been placed by the Applicant on the decision of Hon'ble Supreme Court in the case of *Kalparaj Dharamshi & Anr versus Kotak Investment Advisors Ltd & Anr* [Civil Appeal Nos 847-848; 2929-2950 and 3138-3139 of 2020] wherein it has referred to the Bankruptcy Law Reforms Committee ('BLRC / Committee') Report of 2015 and held at para 138 as under:-

"138. The committee also expressed the opinion, that there should be freedom permitted to the overall market, to propose solutions on keeping the entity as a going concern. The

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Committee opined, that the details as to how the insolvency is to be resolved or as to how the entity is to be revived, or the debt is to be restructured will not be provided in the I&B Code but such a decision will come from the deliberations of CoC in response to the solutions proposed by the market.”

- 8.1. Another relevant extracts of the decision of the Hon'ble Supreme Court in *Kalpraj Dharamshi & Anr versus Kotak Investment Advisors Ltd & Anr* [supra]

“141. After considering the judgment of this Court in the case of Arcelormittal India Private Limited vs. Satish Kumar Gupta and others and the relevant provisions of the I&B Code, this court further observed in K. Shashidhar (supra) thus:

....

Besides, the commercial wisdom of CoC has been given paramount status without any judicial intervention, for ensuring completion of stated processes within the timelines prescribed by the I&B Code. There is an intrinsic assumption that financial creditors are fully informed about the viability of the corporate debtor and feasibility of the proposed resolution plan. They act on the basis of thorough examination of the proposed resolution plan and assessment made by their

team of experts. The opinion on the subject matter expressed by them after due deliberations in CoC meetings through voting, as per voting shares, is a collective business decision. The legislature, consciously, has not provided any ground to challenge the “commercial wisdom” of the individual financial creditors or their collective decision before the adjudicating authority. That is made nonjusticiable.

142. This Court has held, that it is not open to the Adjudicating Authority or Appellate Authority to reckon any other factor other than specified in Sections 30(2) or 61(3) of the I&B Code. It has further been held, that the commercial wisdom of CoC has been given paramount status without any judicial intervention for ensuring completion of the stated processes within the timelines prescribed by the I&B Code. This Court thus, in unequivocal terms, held, that there is an intrinsic assumption, that financial creditors are fully informed about the viability of the corporate debtor and feasibility of the proposed resolution plan. They Act on the basis of thorough examination of the proposed resolution plan and assessment made by their team of experts. It has been held, that the opinion expressed by CoC after due

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deliberations in the meetings through voting, as per voting shares, is a collective business decision. It has been held, that the legislature has consciously not provided any ground to challenge the "commercial wisdom" of the individual financial creditors or their collective decision before the Adjudicating Authority and that the decision of CoC's 'commercial wisdom' is made nonjusticiable."

9. In view of the above, **IA 931/2021** filed by the Applicant, in CP(IB)-4513/MB/2018 is **not allowed** and **"dismissed"**.

Sd/-
Chandra Bhan Singh
Member (Technical)

Sd/-
Suchitra Kanuparthi
Member (Judicial)