

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
NEW DELHI, COURT-III**

IA-5421/2023  
In  
IB-1348(ND)/2019

**IN THE MATTER OF IB-1348(ND)/2019:**

M/s. NISUS FINANCE & INVESTMENT MANAGERS LLP & Anr.

..... **Financial Creditors**

**Versus**

M/s. EARTHCON UNIVERSAL INFRATECH PRIVATE LIMITED

..... **Corporate Debtor**

**AND IN THE MATTER OF IA-5421/2023:**

M/s. NIRALA PROJECTS PRIVATE LIMITED

..... **Applicant**

**Versus**

Mr. GAURAV KATIYAR & 4 Ors.

..... **Respondents**

**Order Pronounced On: 09.04.2024**

**CORAM:**

**SHRI ATUL CHATURVEDI  
MEMBER (TECHNICAL)**

**SHRI BACHU VENKAT BALARAM DAS  
MEMBER (JUDICIAL)**

**PRESENT:**

For the Applicant :  
For the Respondents : Mr. Rishabh Jain, Adv. for RP and Mr. Gaurav  
Katiyar, RP in person

**ORDER**

**PER: ATUL CHATURVEDI, MEMBER (TECHNICAL)**

1. The present Application has been filed by Mr. Pankaj Thakur, the Applicant under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 being aggrieved by the mischievous and fraudulent conduct of the Resolution Professional of the Corporate Debtor. The Applicant seeks the following reliefs:

*“1. Issue directions to the Committee of Creditors of the Corporate Debtors to re-evaluate the Resolution Plan submitted by the Applicant in*

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*accordance with Section 30(2) of the Code and to put it for voting by the Committee of Creditors after confirming that the Resolution Plan submitted by the Applicant herein complies with Section 30(2) of the Code.*

*2. Pass such other or further order/s which may be deemed fit and proper by this Hon'ble tribunal in the interest of Justice.”*

## **2. Brief Background of the Case:**

The facts that are relevant for the determination of the issues involved in this application are stated as under:

- i.** An application under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("IBC") was filed by the Financial Creditors i.e. M/s. Nisus Finance & Investment Managers LLP & Anr., against the Corporate Debtor i.e. M/s. Earthcon Universal Infratech Private Limited and the said application was admitted by this Adjudicating Authority vide order dated 08.11.2020 and a moratorium was declared including the appointment of Mr. Jitendra Arora as an Interim Resolution Professional. Subsequently, the present Respondent namely Mr. Gaurav Katiyar was confirmed as Resolution Professional.
- ii.** The Resolution Plan was submitted by the Successful Resolution Applicant namely Consortium of M/s. D. S. Infraheights Private Limited and M/s. Anand Buildtech Private Limited which was approved by the CoC in its 26<sup>th</sup> meeting dated 19.08.2023 by 70.18% voting share in respect of the CIRP of the Corporate Debtor after considering its feasibility and viability. Thereafter, Mr. Gaurav Katiyar, the Resolution Professional of M/s. Earthcon Universal Infratech Private Limited submitted an IA-4466/2023 for seeking approval of the Resolution Plan under Section 30(6) read with Section 31 of IBC, 2016 on 22.08.2023, which is pending adjudication before this Adjudicating Authority.

### **3. Submissions of the Applicant:**

- i.** The Applicant submitted that the Resolution Professional has derelict upon his duties cast on him by IBC, 2016. It was the duty of the Resolution Professional to represent and act on behalf of the Corporate Debtor with third parties, exercise rights for the benefit of the Corporate Debtor in judicial, quasi-judicial or arbitration proceedings. However, without considering the benefits or losses caused to the Corporate Debtor, the Resolution Professional in connivance with the successful Resolution Applicant decided to favor the successful Resolution Applicant and discriminated against other Resolution Applicants like the Applicant herein.
- ii.** It is submitted that the Resolution Plan is in contravention of Section 30 (2) of the IBC, 2016, which contravenes the provision of law as there was procedural irregularity about the conduct of the proceedings in relation to the CoC. The Resolution Professional has wrongfully favored the Successful Resolution Applicant in approving his Resolution Plan and rejecting the Applicant's plan.
- iii.** The Resolution Professional while conducting the process of CIRP in respect of the Corporate Debtor has not ensured that a level playing field for all the Resolution Applicants is made available. The rules of the game have been purposely, deliberately, and suitably amended/changed as per the whims and fancies of the Resolution Professional.
- iv.** It is submitted that two Resolution Applicants participated in the CIRP of the Corporate Debtor. The Applicant herein, after meeting with the technicalities and prerequisites insofar as the Resolution Plan of the Applicant is concerned presented the Resolution Plan of the Applicant for consideration and perusal of the members of the CoC. The Resolution Plans were floated for voting in the 26<sup>th</sup> COC meeting, the Resolution Professional, in active collusion and concert with the

successful Resolution Applicant mischievously and with malice intention proceeded to append a comment under the nomenclature of "non-compliant".

- v. A bare perusal of the Resolution Plans including the plan filed by the Applicant and the Successful Resolution Applicant, when juxtaposed to each other, would demonstrate and reveal that different yardsticks have been purposely adopted by the Resolution Professional to make the Applicant's plan as a non-compliant while with the same and similar conditions, the plan by the Successful Resolution Applicant as 'compliant'.

#### **4. Submissions of the Respondent No. 1:**

- i. The Respondent No. 1/Resolution Professional has filed a reply affidavit denying the allegations made by the Applicant and stated that during the CIRP, the Applicant submitted a non-compliant Resolution Plan and despite objections raised by the Resolution Professional, the Applicant did not rectify/amend the plan.
- ii. The proposed Resolution Plan of the Applicant was put to vote before the CoC as a non-compliant plan which was rejected by the CoC with 100% voting share. The Respondent relied on the judgment passed by the Hon'ble NCLAT in the matter of **M.K. Rajgopalan v. S. Rajendran & Anr.** [Company Appeal (AT)(CH) (INS) No. 58 of 2023], wherein the Hon'ble NCLAT held that

*"31. On a careful consideration of the respective contentions advanced on either side, this 'Tribunal', keeping in mind of a vital fact that the 'Petitioner / Appellant', being an 'Unsuccessful Resolution Applicant', has no 'Locus', to 'assail' a 'Resolution Plan' or its 'implementation', coupled with a candid fact that he is not a 'Stakeholder', as per Section 31 (1) of the I & B Code, 2016, in relation to the 'Corporate Debtor', this 'Tribunal', without any 'haziness', holds*

*that the 'Petitioner / Appellant', is not an 'Aggrieved Person', coming within the ambit of Section 61 (1) of the I & B Code, 2016, especially, when he is not a 'Privy', to the 'Resolution Plan'. Viewed in that perspective, the 'Leave', sought for in IA No. 215 of 2023 in Comp. App (AT) (CH) (INS.) No. 58 of 2023, sans merits."*

- iii.** It is submitted by the Respondent that the rejection of Applicant's Resolution Plan by CoC is in the realm of commercial wisdom of CoC and cannot be interfered with by this Adjudicating Authority.
- iv.** It is the case of the Respondent that the amended Plan or affidavit did not provide for the distribution of benefit of PUFÉ transactions among the creditors/stakeholders of the Corporate Debtor. Therefore, the proposed Resolution Plan of the Applicant herein was marked as "Non-Compliant" at the time of e-voting. Further, equal opportunities were provided to the Applicant (Unsuccessful Resolution Applicant) and Successful Resolution Applicant. The Successful Resolution Applicant sincerely addressed all the queries/observations of the Resolution Professional and amended his proposed resolution plan in a single opportunity.

#### **5. Analysis and Findings:**

- i.** We have heard the submissions of Ld. Counsel appearing for the Applicant as well as Ld. Counsel appearing for the Respondents. We have also perused the records.
- ii.** The Hon'ble Supreme Court in the matter of **K. Sashidhar Versus Indian Overseas Bank & Ors.** reported in (2019) 12 SCC 150 has held that the commercial decision of CoC is non-justiciable.
- iii.** In light of the above-quoted judgement, it is clear that the "Commercial wisdom of CoC" is given paramount status.
- iv.** Admittedly, the proposed Resolution Plan of the Applicant (Unsuccessful Resolution Applicant) was put to vote before the CoC as a non-

compliant plan which was rejected by the CoC with 100% voting share. Hence, this Adjudicating Authority is not endowed with the powers of jurisdiction or authority to analyse or evaluate the commercial decision of the CoC.

- v. The members of the CoC are the best judges of their interest, fully conversant with market trends, and therefore, their decision should not be interfered with by this Adjudicating Authority for the reason that it is not a part of the judicial function to examine their commercial decisions.

6. In view of the above facts and circumstances and the foregoing discussion. It is accordingly ordered as follows:

- i. The Application bearing **IA-5421/2023** filed by the Applicant is **dismissed**.
- ii. The Registry is directed to send a copy of this order to the Insolvency and Bankruptcy Board of India for their record.

Sd/-  
**(ATUL CHATURVEDI)**  
**MEMBER (TECHNICAL)**

Sd/-  
**(BACHU VENKAT BALARAM DAS)**  
**MEMBER (JUDICIAL)**