IN THE NATIONAL COMPANY LAW TRIBUNAL
KOCHI BENCH

I.A.(IBC) No. 46/KOB/2021

In

IA(IBC)/13/KOB/2021 in TIBA No.11/KOB/2019

(Under Section 60(5) © of IBC, 2016 and Rule 32 of NCLT Rules, 2016)

Date of decision: 22nd February, 2021

CORAM

HON'BLE MR. ASHOK KUMAR BORAH, MEMBER (JUDICIAL)

Applicant/Petitioner:

Dr. Vijay Radhakrishnan
R/o 4D, Express Estate Next to AJ Hall,
Kaloor, Ernakulam-682017, Kerala

Versus

Respondents/Resolution Professional:

Shri Bijoy P Pulipra, CS
Resolution Professional, PVS Mmorial Hospital Pvt.Ltd
Ground Floor, TC-11/789(1), Vayal Road
(Plamoodu Nalanda Junction Road)
Nanthancode, Kowdiar PO, Kerala-695003.

Parties/Counsel appeared (through Video Conferncing)

For applicant : Mr.Sankar P Panicker, Advocate
For Respondent : Mr.Bijoy Prabhakaran Pulipra, RP

O R D E R

This IA (IBC) 46/KOB/2021 has been filed by Dr. Vijay Radhakrishnan, a doctor by profession who was working with PVS Memorial Hospital against the Resolution Professional seeking the following reliefs:

(i) *To reject the recommended Resolution Plan as the same is not complying with Regulation 35(a), 35(b) and 35(c) of CIRP regulations and Section 30(2)9f) of IBC 2016 and infringes the fundamental rights enshrined under the Constitution of India thereby not complying with Section 30(2)() of the IBC 2016.*

(ii) *To pass an order rejecting the Valuation report issued by Shri R,K. Patel as it is prepared negligently without any care and caution. To appoint another valuer for land and building for complying with Regulation 35(a), 35(b) and 35(c) of CIRP Regulations.*

(iii) *To pass order directing the RP and CoC to reconvene the meeting to comply with the provisions of IBC 2016 and CIRP regulations upholding the fundamental rights enshrined under the Constitution of India and arrive at a value of Resolution Plan which balances the interest of all stakeholders.*

2. The applicant states that he is the POA holder of 46 doctors who were also working with the said Hospital. This tribunal vide order dated 16.11.2019 in TIBA No.11/KOB/2019 has initiated Corporate Insolvency Resolution Process (CIRP for short) against M/s PVS Memorial Hospital Private Limited. The Committee of Creditors (Hereinafter referred to as CoC) in their 27th Meeting held on 26th December, 2020 had approved the Resolution Plan of the Resolution Applicant M/s Lissie Medical Institution (Herein after referred as RA).

3. It is stated in the I.A that even though the Corporate Debtor (CD for short) was not functioning for more than two years, as per the orders of Government of Kerala under the Disaster Management Act, 2005, the hospital was used as Covid Care Centre for which the State Government made it operational spending a huge

amount. As per the CoC Approved Plan, the employees of CD would get 99.29% of their admitted claim, whereas, the other operational creditors other than employees and workmen would get only 2.34% of the admitted claim. This category of creditors include 44 creditors having admitted claims to the tune of Rs 13,01,55,.997/- (Rupees Thirteen Crores, one lakh fifty five thousand nine hundred and ninety seven only) who have rendered healthcare services to the patients visiting the CD on the basis of a consultancy basis. The nature of services rendered by applicant herein is similar to the nature of employees of the CD. The applicant herein is a qualified professional doctor who attend the patient (both patients and outpatients) on a daily basis like a normal employee. The only notable distinction on finance and accounting perspective is that in the case of employees, there will be deduction of the money towards Provident Fund and Employees State Insurance, whereas in the case of consultant doctor, like applicant, there will be deduction towards tax at source (TDS).

4. It is the contention of the applicant that inequitable provision made in the Plan by way of discriminating the employee doctors and consultant doctors, the resolution plan submitted by RA and approved by the CoC violated article 14 of the Constitution of India and hence cannot be considered in compliance with all the prevailing laws for the time being in force as referred under Section 30(2)(e)of IBC 2016. In this context, the applicant has referred to a decision of the Hon’ble Bombay High court in the case **CIT Vs. Grant Medical foundation**

(Ruby Hall Clinic) in which it was held that in a case where doctors were paid fixed remuneration and tenure, the amount paid to such doctors constitutes salaries. To decide the relationship of employer and employee, it was to be examined whether the contract entered into between the parties was 'contract for service' or 'contract of service’.

5. It is his further contention that there are anomalies observed in the valuation report submitted by one of the Registered valuer shri R.K. Patel, which warrants to be rejected. The report essentially refers to the matter of Galaxy Cotton & Textiles Private Limited. The average fair value per cent of the land has been reported at Rs. 48.56 lakhs by Shri Patel, whereas the report given by Shri Tom Panikulam, value per cent is Rs 42 lakhs, 22.50 lakhs, 15 lakhs, 11.25 lakhs for the different survey numbers. Even if the maximum value Viz, 42 lakhs given in the report of Shri Tom is adopted for comparison, the variance is about 15.62%. The Rupee value of the difference of Rs 6.5 lakhs per cent for 114 cents would amount to Rs 7.14 crores. The valuation was done during the period (between 30 January 2020 to 25 February 2020), when hospital facility was literally in a stand still as there were no operations in the CD. However, the Resolution Plan was submitted by the RA on 1.10.2020, while the Government of Kerala spent huge amount to put the hospital back in action. Therefore, if a fresh valuation is taken on the current circumstances, the entire valuation would prove to be totally different.

6. It is further stated that while the average Fair value of the Land and Building is Rs. 161.95 Crores and the average Liquidation Value of Land and Building is Rs 121.32 Crores, the value as per Resolution Plan is only Rs 126 crores, which is just above the Liquidation Value. This is clearly kept with the ulterior motive to show "namesake compliance", whereas in reality the real value of the asset with Government's infusion of funds is even far more than the average fair value viz., Rs. 161.95 crores. The Resolution Plan submitted based on the above Valuation Report will only be beneficial to the RA instead of all the stakeholders. This recommended Resolution Plan fails the test of resolving the insolvency, instead it takes the character of distress selling of the assets to meet the ends only three stakeholders viz., a section of Financial Creditors, Employees and workmen and the Resolution Applicant. Since the CIRP was conducted and concluded during the period of COVID lockdown, where there was only one bidder, with the support of a faulty and negligent Valuation Report where the variation in value of land alone was more that 15.62%, the objective of the IBC 2016, which is maximising the stakeholders wealth with appropriate price discovery has not been achieved.

7. As per Section 31(1) of the IBC 2016, this Tribunal being the Adjudicating Authority is to satisfy and confirm whether Section 30(2) of the IBC 2016 is complied with before approving the Resolution Plan. In the matter under consideration, mandatory provisions of Regulations have not been complied with.

8. In view of the aforesaid reasons, the applicant seeks to reject the Resolution Plan or refer back for review by CoC in the interest of the stake holders.

9. The Resolution Professional (Respondent) filed a counter opposing the contentions raised by the applicant and denying all the averments made in the application, except those which are specifically admitted. It is true that the Government of Kerala taken over the hospital for Covid Care centre under the Disaster Management Act, 2005. However, the averments that the Government invested crores of money to make it operational is not correct, as the respondent is not aware of such things done in the hospital. Bald allegations were made stating that the Resolution Plan approved by the CoC is without following the proper procedure and the regulations. The related parties shall stand subordinated to other creditors and stand extinguished upon approval of the Resolution Plan by the adjudicating Authority.

10. The Resolution Applicant had devised the distribution waterfall after taking into account the order of priority amongst creditors as laid down in Sub-Section (1) of Section 53, including the priority and value of the security interest of a secured creditor in line with the Code. However, the Resolution Plan reserves an amount of Rs. 1,00,00,000/- (Rupees One Crore Only) for distribution to the operational creditors and unsecured financial creditors of the Corporate Debtor)

11. The averments regarding the balancing of interest due to non allocation of plan amount on percentage is denied. With regard to the contention of violation of Article 14 of the Constitution of India, the Respondent submitted that Hon'ble Supreme Court in WRIT PETITION (CIVIL) NO. 99 OF 2018 in the matter of **Swiss Ribbons Private Limited** had held that classification between various class of creditors is neither discriminatory, nor arbitrary, nor violative of Article 14 of the Constitution of India.

12. The Applicant is a not a full time employee of the CD and his name is not entered in the muster rolls of the corporate debtor as “Employee”. The applicant was acting as consultant of the Corporate Debtor and the Corporate Debtor done the Tax Deduction at Source while paying the wages. There is no employment contract between the Applicant and the Corporate Debtor. Hence there is a clear demarcation between the Doctors who were the employees and doctors who were the consultants. There is no discrimination or arbitrariness among the claimants and the claims are admitted based on the claim forms submitted by the Applicant. The Respondent had not classified the Applicant doctors as "Operational Creditors". Respondent had arrived at the classification of the Creditors based on the nature and type of claim forms submitted by the Claimants. The Applicant has submitted his claim in Form B specified under the CIRP Regulations. The Form B filed by the Applicant under

Regulation 7 of IBBI (CIRP) Regulations are "proof of claim by operational creditors except workmen and employees.

13. The valuation was done by two independent Registered Valuers registered with the IBBI under the Companies (Registered Valuers and Valuation) Rules, 2017 and the fair value and the liquidation value of the Corporate Debtor was computed in accordance with internationally accepted valuation standards, after physical verification of the inventory and fixed assets of the Corporate Debtor. The fair value and the liquidation value of the Corporate Debtor arrived at by both groups of Registered Valuers were not significantly different and, therefore, there was no requirement to appoint another Registered Valuer by the Respondent to submit an estimate of the value computed in the same manner. The Registered Valuers are independent professionals and valuation of the Corporate Debtor was arrived at by adopting the most appropriate method with reference to the nature of the asset and the data available to arrive at the fair value and the liquidation value on the valuation date. The value arrived at by the Registered Valuers are only *"estimates' and the same cannot be construed as the accurate value of the Corporate Debtor. Regulation 27 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 clearly provides for the criteria of independence of the Registered Valuers and the said appointments are made in accordance with the said Regulations. The respondent referred to a

judgment of the Hon'ble Supreme court in **Maharashtra Seamless Limited vs. Padmanabhan Venkatesh & Ors. (Civil Appeal No. 4242 of 2019)** in which it was categorically held that the "object behind prescribing the valuation process is to assist the Committee of Creditors ("CoC") to take decision on a Resolution Plan properly and there is no statutory mandate under the Code that the bid of the Resolution Applicant should match the liquidation value arrived at in accordance with Regulation 35 of the CIRP Regulations. The relevant para of which are quoted below:

> 26. No provision in the Code or Regulations has been brought to our notice under which the bid of any Resolution Applicant has to match liquidation value arrived at in the manner provided in Clause 35 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. This point has been dealt with in the case of Essar Steel (supra). We have quoted above the relevant passages from this judgment.
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> 27. It appears to us that the object behind prescribing such valuation process is to assist the CoC to take decision on a resolution plan properly. Once, a resolution plan is approved by the CoC, the statutory mandate on the Adjudicating Authority under Section 31(1) of the Code is to ascertain that a resolution plan meets the requirement of sub-sections (2) and (4) of Section 30 thereof. We, per se, do not find any breach of the said provisions in the order of the Adjudicating Authority in approving the resolution plan.

Respondent received the valuation reports from the Registered Valuers during May, 2020. The value arrived at by the Registered Valuers are mere guiding light to the CoC to take a commercial decision and the said estimated values are not binding on the CoC. The 15.92% variance in the value of the land in two reports is not a significant variation as-the Fair Value and Liquidation Value has been arrived at based on many other factors. The Applicant made a bald allegation of "namesake compliance" without providing any proof of the same. The Applicant has made a mere guess work on government investment and demands for revaluation without any merits.

14. Section 31(1) of the Code lays down in clear terms that for final approval of a Resolution Plan, the Adjudicating Authority has to be satisfied that the requirement of Sub-Section (2) of Section 30 of the Code has been complied with. The proviso to Section 31(1) of the Code stipulates the other point on which an Adjudicating Authority has to be satisfied. In the case of Committee of Creditors of ***Essar Steel India Limited vs. Satish Kumar Gupta, decided on 15th November, 2019 in Civil Appeal Nos. 8766-8767 of 2019 (2019 SCC Online SC 1478).)*** it was held that the scope of interference by the Adjudicating Authority is limited judicial review.

15. Under Section 30(2) of the IBC the Adjudicating Authority cannot interfere with the commercial wisdom of the Committee of the creditors. The two appointed registered valuers who were registered with the IBBI under the Companies (Registered valuers and valuation) Rules, 2017 were appointed in order to determine the fair value and the liquidation value of the Corporate Debtor in accordance with Regulation 35 and the fair value and the liquidation value of the Corporate Debtor was computed in accordance with internationally accepted valuation standards, after physical verification of the inventory and fixed assets of the Corporate Debtor. The fair value

and the liquidation value of the Corporate Debtor arrived at by the Registered Valuers were not significantly different and therefore, there was no requirement to appoint another Registered Valuer by the Resolution Professional to submit an estimate of the value computed in the same manner. From the above. it is clear that the Respondent had duly complied with the provisions of Regulation 27 and 35 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

16. It is the duty and responsibility of the Resolution Professional to strictly adhere to the timelines specified under the Code. Section 31(1) of the Code lays down in clear terms that for final approval of a Resolution Plan, the Adjudicating Authority has to be satisfied that the requirement of Sub-Section (2) of Section 30 of the Code has been complied with.

17. This Tribunal heard the arguments advanced by the learned counsel for the applicant and the Resolution Professional who appeared in person, through video conferencing.

18. The only question to be decided is as to whether the applicant is eligible to get the reliefs to reject the Resolution Plan submitted by the Resolution Applicant M/s Lissie Medical Institutions and also to reject the valuation report filed by Mr.R.K. Patel and to appoint another valuer convening another CoC.?

19. The bare reading of the history of the case mentioned above makes it crystal clear that the Resolution Professional took all steps as per the provisions

of IBBI Regulations, before submitting the Resolution Plan to the CoC for its approval. Thereafter, only after the approval of CoC, the Resolution Professional filed the Resolution Plan for approval of this Adjudicating Authority. It is seen that wide publicity has been made inviting Expression of Interest for getting a prospective Resolution Applicant, so that the maximum value be received for the Corporate Debtor's properties. If the contention of the applicant is accepted, a question arises here why any other interested persons, who can offer a more valued Resolution Plan than the present one has not come forward to submit a Resolution Plan. The technical stags stated by the applicant that one of the valuer assessed a less value and other valuer has given a good value cannot be accepted. The value assessed by both the valuers are more or less same, except few difference in the value. The resolution professional has not accepted the value given by Mr. Patel only. He has computed the value in accordance with the internationally accepted valuation standards, after physical verification of the fixed assets of the Corporate Debtor. The fair value and value arrived at by both groups of the registered valuers were not significantly different. Hence, he has not appointed a fresh valuer. In this respect the decision rendered in the case **Maharashtra Seamless Limited vs. Padmanabhan Venkatesh & Ors. (Civil Appeal No. 4242 of 2019** is relevant in which it is stated that:

> *"Object behind prescribing the valuation process is to assist the Committee of Creditors ("CoC") to take decision on a Resolution Plan properly and there is no statutory mandate under the Code that the bid of the Resolution Applicant should match the liquidation*

> *value arrived at in accordance with Regulation 35 of the CIRP Regulations."*

20. This Tribunal finds that the Resolution Professional had complied with the provisions of Regulation 27 and 35 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, before arriving at a decision to place the Resolution Plan before the CoC. The CoC approved the Resolution Plan with 100% voting right for approval by the Adjudicating Authority. Under Section 31(1) of the Code, for final approval of a Resolution Plan, the adjudicating authority has to be satisfied that the requirement of Sub Section (2) of Section 30 of the code has been complied with. On a verification of the Resolution Plan submitted by M/s Lissie Medical Institutions it is seen that requirement of Sub-Section (2) of Section 30 has been followed before submitting the Resolution Plan for the approval of the Adjudicating Authority. Section 31(1) of the Code lays down in clear terms that for final approval of a Resolution Plan, the Adjudicating Authority has to be satisfied that the requirement of Sub-Section (2) of Section 30 of the Code has been complied with. The proviso to Section 31(1) of the Code stipulates the other point on which an Adjudicating Authority has to be satisfied. In the case of Committee of Creditors of ***Essar Steel India Limited vs. Satish Kumar Gupta, decided on 15th November, 2019 in Civil Appeal Nos. 8766-8767 of 2019 (2019 SCC Online SC 1478).)*** it was held that the scope of interference by the Adjudicating Authority is limited judicial review. The relevant portion of para 46 of the said judgment is quoted below:

46…………This being the case, judicial review of the Adjudicating Authority that the resolution plan as approved by the Committee of Creditors has met the requirements referred to in Section 30(2) would include judicial review that is mentioned in Section 30(2)(e), as the provisions of the Code are also provisions of law for the time being in force. Thus, while the Adjudicating Authority cannot interfere on merits with the commercial decision taken by the Committee of Creditors, the limited judicial review available is to see that the Committee of Creditors has taken into account the fact that the corporate debtor needs to keep going as a going concern during the insolvency resolution process; that it needs to maximise the value of its assets; and that the interests of all stakeholders including operational creditors has been taken care of. If the Adjudicating Authority finds, on a given set of facts, that the aforesaid parameters have not been kept in view, it may send a resolution plan back to the Committee of Creditors to re-submit such plan after satisfying the aforesaid parameters. The reasons given by the Committee of Creditors while approving a resolution plan may thus be looked at by the Adjudicating Authority only from this point of view, and once it is satisfied that the Committee of Creditors has paid attention to these key features, it must then pass the resolution plan, other things being equal.

21. In this respect, it is worthwhile to note that when the Resolution Professional has filed the Resolution Plan before this Tribunal, on a Caveat Petition, this applicant was also heard on 28.1.2021 and he has been given time to make his objection, if any, and the pronouncement of the approval of the Resolution Plan was fixed on 22.2.2021. However, the applicant approached with this IA only on 12.2.2021 (after curing the defects), ie., the last moment when the Plan is to be approved. It seems, this is only a delaying tactics putting hurdle in the process of approval of Resolution Plan by this Adjudicating Authority, which cannot be accepted. As rightly stated by the Resolution Professional, that if the applicant is aggrieved by the Resolution Plan approved by this Tribunal, under Section 61(3) the applicant can very well have the remedy of appeal before the appropriate forum for redressal of his grievances. In view of the pronouncements of the Hon'ble Supreme Court and the Hon'ble

NCLAT, as stated earlier in this order, this Tribunal cannot entertain the claim put forward by the applicant herein for rejection of the Resolution Plan at this stage.

22. For the aforesaid reasons, this Tribunal do not find any convincing reason to interfere with the request of the respondent Resolution Professional for approving the Resolution Plan. Hence, **IA(IBC) 46/KOB/2021 stands dismissed**. No order as to costs.

Dated the 22nd day of February, 2021

Sd/-

(Ashok Kumar Borah)

Member (Judicial)