IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH, COURT NO. II
KOLKATA

I.A. (IB) No. 1470/ KB/ 2023
In
Company Petition (IB) No. 302 /KB/ 2021

An application under Section 60 (5) of the Insolvency and Bankruptcy Code, 2016 read with Rule 11 of the National Company Law Tribunal Rules, 2016.

IN THE MATTER OF:

YES BANK LIMITED, … Financia Creditor.

Verses

M/S. SARGA HOTEL PRIVATE LIMITED, … Corporate Debtor.

And

IN THE MATTER OF:

KANORIA ENERGY & INFRASTRUCTURE LIMITED
(ERSTWHILE INFRASTRUCTURE LIMITED), … Applicant.

Verses

AVISHEK GUPTA (RESOLUTION PROFESSIONAL), … Respondent.

Date of Hearing: October 19, 2023.

Date of Pronouncement: November 09, 2023.

CORAM:

SMT. BIDISHA BANERJEE, MEMBER (JUDICIAL)

SHRI ARVIND DEVANATHAN, MEMBER (TECHNICAL)

Appearance (via video conferencing/physically)

For Resolution Professional:

1. Mr. Ramji Srinivasan, Sr. Adv.

2. Ms. Manju Bhuteria, Adv.

3. Mr. Sourojit Dasgupta, Adv.

4. Ms. Arundhati Burman, Adv.

5. Mr. Souvik Majumdar, Adv.

For COC:

1. Mr. Abhinav Vasisht, Sr. Adv.

2. Mr. Arindam Mrinal Pal, Adv.

3. Ms. Adwitya Das, Adv.

4. Mr. Pramit Chakraborty, Adv.

For Applicant in IA (IB) No. 1470/KB/2023:

1. Mr. Jishnu Saha, Sr. Adv.

2. Ms. Urmila Chakraborty, Adv.

3. Mr. Dripto Majumder, Adv.

4. Mr. Niraj Shukla, Adv.

O R D E R

Per: Arvind Devanathan, Member (Technical)

1. This Court is congregated through hybrid mode.

2. Heard the learned Counsel for the parties.

3. This instant application is filed by the **Kanoria Energy & Infrastructure Limited (Erstwhile Infrastructure Limited),** hereinafter referred to as the "Applicant" against the **Mr. Avishek Gupta, Resolution Professional** of the **Sarga Hotel Private Limited** under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 seeking the following direction as;

(a) *Pass an order thereby directing the Respondent/ RP to consider the Resolution Plan of the Applicant dated April 11, 2023 as is revised on May 23, 2023 and table it before the CoC for its evaluation; and*

(b) *Pass any other order may deem fit and proper.*

4. Brief facts of the case:

4.1. Sarga Hotels Private Limited, the Corporate Debtor (hereinafter referred to as CD) was put to Corporate Insolvency Resolution Process (CIRP) by the Financial Creditor, Yes Bank Limited and the same was initiated based on the National Company law Tribunal's order dated 11th February, 2022. Mr. Avishek Gupta was appointed as Resolution Professional by CoC. Upon initiation of CIRP, Form-G in terms of Regulations 36A of IBBI (Insolvency Resolution Process for Corporate Person) Regulation, 2016, for inviting expression of interest was published.

4.2. The Applicant submitted its expression of interest on 28th May, 2022 and a draft Resolution Plan on 30th September, 2022, and a signed Resolution Plan on **11th April, 2023**. The applicant thereafter sent an email on 23rd May, 2023 to the Resolution Professional of the Corporate Debtor stating that in furtherance to the Resolution Plan submitted, the Applicant is now in a position to offer more favourable Financial Plan and, accordingly, conveyed his intention in enhancing the originally submitted plan on April 11th 2023, from Rs. 284 crores to rupees Rs. 310 crores.

4.3. The Applicant herein was corresponding with the Resolution Professional of Corporate Debtor and has sought final extension of time till 7th May, 2023 in the email dated 5th May, 2023 (which is in page number 24 of Reply to the Application) for submitting the revised Plan. The Applicant did not submit the revised plan on 7th May, 2023 as assured but instead sought time up to 11th May, 2023.

4.4. On 7th May, 2023 again the Applicant sent an email seeking time up to 14th May, 2023 instead of earlier request for 11th May, 2023. This request was placed before CoC and CoC granted one more day as last chance i.e., till 8th May, 2023 to submit the revised plan and this was communicated by the Respondent vide email dated in the morning hours of 8th May, 2023 which is in page 23 of the Reply.

4.5. The CoC, in its 14th Meeting held on 24/05/2023 considered the email sent by the Applicant sent on 23rd May, 2023 which conveyed the intention of enhancing the value from Rs. 284 crores to Rs. 310 crores and took a decision that the intent to enhance the offer contained in the email received well and long after the dead line of 8th May, 2023 need not be entertained.

4.6. Thereafter, e-voting of all four applications of the resolution plan including the applicant's resolution plan dated **11th April, 2023** was put to vote and resolution plan submitted by Successful Resolution Applicant, SEMPL was approved by COC with requisite voting share.

4.7. Being aggrieved by the decision of the CoC of not considering the email of the applicant which conveyed the intention to enhance the offer, this application has been filed before us for intervention and direction to the resolution professional to consider the resolution plan of the Applicant dated 11th April, 2023 as is revised on 23rd May, 2023 through an email and put it before CoC for reconsideration.

5. Submission by the Ld. Counsel for the Applicant:

5.1. The Ld. Counsel for the Applicant submitted that by virtue of the NCLT's order dated 10th January, 2023, the CIRP period got extended and the Resolution Professional of the CD got time till 6th July, 2023 to complete the CIRP and therefore, there was no pressing hurry for the RP and the CoC to go ahead with a plan with a lesser plan value.

5.2. It is further submitted that the principal objective of the Code is maximisation of wealth of the Corporate Debtor and the same has been compromised in this case by not considering his revised offer thru an email dated 23/5/2023.

5.3. The Ld. Counsel relied on the judgement rendered by the NCLT reported in ***2019 SCC Online NCLT 3677***, in the case of ***Andra Bank versus Oracle Textile Limited***. In this case, resolution professional rejected certain resolution plans due to delay in submission. However, placing reliance on the Honourable Principal Bench of NCLT rendered in the case of *Punjab*

National Bank versus Bhushan Power, NCLT allowed other two resolution plans which were received beyond the time line to be placed before CoC for reconsideration.

5.4. The Ld. Counsel also relied on the case law rendered by the NCLT in ***ICICI Bank versus Unimark Remedies***. In this case also, the Resolution Applicant had approached the Resolution Professional with a delayed proposal, but before approval of resolution plan. Keeping in view the objective of the Code which is the maximization of value of the Corporate Debtor the Tribunal allowed the applicant to submit his plan and directed the CoC to reconsider.

5.5. Ld. Counsel has also relied on the case law rendered by the Hon'ble NCLAT in ***Vistara ICTL versus Torrent Investments*** wherein the Hon'ble Tribunal held that Regulation 39 (1A) does not prohibit CoC from negotiating with the resolution applicants or asking resolution applicants for further increase in the plan value. It is contended that Regulation 39 (1B) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulation, 2016 is directory, in view of the judgements relied by him. Therefore, he submits that direction may be given to COC to consider the revised offer and put it for voting.

6. Submission by the Ld. Counsel for the Respondent, per contra:

6.1. Ld. Counsel submits that extension was granted to the applicant several times and final request was made to him submit his revised plan on or before 8th May, 2023. When they failed to submit the enhanced resolution plan on 8th May 2023, the resolution plan submitted by them on 11th April, 2023 was taken and put to vote along with other resolution plans as per the decision taken in 14th CoC meeting held on 24/5/2023.

6.2. It is the submission of the learned Counsel that even the email dated 23rd May, 2023 from the Applicant was not revised proposal of resolution plan but only an intent to enhance the plan value.

6.3. Learned Counsel further submits that the CoC was apprised of the email of the applicant dated 23rd May, 2023 and after detailed deliberation and discussion, the CoC Members took the decision to go ahead with already submitted plans and put it for voting. Ld. Counsel submits that from the records it is evident that CoC were of the view that unsolicited bid much beyond the timeline prescribed for submission of final resolution plan cannot be accepted even assuming that the e-mail which showed only intent to enhance the commercial offer be taken as a complete offer of revision of plan value.

6.4. Ld. Counsel further submitted that the case laws relied by the applicant are not relevant as those judgments were rendered before Regulation 39 (1) (1B) of the IBBI (Insolvency Resolution Proceccess for Corporate Person) Regulation, 2016 came in to an effect. He further relied on several case laws of the Hon'ble NCLAT including the judgments rendered in ***Kalinga Allied Industries Private Limited versus Committee of Creditors reported in 2022 SCC Online NCLAT 1618, Express Resorts and Hotels Limited versus Amit Jain, Resolution professional, Neesa Leisure Limited and Others reported in 2023 SCC Online NCLAT 97, Chhattisgarh Distilleries Ltd. versus Dushyant Dave (Resolution professional of Anand Distilleries PVT Ltd. reported in 2020 SCC Online NCLAT 1078, Shrawan Kumar Agarwal versus Rituraj Steel Private Limited 2020 SCC Online NCLAT 380, Unicorn Buildtech versus Aishwarya Mohan Gahrana Resolution Professional reported in 2021 SCC Online NCLAT 4546 and Steel Strips Wheels Ltd. versus Avil Menezes, Resolution Professional of AMW Autocomponent Ltd. and Others reported in 2022 SCC Online NCLAT 150***

to contend that no fresh consideration of any resolution plan can be entertained in the guise of maximization of value of assets of the CD under the facts and circumstances of this case.

6.5. Relying on the judgements cited above, he submits that maximisation ought to be within the specified timeline and in a time bound manner. The entire scope and objective of the Code would fail if the resolution process were protracted merely because there is another offer better than the approved offer after the time lines are over. The CoC need not consider such a plan received well beyond the timeline specified by the Committee of Creditors. He also relied on judgment in the matter of *ArcelorMittal India Private Limited versus Satish Kumar Gupta* wherein the Hon'ble Supreme Court in para 79 has observed that there is no vested right in the resolution applicant to have his resolution plan approved. Making these observations, the Hon'ble Supreme Court declined to interfere with the order passed by the Adjudicating Authority.

6.6. In view of the above submissions, the learned Counsel for the Respondent submitted that the present application filed by the applicant should not be entertained and be dismissed.

7. Analysis and findings:

7.1. The Corporate Debtor (CD) was put to Corporate Insolvency Resolution process by NCLT vide its order dated 11th February, 2022. As per Section 12 of the Code, the CIRP process should be completed within a period of 180 days from the date of admission of the application to initiate such a process. The maximum time given for completing the process is 330 days from the date of commencement of Insolvency. In the given case, period of 330 days was over on **10th Jan 2023** which got extended by an order of NCLT to **6th July 2023.** This itself is way beyond the 330 days i.e., prescribed by the Code.

7.2. Therefore, in pretext of maximization of wealth, if we allow this application, then equal opportunity should be given to other resolution Applicants too to enhance the value and the entire process will be time consuming and would derail the CIRP process further.

7.3. One of the main objectives of the Code is that Resolution of Corporate Persons Insolvency should be done in time bound manner apart from maximization wealth. It is the Intention of the code to put back the CD as a going concern at the earliest so that value of CD do not get eroded further due to delay in restoration of CD to normalcy.

7.4. The Hon'ble NCLAT in the case of ***Shrawan Kumar Agarwal versus Rituraj Steel Private Limited*****,** held that after approval of the resolution plan with the requisite majority in CoC, the Adjudicating Authority cannot interfere with the commercial wisdom of CoC or give any direction for rebidding for maximization of value of the Corporate Debtor. Interference in the business decision of the COC is not permissible in law.

7.5. We have gone through the judgments relied by the learned Counsel appearing for the Applicant/Respondent.

7.6. We find that the judgments relied by the Applicant have been rendered, prior to the introduction of 39 (1) (1B) of the IBBI (Insolvency resolution Process for Corporate Persons) Regulation, 2016.

7.7. As per 39 (1) (1B), the Committee shall not consider any resolution plan received after the time specified by the committee of creditors under Regulation 36 (b) or received from a person who does not appear in the final list of prospective resolution applicant or does not comply with the provisions of sub-Section (2) of Section 30.

7.8. In the given case, only an intent to enhance the offer was received by an e-mail dated 23rd May, 2023 by the Applicant. The Regulation provides that even when the resolution plan is received after the time specified by CoC the same shall not be accepted. When that being the case, the decision of CoC cannot be faulted as they gave several extensions to the Applicants to submit the revised plan.

7.9. It is not the case of the Applicant that his e-mail dated 23rd May, 2023 conveying intention to enhance the offer was not discussed in the 14th COC meeting.

7.10. In the 14th COC meeting held on 24th May, 2023, the Resolution Professional appraised the members of COC about the receipt of e-mail from the Applicant dated 23rd May, 2023 and only after detailed deliberation and discussions, the members accepted the resolution plans submitted already and put them for voting. Therefore, by respectfully following the several Judgements of Honourable NCLAT cited by the Ld. counsel for the respondent, we hold that decision of CoC in approving the plan of the successful resolution applicant need not be interfered. The relevant portion of the minutes of 14th CoC meeting reproduced herein as:

> **"***The RP team infomed the CoC members that vide email dated 23 May 2023 received at 10:52 PM, A Infrastructure Limited ("AIL") had proposed to revise their financial offer to the financial creditors from INR 284 Cr to INR 310 Cr. In their email, AIL has offered to pay an upfront (within 45 days from NCLT approval date) amount of INR 200 Cr and the balance payment of INR 110 Cr within a year from the NCLT approval date. It was brought to the notice of the CoC members that the resolution applicants were categorically asked to submit a final legally compliant plan on 8th May 2023, keeping the commercials same as on 11th April 2023. AIL was also informed by the RP team that if no revised final signed resolution plan was received by the stipulated timeline, their signed resolution plan as on 11th April 2023 will be considered final. AIL did not submit its revised final signed resolution plan by 8th May 2023. However, now, when the resolution plans are being put for voting, AIL has sent an unsolicited email proposing that it can increase its commercial offer. AIL email was then presented before the CoC for heir consideration and views. The representative of JCE stated that the RAs were given suficient time to submit a revised plan within a specific timeline. Further, AlL did not submit a signed plan within the prescribed timeline and, through the*

email dated 23 May 2023, it has just shown an intent to change their commercial offer after a substantial delay post 8th May 2023 and that too when CoC was considering the resolution plans for voting. It was also observed that the timing of the email received from AIL indicates that AIL knew about the proposed voting on the resolution plans by the CoC even though the agenda for the CoC meeting was confidential and shared only with the CoC members and the suspended board (as participants in the CoC meeting). Further, there appeared to be striking similaritics between the revised proposal submited by AlL and the financial proposal contained in the resolution plan of the one of the RAs. Hence, it appears that confidential infornation is being leaked to AIL as well. The CoC also requested the RP and CoC legal counscls to share their views. Both the legal counscls stated that CIRP is a time bound process, and the R RAS were clearly informed to submit heir final plans by 8th May 2023. However, the final decision rests with the CoC members, After deliberation, it was decided by both the CoC members that the reviscd proposal fron AIL cannot be considered on account ofit being unsolicited, beyond the prescribed timelines and that too, only a mere proposal/ intent sent on an email on the eve of the CoC meeting convened to vote on the resolution plans.**"**

7.11. We also find no allegation of fraud or irregularity committed by the Resolution Professional or members of Committee of Creditors while approving the resolution plan of the successful resolution applicant.

8. In view of the analysis and findings, we are of the view that the application being **I.A. (IB) No. 1470/ KB/ 2023** filed by the Applicant is not maintainable and accordingly, **dismissed**.

9. Certified copy of this order may be issued, if applied for, upon compliance of all requisite formalities.

Arvind Devanathan
Member (Technical)

Bidisha Banerjee
Member (Judicial)

This Order signed on the 09th day of November, 2023.

Bose, R.K. [LRA]/ Sayon_Steno