



IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH : C-IV

MA-424/2019 in CP(IB)-197/MB/2018

Under Section 60(5) of the IBC, 2016

In the matter of

State Bank of India ...Applicant

v/s.

Amit Gupta & Ors. ...Respondents/

In the matter of

ICICI Bank ...Financial Creditor

v/s.

Unimark Remedies Ltd.

...Corporate Debtor

Order Pronounced on: **17.04.2023**

Coram:

Mr. Prabhat Kumar

Hon'ble Member (Technical)

Mr. Kishore Vemulapalli

Hon'ble Member (Judicial)

Appearances (via videoconferencing):

For the Applicant: Mr. Abdullah Qureshi, Advocate.

For the Respondents: Ms. Pooja Mahajan a/w Ms. Mahima Singh, Ms. Arveena Sharma & Mr. Jineshkumar Gandhi i/b Arihant Associates, Advocates. Mr. Amit Gupta, RP present in person. Mr. Vikram Nankani, Ld. Sr. Counsel, Mr. S. Das and Ms. Arushi Kaulaskar i/b Krishnamurthy & Co., Advocates.



ORDER

Per: Kishore Vemulapalli, Member (Judicial)

This is an Application filed by State Bank of India, a Financial Creditor of the Corporate Debtor, seeking an order from this Tribunal (i) to declare the decision of the CoC in the 14th meeting held on 26.12.2018 to distribute the additional Rs.10.00 crores offered by the Successful Resolution Applicant, amongst the Financial Creditors on the basis of charge on assets of the Corporate Debtor, as invalid owing to no legal sanctity to it and is discriminatory and (ii) to direct the CoC to distribute the same amount on a pro rata basis of the admitted claims of all the Financial Creditors.

Brief Facts of the Case:

1. The CIRP of the Corporate Debtor viz. Unimark Remedies Ltd. was commenced vide an admission order dated 03.04.2018 of Court-1 of this Bench in CP(IB)-197/MB/2018 filed by ICICI Bank; a Financial Creditor. Mr. Amit Gupta was appointed as IRP of the Corporate Debtor. As per the regulations, the IRP called for the claims of the creditors and CoC was constituted (wherein the Applicant herein has 9.37% of voting share), Information Memorandum was prepared and then called for Expression of Interests from the public. Thereafter the prospective resolution applications were presented in the CoC for approval of the resolution plan.
2. In the CoC meeting held on 26.12.2018, it was informed that the Resolution Applicant has improved the resolution amount by Rs.10.00 crores and it was proposed by the Process Advisor (PWC) to distribute this additional amount amongst those Financial Creditors who were negatively affected



by the distribution of Rs.111 crores, which was the originally proposed plan amount, on the basis of their voting share. In the proposed structure the additional amount of R.10.00 crores were distributed only amongst nine (9) Financial Creditors and not all Financial Creditors.

3. The Applicant submits that the meeting on 26.12.2018 was held without giving notice/intimation to the members, therefore, the Applicant could not attend the said meeting. Upon receipt of the minutes of the meeting, the Applicant informed its concern to the Resolution Professional vide letter dated 04.01.2019 for which the RP replied by email on 07.01.2019 without any consideration to the concerns of the Applicant. The Applicant further states that despite the decision already been taken in the 13th CoC meeting to distribute the Resolution amount on voting share basis, without concurrence of the Applicant, distribution of additional amount offered by the Resolution Applicant to Financial Creditors was discussed again before the CoC by the Resolution Professional in the meeting held on 26th December 2018 to benefit some of the Financial Creditors only and the RP and the CoC have thus acted in a discriminatory manner and arbitrarily decided to distribute the said additional amount to the Financial Creditors as per the charge on their securities. Such decision of the Committee of Creditors is outside the scope of the powers or scope envisaged in the Insolvency and Bankruptcy Code, 2016 and discriminatory to the Applicant. This decision without taking consent of the Applicant was totally biased and will cause huge loss and serious prejudice to the interest of the Applicant.



4. To establish the contention of the Applicant, the Applicant relied upon the judgment passed by the Hon'ble NCLAT in the case of *Binani Industries vs. Bank of Baroda in Company Appeal (AT) (Insolvency) No. 82/2018*, the relevant part is as follows:

"48. it is necessary to balance the 'Financial Creditors' and the 'Operational Creditors' while emphasising on the maximisation of the assets of the 'Corporate Debtor'. Any 'Resolution Plan' if shown to be discriminatory against one or other 'Financial Creditor' or Operational Creditor', such a plan can be held to be against the provisions of the I&B Code."

5. The Respondent No.1 i.e. RP submitted that the applicant was well aware of the fact that meeting dated 24.12.2018 was adjourned to 26.12.2018 as the applicant was present at the meeting held on 24.12.2018 and participated in that meeting. The meeting dated 24.12.2018 was adjourned without being concluded. The applicant has conveniently withheld producing the email dated 25.12.2018 of the applicant on record. The RP has further submitted that the adjudicating authority does not have any equity or plenary jurisdiction and that the jurisdiction under Section 31(1) of the Code is limited to the determination whether the Resolution Plan, as approved by the CoC, complies with the requirements of Section 30(2) of the Code read with the CIRP Regulations. Further emphasised that commercial wisdom of CoC is supreme.
6. The Respondents (R2, R3, R4, R5, R8, R10, R11, R13, R14, R15) jointly submit that the CoC approved the Resolution Plan of ARCIL Consortium with 72.25% voting share of the CoC members. The meeting held on



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26.12.2018 was the extension of the 14th CoC meeting held on 24.12.2018, which was adjourned to 26.12.2018. Therefore, allegation of the Applicant that no notice was given for the meeting held on 26.12.2018 is totally frivolous in nature and the Applicant deliberately chose to remain absent. In the said meeting, the distribution method was suggested by the process advisor to CoC which was agreed by the CoC members present in the meeting. The Respondents further submit that the majority of the CoC members were of the opinion that the distribution mechanism was fair and just to distribute the amount offered in the Resolution Plan by ARCIL Consortium. The relevant portion of the minutes of the meeting is reproduced below:

“After discussion amongst the members of CoC, Rohit Govil (Representative of process advisor – PWC) suggested a method of distribution of value derived by each financial creditor. He suggested that the Resolution Applicant can be asked to increase the bid further and the increased amount can be distributed in the following manner:

- *The enhanced amount will be distributed to the financial creditors having a negative value in the case of Resolution over liquidation upto Rs.13.79 crores in the ratio of their shortfall for 9 banks.*
- *The surplus balance over and above after meeting the shortfall of Rs.13.79 crores will be distributed as per the voting share.*

The aforesaid recommendation made by Rohit Govil and the Resolution Professional was agreed upon by the members of the 14th CoC meeting dated 26th December 2018 and the members present in that meeting took note of the same.”

7. The Respondents further submit that the action of the CoC are *bonafide* in nature and strictly as per the provisions of the Code. They took a prudent decision keeping in mind the commercial viability of the resolution plans



submitted. They contented that the Application of the dissenting member should be dismissed.

Findings:

8. This case was first heard in Court-1 as the main Company Petition was heard and admitted into CIRP by Court-1 and the matter was running there since 2018. Thereafter, it was transferred to Court-3. After a short while, it is again transferred from Court-3 to this Court (Court-4). This Bench heard various IAs on few occasions. The matter was reserved for orders on 10.11.2022 by this Bench. However, the matter was de-reserved consequent to reconstitution of the Bench.
9. We have perused the material on record and heard the Counsel. We find that the resolution plan contemplates distribution of additional sum of Rs.10 crores in the ratio of securities charged to the financial creditors, while the original amount proposed for financial creditors is to be distributed based on their voting share. We notice that the effect of change in distribution method of additional amount has resulted into payment out of additional amount to only nine financial creditors out of 17 Financial Creditors.
10. The Section 5, which is under Chapter I of Part II of the Code, only classify the creditors into financial creditors, operational creditors or other creditors. It does not contemplate classification based on security interest held by such creditors, however, the security holder under each classification represents a distinct sub-class and can be treated differently vis-a-vis another sub-class under the same class. We find that the



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adjudicating authority does not have any equity or plenary jurisdiction and that the jurisdiction under Section 31(1) of the Code is limited to the determination whether the Resolution Plan, as approved by the CoC, complies with the requirements of Section 30(2) of the Code read with the CIRP Regulations. Further emphasised that commercial wisdom of CoC is supreme. Accordingly, we find that the reliance placed by applicant on decision of Hon'ble NCLAT in case of "*Binani Industries vs. Bank of Baroda*" in *Company Appeal [AT] (Insolvency) No. 88/2018* does not support its case as there is no discrimination within the sub-class of secured creditor under class of financial creditor.

11. In view of the aforesaid, this IA is **dismissed**.

Sd/-

PRABHAT KUMAR
MEMBER (TECHNICAL)

Sd/-

KISHORE VEMULAPALLI
MEMBER (JUDICIAL)