

NATIONAL COMPANY LAW TRIBUNAL

KOLKATA BENCH

KOLKATA

CA(IB) No. 1175/KB/2019

CA(IB) No. 1266/KB/2019

CA(IB) No. 1327/KB/2019

In

CP(IB) No. 1237/KB/2018

In the matter of:

Beni Gopal Singh

..Operational Creditor

Versus

EMC Ltd.

.. Corporate Debtor

And

In the matter of:



CA Kannan Tiruvengadam

.. Applicant/Resolution Professional

Coram: Shri Jinan K.R., Member(Judicial)

Shri Harish Chander Suri, Member(Technical)

For the Bank of Baroda, Canara Bank:

1. Mr. RC Prusti, Advocate
2. Ms. S Kabi, Advocate

For the Resolution Professional:

1. Mr. Joy Saha, Senior Advocate
2. Mr. Anuj Singh, Advocate
3. Mr. Pratik Mukhopadhyay, Advocate
4. Mr. Dipen Chatterjee, Advocate
5. Mr. Saptarshi Mandal, Advocate
6. Mr. Avik Mukherjee, Advocate
7. CA Jainendra Jain

For the Resolution Applicant

1. Mr. Kanishk Kejriwal, Advocate

For Union Bank of India

1. Mr. Anirban Ray, Advocate
2. Mr. SK Singhi, Advocate
3. Mr. Ankur Singh, Advocate
4. Mr. Prashant Tripathy, Advocate

For Sam Business Continuity Services

1. Mr. Dharamveer Singh, Advocate

Date of Pronouncement of the Order :

ORDER

Per Shri Jinan KR, Member(Judicial)

1. All the Applications bearing No. CA(IB) No. 1175/KB/2019, CA(IB) No. 1266/KB/2019 and CA(IB) No. 1327/KB/2019, in CP(IB) No. 1237/KB/2018, are taken together for convenience and for avoiding repetition of facts.
2. The CP(IB) No.1237/KB/2018 was filed by one Mr. Beni Gopal Singhi, Operational Creditor under Section 9 of the Insolvency and Bankruptcy Code, 2016, for initiating insolvency resolution process as against the Corporate Debtor, EMC Ltd.
3. The Application was admitted vide Order dated 12-11-2018 by appointing Mr. Rakesh Kumar Agarwal as the Interim Resolution

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Professional. Mr. Rakesh Kumar Agarwal, thereafter, was replaced by Mr. Kannan Tiruvengadam and he continued the CIRP process. Mr. Kannan Tiruvengadam complied with all the requirements to be meted out under the Code and Regulations and conducted altogether 9 meetings of the Members of the Committee of Creditors and ultimately succeeded in getting the approval for a Resolution Plan submitted by Almas Global Opportunity Fund SPC( in short ALMIS) by a vote share of 80.18%. It is that Resolution Plan comes up for approval before us.

4. As usual, three Objectors come forward objecting the approval of the Resolution Plan. So, first of all, let us see whether the objections are sufficient enough to reject the plan or requires modifications as prayed for.

5. The Bank of Baroda, a Financial Creditor, who is a Member of Committee of Creditors and voted in favour of the approval of the Resolution Plan by the Committee of Creditors, filed CA(IB) No. 1175/KB/2019, praying for issuing directions to the Applicant/Bank of Baroda with regard to payment, pursuant to the invocation of Bank Guarantee by the beneficiary, M/s. Power Grid Corporation of India Limited. It is submitted by the Ld. Counsel, appearing for the Bank of Baroda that during the CIRP process, M/s. Power Grid Corporation of India Limited, invoked the Bank Guarantee issued in their favour by Bank of Baroda, on behalf of the Corporate Debtor and claimed for remitting the proceeds of the said Bank Guarantee to Power Grid Corporation of India Limited, as soon as possible, without any delay. Vide letter dated 09-07-2019, the Bank was warned that in failing

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with the payment made by M/s. Power Grid corporation of India Limited, they will be constrained to initiate legal proceedings against Bank of Baroda and thereby Bank of Baroda comes up with this Application for advising the Bank by the Adjudicating Authority.

6. We are afraid, a nationalized Bank, Bank of Baroda, who is a Member of Committee of Creditors, comes before us seeking advice as to what to do with the remittance of payment in terms of the Bank guarantee invoked by M/s. Power Grid Corporation of India Limited. In course of argument, Ld. Senior Counsel, appearing for the Resolution Professional submits that the Bank has its own Legal Advisers, Legal Officers and approaching the Adjudicating Authority for getting advice is improper and not advisable. Admittedly, the Bank Guarantee is an independent contract between the Bank and the beneficiary, which cannot be stopped due to moratorium declared under Section 14 of the Insolvency & Bankruptcy Code, 2016. This being the legal position applicable to the case in hand, it appears to us that it is left open to the Bank to decide in accordance with the terms and conditions stipulated under the Bank Guarantee. Upon the aforesaid observation, the Application deserves no consideration and is liable to be dismissed.

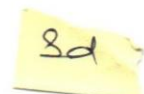
7. The CA(IB) No. 1266/KB/2019, is one another Application that comes up for consideration at the time of hearing, as to the approval of the Resolution Plan of the Corporate Debtor. The Applicant, here in this Application, is Canara Bank. The Applicant, Canara Bank, is also one among the Financial Creditors and Member of the committee of Creditors. The Canara Bank, also voted in favour of the approval



of the Resolution Plan approved by the Committee of Creditors. The Applicant prays for recalling the Order in CA(IB) No. 947/KB/2019 and to pass an order of stay of the operation of the Order of this Adjudicating Authority dated 06-09-2019, passed in CA(IB) No. 947/KB/2019.

The CA(IB) No. 947/KB/2019 is an Application filed by the Resolution Professional praying for issuing directions to the Applicant, Canara Bank, to refund a sum of Rs. 1,96,12,749/- to the Corporate Debtor on the ground that the said sum was adjusted by the Applicant in violation of the declaration of the moratorium in the case in hand. The CA(IB) No. 947/KB/2019 is an Application hotly contested by the Applicant, Canara Bank. It is after an elaborate hearing on the side of the Applicant Bank and the Resolution Professional, we are inclined to pass an order in favour of the Corporate Debtor, directing the Applicant Bank to pay a sum of Rs. 1,96,12,749/- to the Corporate Debtor, along with interest thereon. It is that order which is requested to be recalled. It appears to us that the Applicant has got the right of appeal to challenge the Order passed on merits and the objections raised in the Application are the similar objections as had been raised in CA(IB) No. 947/KB/2019 and therefore, we do not find any justifiable reason to recall the Order dated 06-09-2019.

At this juncture, Ld. Counsel for the Applicant Bank referred to us an Order dated 30-09-2019, passed by the Hon'ble NCLAT in CA(AT) (Insol.) No.190 of 2019, wherein the Hon'ble Appellate Tribunal issued directions to the Appellant, Punjab National Bank, to deposit the amount with the Resolution Professional by way of FDR.



The Resolution Professional filed similar Application CA(IB) No. 942/KB/2019 for refunding an amount of Rs. 1,62,63,998/- which was allegedly adjusted by the Punjab National Bank in violation of the declaration of the moratorium in the case in hand. Vide Order dated 25-09-2019, this Adjudicating Authority allowed CA(IB) No. 942/KB/2109, wherein the very same challenge had been taken by the Punjab National Bank. A copy of the Order referred to us, in no way prohibits us from proceeding with the approval or rejection of the Resolution Plan under consideration. The Applicant, having chosen not to prefer an Appeal, the directions in the Appeal preferred by Punjab National Bank, will in no way be helpful to the applicant to recall the order under challenge in this case. Accordingly, we do not find any justifiable reason to recall the Order as prayed for by the Bank. Moreover, we do not find that this Application is maintainable under sub-section 5 of Section 60 of Insolvency & Bankruptcy Code, 2016. Accordingly the application deserves an Order of dismissal.

8. The CA(IB) No. 1327/KB/2019 is an Application filed by Union Bank of India, another Financial Creditor, who is also a Member of the Committee of Creditors objecting to the approval of the Resolution Plan contending that the distribution of Resolution fund is not fair, equitable and hence, discriminatory and therefore, the distribution pattern is to be modified in order to meet ends of justice. The Ld. Counsel, appearing for the Applicant, submits that the distribution pattern approved by the Committee of Creditors is adversely affected. Hence, the distribution pattern filed by the

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Resolution Professional should be modified to make it fair and equitable to all Financial Creditors for the ends of justice.

9. The Financial Creditor, Union Bank of India, the Applicant here, voted in favour of the approval of the Resolution Plan before the Committee of Creditors. It is also significant to note that the distribution pattern was deliberated upon before the Committee of Creditors at length. A copy of the Minutes, wherein the distribution pattern was deliberated upon before the Committee of Creditors in the meeting held on 26-09-2019, was brought to our notice. It is good to read the relevant portion in the minutes at Page 9. It read as follows:

*" The members of the committee deliberated on the proposed distribution pattern. Some of the members of the committee including Union Bank of India, raised objection that the distribution is not equitable because of proposed additional comfort provided to those members who have un-invoked bank guarantees amount to INR 763.67 Crore as on 24<sup>th</sup> September, 2019. One of the committee members suggested that for equitable distribution amongst the members there should be an inter se agreement between the consortium lenders where all the uninvoked bank guarantees will be distributed amongst the members equally. SBI explained elaborately that the un-invoked BG's are contingent in nature and further stated that in case of invocation of BG post approval of resolution plan the banks are liable to pay to the beneficiaries immediately for which they are getting only debentures carrying a coupon @0.01% per annum which are redeemable in cash after seven years from the date of*

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*issue. Therefore, SBI felt that there is no additional comfort on such kind of offering by the prospective resolution applicant on the un-invoked BGs. RP Also explained that the resolution amount indicated by prospective resolution applicant against the total gross claims without differentiating between funded and non-funded outstanding.*

*Representative from Oriental Bank of Commerce(OBC) sought clarification from RP as to why there is a difference in distribution amount between that of security interest vis-à-vis voting rights. RP replied that as they have an exclusive charge on Naini Solar Plant, which is not distributed among other lenders, OBC is getting more in terms of security interest.*

*To a specific query from Union Bank of India, the legal advisers informed that voting is on the resolution plan and not on the manner of distribution."*

10. The above said discussions indicate that the very same objection in regard to distribution pattern raised by the applicant had been considered by the Committee of Creditors, while finalizing the pattern of the distribution of the Resolution fund. The Committee of Creditors approved the above said pattern and the very same pattern is highlighted in the Resolution Plan too, and it is that Resolution Plan that has been approved by the COC, wherein the Applicant Bank voted in favour of the Resolution Plan. Therefore, it appears to us that the Applicant Bank is estopped from raising such an objection which has already been raised before the Committee of Creditors and the Committee of Creditors deliberated on those objections and upon

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certain clarifications, the said pattern was approved with majority of vote share. Therefore, it appears to us that the majority decision of the Financial Creditors cannot be disturbed by raising the very same objection before us.

In **K.Sashidhar V. Indian Overseas Bank and Others [2019] 148 CLA 497 (SC)** the Hon'ble SC observed that:-

*"Where the legislature has not envisaged challenge to the commercial/business decision of the financial creditors taken collectively, the same cannot be challenged on the ground that reasons therefor were not recorded.*

*It is not open to the Adjudicating Authority to entertain a revised resolution plan after the expiry of the statutory period of 270 days.*

*It is not Supreme Court to exercise powers under article 142 of the Constitution which will result in issuing directions in the teeth of the provisions as applicable to case in hand."*

11. Bearing in mind the proposition held in the above cited decision, we are of the considered view that the objections raised by the applicant deserve no consideration and accordingly the CA(IB) No. 1327/KB/2019, is liable to be dismissed.

12. Having found that none of the Objections in regard to the approval of the Resolution Plan is sustainable under law, then let us see whether the Resolution Plan under consideration is liable to be approved.



13. The Ld. Senior Counsel, appearing for the Resolution Professional, submits that the Resolution Plan is complete, that it is approved by the Committee of Creditors by a vote share of 80.18% and is not in contravention of any of the provisions of the law, for the time being in force, and it is in conformity with Section 30(2) (e) of the Code and that the Plan conforms to such other requirements as may be specified by the Board and in confirmation with Section 30(2) (f) of the Code. The Resolution Plan is feasible and viable as per the majority decision of the Committee of Creditors. Provisions for its effective implementation has been incorporated in conformity with Section 31(1) of the Code. So also, the Resolution Plan identifies specific sources of funds that will be used to pay the Insolvency Process Cost, liquidation value due to the Operational Creditor, and liquidation value due to the Financial Creditors. The Resolution Plan provides the requirements to be meted out under Regulation 32(2). It provides the terms of the Plan and its implementation schedule, the management and control of the business of the Corporate Debtor during its terms, adequate means for supervising its implementation. A look at the Resolution Plan also shows that the Resolution Applicant has the capability to implement the Resolution Plan. The performance security also seen brought in. So also, the Resolution Applicant has submitted affidavit under Section 29(A) that it is eligible to submit a Resolution Plan like that of the Plan under consideration.

14. In ***Rajputana Properties Private Limited Vs. Ultratech Cement Limited and Ors [Civil Appeal No. 10998 of 2018 Supreme Court]*** the Supreme Court upheld the order passed



**by the NCLAT that "approval of the NCLT is not a mere requirement/formality.** Even though the NCLT is not permitted to alter the terms of the plan, the ultimate authority to approve or reject a plan vests with the NCLT, and for that it should consider the following aspects :

- (i) Whether the plan complies with the requirement of Section 30(2)?
- (ii) Whether the plan is fair and equitable or there is any unjust discrimination not envisaged in law?
- (iii) Whether the plan adheres to the object of the Code i.e. maximizes the value of assets and balances the interests of all the stakeholders?

*Only if the aforesaid questions are answered in satisfactory, the plan is confirmed, if not the NCLT may deny its confirmation."*

15. The proposition laid down in the abovesaid judgment made it clear that the power of interfering the commercial wisdom of the Financial Creditor in approving the resolution plan is very limited. The Resolution Plan comes up for consideration being completed with all the requirements of Section 30(2) of the Code and that there is nothing brought out to show that the distribution pattern is unfair and unjust and that there is discrimination among the class of Financial Creditors in regard to distribution of the fund, we are bound by the approval of the resolution plan by the CoC. We are also satisfied that the plan under consideration satisfies with the requirements of Section 30(2), that the plan is fair and equitable and there is any

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unjust discrimination as alleged and that the plan adheres to the object of the Code i.e. maximizes the value of assets and balances the interests of all the stakeholders. All the questions answerable by us as per the guideline in approving a resolution plan as laid down in the above cited decision being answered in affirmative, we have no other alternative other than to approve the Resolution Plan under consideration. Accordingly, the Resolution Plan under consideration deserves to be approved, upon the following among orders :

#### ORDER

- i) The Resolution Plan of EMC Ltd., which is approved by the CoC with 80.18% voting share, is hereby approved under provisions of sub-section(1) of Section 31 of the Insolvency and Bankruptcy Code, 2016, which shall be binding on the Corporate Debtor, EMC Ltd., its employees, members, creditors, guarantors, 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, such authorities to whom statutory dues are owed and other stakeholders involved in the Resolution Plan;
- ii) The moratorium order passed under Section 14 shall cease to have effect.




- iii) The Resolution Professional shall forward all records relating to the conduct of the Corporate Insolvency Resolution Process and the Resolution Plan to the Insolvency and Bankruptcy Board of India to be recorded in its database.
- iv) CA(IB) No. 1175/KB/2019, CA(IB) No. 1266/KB/2019 and CA(IB) No. 1327/KB/2019, in CP(IB) No. 1237/KB/2018, are dismissed and disposed of, accordingly.
- v) The CP(IB) No. 1237/KB/2018, is allowed and disposed of accordingly.

16. The free copy/certified copy of the Order may be issued to all the concerned Parties, if applied for, upon compliance with all requisite formalities.



(Harish Chander Suri)  
Member(Technical)



(Jinan K.R.)  
Member(Judicial)

Signed this, the 21<sup>st</sup> day of October, 2019

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