

IN THE NATIONAL COMPANY LAW TRIBUNAL
COURT - I, MUMBAI BENCH

I.A. No. 784 of 2020

in

C.P. (IB) 2045/NCLT/MB/2018

Under Section 60(5) of the I&B Code, 2016

Invent Asset Securitization and Asset
Reconstruction Private Limited

...Applicant

V/s

1. Vijendra Kumar Jain, Resolution
Professional of Shree Vindhya Paper
Mills Limited
2. Alpha Buildhome Private Limited
3. Constantia Corporate Shared Services
Private Limited, (Formerly Constantia
Properties Private Limited)

...Respondents

In the matter of:

C.P. (IB) No. 2045/NCLT/MB/2018

Stressed Assets Stabilization Fund

... Financial Creditor

V/s

Shree Vindhya Paper Mills Limited

...Corporate Debtor

Order Dated: 05.10.2020

Coram:

Hon'ble Member (Judicial), Janab Mohammed Ajmal

Hon'ble Member (Technical), Shri V. Nallasenapathy

Appearance (via video conference)

For the Applicant : Mr Rohit Gupta, a/w Mr Nikhil Rajani, Advocates
i/b. M/s. V. Deshpande and Co.

For the Respondent(s) : Ms Shikha Bhura with Mr Naman Gadhia,
Advocates i/b Taplegal (For R1)
Mr Ashish Parwani with Mr Chintan Gandhi,
and Mr Nishant Sogni, Advocates i/b Rajani
Associates (For R2 & R3)

ORDER

Per: V. Nallasenapathy, Member (Technical)

1. This is an Application filed by the Applicant for the following reliefs:

- a) *That this Hon'ble Tribunal be pleased to allow Miscellaneous Application filed by the Applicant and accordingly direct the Resolution Applicant to revise the Resolution Plan to the extent of revising and improving the settlement of claim amount to be offered to the Applicant and the 2nd charge holders as the offer of 0.5% on principal outstanding envisaged under the proposed Resolution Plan is very low;*
- b) *That this Hon'ble Tribunal be pleased to direct to the Resolution Applicant to increase the settlement of the claim amount of the Applicant;*
- c) *Pending the hearing and final disposal of the present Miscellaneous Application, this Hon'ble Tribunal be pleased to restrain the Resolution Professional from seeking approval of proposed*

Resolution Plan jointly submitted by Alpha Buildhome Pvt. Ltd. and M/s Constantia Corporate Shared Services Pvt. Ltd.

- d) *This Hon'ble Tribunal be pleased to stay any further steps to be taken by Resolution Professional and the Committee of Creditors in the approval of Proposed Resolution Plan jointly submitted by Alpha Buildhome Pvt. Ltd. and M/s Constantia Corporate Shared Services Pvt. Ltd, in the absence of or without taking into consideration the claim of the present Applicant;*
- e) *Interim reliefs as prayed in prayer clause (b) to (e).*
2. The Applicant is a Financial Creditor of the Corporate Debtor which was put under Corporate Insolvency Resolution Process (CIRP) by an order of this Tribunal dated 07.06.2019.
 3. The Applicant filed a claim before the Insolvency Resolution Professional (IRP) and the same was admitted for Rs. 46,89,86,949/-. The Applicant submits that the Resolution Plan approved by the Committee of Creditors (CoC) provides payment of only 0.5% of the principal outstanding of the Applicant who is having a second charge on the immovable property of the Corporate Debtor. Hence, the Applicant prays that the Resolution Applicant (RA) has to revise the Resolution Plan by improving the payment proposed to the Applicant.
 4. The Applicant in support of his Application has raised the following contentions:
 - a) The Resolution Professional (RP) admitted the claim of the Applicant as second charge holder on the properties of the Corporate Debtor.
 - b) The Respondent No. 2 (R2) and Respondent No. 3 (R3) who are the Resolution Applicants, in the 6th CoC meeting held on 22.01.2020, asserted that they will consider and improve the offer of settlement to the second charge holders including the Applicant, as the proposed

offer of 0.5% of principal outstanding was very low. However, despite the assurances made in the meeting, R2 and R3 failed to revise the offer of settlement of claim to the second charge holders.

- c) The Corporate Debtor created first charge over the factory, land and building, plant and machinery situated at Village Dushkhede, Taluka Yawal, District Jalgaon in favour of some Financial Creditors and the principal outstanding amount due to the Applicant is Rs.3,63,35,186/- and the claim of the Applicant admitted is for Rs.46,89,86,949/- and the offer of 0.5% in the Resolution Plan to the Applicant works out to a meagre sum of Rs.1,81,676/-.
 - d) Since the Applicant is the second charge holder, the Applicant has to compromise almost the entire outstanding dues and the CIRP had not ensured any benefit to the Applicant. The Resolution Plan is afflicted with vices of manifest arbitrariness and unfairness.
 - e) The Ld. Counsel for the Applicant submitted that, on percentage basis even the Operational Creditors were placed in a better position than the Second Charge Holders.
5. The Respondent No. 1 (R1) filed reply to the Application and contended as below: -
- a) The Corporate Debtor was non-functional since 2005 and the liquidation value of the assets of the Corporate Debtor is Rs.4,00,00,000/- approximately and the Resolution Plan is for a sum of Rs.32,28,00,000/-.
 - b) It is a fact that in the 6th CoC meeting held on 22.01.2020, the issue of improvement of offer of 0.5% on the principal outstanding to the second charge holders was discussed and the Resolution Applicants were asked to consider an improvement in the offer. However, in the revised Resolution Plan submitted on 01.02.2020, the Resolution Applicants only added a note stating that the settlement amount of Rs.11,03,24,869/- under the distribution of payment to Financial

Creditors may be made as mutually agreed by the CoC and in fact the Resolution Applicants have not made any improvement in the offer of 0.5% proposed to the second charge holders. However, the Resolution Plan was approved by the CoC with a voting share of 93.06%.

- c) The Plan has been approved with more than requisite majority of 66% as provided under Section 30(4) of the Code. Further the said Section provides that the manner of distribution shall take into account the order of priority amongst the creditors as laid down in Section 53(1) of the Code including the priority of value of security interest of a secured creditor.
- d) In the 6th CoC meeting, the request for improvement in the offer of 0.5% to the second charge holders was made by one Ms Jyoti Sharma of M/s Aircel and not by the Applicant.

6. R2 and R3 filed reply to the Application and contended as below: -

- a) In response to the request of Ms Jyoti Sharma of Aircel for improvement in the offer of 0.5% of the principal amount proposed for the second charge holders, it was informed that the issue will be discussed by the Respondents. However, the Respondents neither committed nor asserted nor assured that such request would materialise.
- b) The financial proposal in the Resolution Plan is as below:

Sr. No.	Particulars	Amount (INR in Lakhs)
1.	Capital Investment for setting up a new plant (excluding debt Resolution and CIRP costs)	2078
2.	Total consideration towards settlement of Resolution Debt + CIRP costs	1150 [35 (Upfront payment within 10 days of effective date) + 1115 (within 45 days of effective date)]
3.	Total	3,228

- c) The liquidation value of the Corporate Debtor is Rs. 4,00,00,000/- (Rupees Four Crores only), and against this value, Resolution Applicants are proposing almost 3 times the liquidation value towards the settlements of debts of the Corporate Debtor and CIRP costs. The dissenting Financial Creditor including the Applicant will be paid in priority over the Financial Creditors. The Resolution Plan has been approved by the whopping majority of 93.06%. The amount payable to the Financial Creditors is Rs. 11,03,24,869/- and the distribution pattern has to be decided by the CoC and not by the Resolution Applicants.
- d) The CoC in its commercial wisdom decided to provide 0.5% to the second charge holders and the same is within the purview of the commercial wisdom of the CoC. The payment offered to the second charge holders is considerably better than the liquidation value payable to the creditors.
- e) Considering the liquidation value, if the payment is provided under Section 53(1) of the Code, the Applicant may hardly get any amount.

7. On hearing the Counsel for the Applicant and Respondents and ongoing through the pleadings the following are the observations of this Bench:

- a) Admittedly the liquidation value payable to the Applicant is "NIL". However, in the distribution mechanism as provided in the Resolution Plan, the Applicant is getting a sum of Rs.1,81,676/-
- b) Even though the Resolution Applicants have agreed to consider the improvement of payment for the second charge holders, the Resolution Applicants after consideration informed the CoC that any improvement has to be made by CoC only and they are not in a position to improve offer of payment to creditors of Rs.11,03,24,869/-. So, the request of the second charge holders was not considered by the Resolution Applicants as well as the CoC while deciding the distribution pattern.
- c) The Hon'ble Supreme Court in *Committee of Creditors of Essar Steel India Limited Vs. Satish Kumar Gupta & Ors. (MANU/SC/1577/2019)*, has held that the CoC is sufficiently empowered to decide the manner of distribution of funds proposed in the Resolution Plan, after taking into consideration the security interest of the secured creditor. The Hon'ble Supreme Court has held as follows:

"40.....Thus, what is left to the majority decision of the Committee of Creditors is the "feasibility and viability" of a resolution plan, which obviously takes into account all aspects of the plan, including the manner of distribution of funds among the various classes of creditors. As an example, take the case of a resolution plan which does not provide for payment of electricity dues. It is certainly open to the Committee of Creditors to suggest a modification to the prospective resolution Applicant to the effect that such dues ought to be paid in full, so that the carrying on of the business of the corporate debtor does not become impossible for want of a most basic and essential element for the carrying on of such business, namely, electricity. This may, in turn, be accepted by the resolution Applicant with a consequent modification as to distribution of funds, payment being provided to a certain type of operational

creditor, namely, the electricity distribution company, out of upfront payment offered by the proposed resolution Applicant which may also result in a consequent reduction of amounts payable to other financial and operational creditors. What is important is that it is the commercial wisdom of this majority of creditors which is to determine, through negotiation with the prospective resolution applicant, as to how and in what manner the corporate resolution process is to take place.

...

42....Thus, it is clear that the limited judicial review available, which can in no circumstance trespass upon a business decision of the majority of the Committee of Creditors, has to be within the four corners of Section 30(2) of the Code, insofar as the Adjudicating Authority is concerned, and Section 32 read with Section 61(3) of the Code, insofar as the Appellate Tribunal is concerned, the parameters of such review having been clearly laid down in K. Sashidhar (supra).

...

46....Thus, it is clear that when the Committee of Creditors exercises its commercial wisdom to arrive at a business decision to revive the corporate debtor, it must necessarily take into account these key features of the Code before it arrives at a commercial decision to pay off the dues of financial and operational creditors. There is no doubt whatsoever that the ultimate discretion of what to pay and how much to pay each class or subclass of creditors is with the Committee of Creditors, but, the decision of such Committee must reflect the fact that it has taken into account maximising the value of the assets of the corporate debtor and the fact that it has adequately balanced the interests of all stakeholders including operational creditors. 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.

...

50.The importance of valuing security interests separately from interests of creditors who do not have security is well set out...

...

54.Indeed, if an "equality for all" approach recognising the rights of different classes of creditors as part of an insolvency resolution process is adopted, secured financial creditors will, in many cases, be incentivised to vote for liquidation rather than resolution, as they would have better rights if the corporate debtor was to be liquidated rather than a resolution plan being approved. This would defeat the entire objective of the Code which is to first ensure that resolution of distressed assets takes

...

56....So long as the provisions of the Code and the Regulations have been met, it is the commercial wisdom of the requisite majority of the Committee of Creditors which is to negotiate and accept a resolution plan, which may involve differential payment to different classes of creditors, together with negotiating with a prospective resolution Applicant for better or different terms which may also involve differences in distribution of amounts between different classes of creditors.

...

57....Indeed, Regulation 13(1) of the 2016 Regulations mandates that when the resolution professional verifies claims, the security interest of secured creditors is also looked at and gets taken care of....

...

89....We cannot arrive at the conclusion that the acceptance of the resolution plan by the majority of the Committee of Creditors should be set aside on this score, inter alia, for the

reason that Shri Sibal assured us that he was not attacking the acceptance of the revised plan but only distribution of amounts payable under the said plan. This being so, it is also not possible to accept the submission of Shri Sibal, that "feasibility and viability" of a resolution plan will not include distribution of the amount of debt under the said plan.... All that was left for distribution by ArcelorMittal was distribution inter se between secured financial creditors which was then done by a majority of 92.24%, as has been seen above based upon the value of their respective security interests....

...

92....Full freedom and discretion has been given, as has been seen hereinabove, to the Committee of Creditors to so classify creditors and to pay secured creditors amounts which can be based upon the value of their security, which they would otherwise be able to realise outside the process of the Code, thereby stymying the corporate resolution process itself.

...

94.The NCLAT judgment which substitutes its wisdom for the commercial wisdom of the Committee of Creditors and which also directs the admission of a number of claims which was done by the resolution applicant, without prejudice to its right to appeal against the aforesaid judgment, must therefore be set aside."

- d) Section 30(4) of the Code provides that the CoC may approve the Resolution Plan by vote of not less than 66% of CoC after considering its feasibility and viability, the manner of proposed distribution which may take into account the order of priority among the creditors as laid down in Section 53(1) of the Code including the priority and value of security interest of a secured creditor. In this case considering the liquidation value of Rs. 4 Crores and the amount due to the first charge holders as admitted by the Resolution Professional is Rs.10,85,07,428/-, if the distribution is made as per the waterfall mechanism provided under Section 53 of the Code the Applicant will get nothing. However, the Applicant is offered a sum of Rs.1,81,676/- . Hence, the cause of compliant by the Applicant does not deserve any merit.

- e) When seen on a collective basis, the percentage offered to the Operational Creditors may appear higher. However, when considered on standalone basis for each Operational Creditor the amount allocated to them may work out to be very meagre. How much to pay to each class/sub-class of Creditors is covered under the commercial wisdom of the CoC. The basis that the Operational Creditors are getting more than the second charge holders, cannot be a cause for complaint when the liquidation value attributable to both them is zero.
- f) A perusal of the provisions of the Code and the principle decided in Essar case supra culminate in the following points: -
- i. The commercial wisdom of the CoC will always prevail.
 - ii. The feasibility and viability of the Resolution Plan takes into account all the aspects of the Plan including the manner of distribution among the creditors.
 - iii. Judicial review of the CoC decision is available only within the ambit of Section 30(2) of the Code.
 - iv. The ultimate decision of what to pay and how much to pay to each class/sub-class of creditors is with the CoC.
 - v. The CoC has the authority to make payment based on the realisable value of the security to each creditor/class of creditors.
8. In view of the above, the decision of the CoC in allocating 0.5% of the debt due to the second charge holders cannot be questioned and the same is not justiciable. The Application thus doesn't merit consideration and is rejected. No costs.

Sd/-
V. Nallasenapathy
Member (Technical)

Sd/-
Mohammed Ajmal
Member (Judicial)