

IN THE NATIONAL COMPANY LAW TRIBUNAL

COURT NO. V, MUMBAI BENCH

IA No. 691 of 2021 in
CP (IB) 3942/MB/2019

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

In the matter of

Wood Preservers Private Limited
...Operational Creditor
v/s

LB Industries Private Limited
....Corporate Debtor

IA No. 691 of 2021 in
CP (IB) 3942/MB/2019

In the matter of

Mr. Jaidev Laxmidas Panchmatia
...Resolution professional/Applicant

Order reserved on: 06.12.2021

Order Pronounced on: 20.01.2022

Coram:

Hon'ble Smt. Suchitra Kanuparthi, Member (Judicial)

Hon'ble Smt. Anuradha Sanjay Bhatia, Member (Technical)

For the Applicant: Mr. Kunal Chheda, Advocate.

Per: Suchitra Kanuparthi, Member (J)

ORDER

Facts of the case:

1. The present application has been filed by Mr. Jaidev Laxmidas Panchmatia (hereinafter referred as "Resolution Professional") in his capacity as Resolution Applicant u/s. 60 (5) of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred as "Code") read with

Rule 11 of NCLT Rules, 2016 challenging the rejection of the resolution plan submitted by the Applicant.

2. The order of admission against the Corporate Debtor was passed on 19.11.2019 vide Company Petition No. 3942 of 2019. The RP issued invitation for expression of interest, in response to that the applicant submitted its expression of interest. Subsequently, the RP issued information memorandum, evaluation matrix and a request for resolution plan. After the request, the Applicant filed resolution plan dated 04.08.2020.
3. The CoC members did not consider the resolution plan on the ground that the applicant is ineligible to file resolution plan u/s. 29A of the Code as Union Bank of India has classified the account as fraud and the same was reported to Reserve Bank India. Hence, the present application is filed challenging the rejection of resolution plan.
4. The Applicant also contended that the resolution plan complies of various requirement u/s. 30 (2) of the Code.

Brief background of Resolution Applicant:

5. LB group came into existence in the year 1955 under parent company Laxmidas Brothers. They were into the business of Plywood trading, Edible Oil trading, Agro commodity trading etc. The Corporate Debtor was classified as MSME on 14.05.2008.
6. The applicant further pointed out that Laxmidas Brothers group had relations with Union Bank of India since 1969. Considering the long standing relationship with the Corporate Debtor, Union Bank of India would not have continued its banking services in case fraudulent transactions were noticed.

7. On 08.08.2020, the Resolution Professional conveyed to the Applicant that the Resolution Plan was not being considered as the Union Bank of India has declared the account as “fraud”. The applicant immediately via email dated 12.10.2020 expressed displeasure and surprise to the decision of not considering the resolution plan. On 14.10.2020, the Resolution Professional replied to the Email of the Applicant and stated that the relevant provision applicable to the applicant was Section 29 (A) (g) and (j) of the Code. On 27.10.2020, the Applicant replied to the Email and explained that Section 29 (A) (g) and (j) of the Code are inapplicable to the Applicant and that Union Bank of India is not empowered to declare the account as fraud but in fact only Adjudicating Authority has power to do so.
8. The Applicant claimed that upon perusal of Section 29 (A) (g) and (f) of the Code it is evident that Resolution Applicant does not fall under any disqualification, however, Section 240A, Section 29 (A) (c) and (h) of the Code are inapplicable to the Applicant.
9. The Applicant also claimed that no application pertaining to preferential transactions, undervalued transactions, extortionate credit transactions or fraudulent transaction have been filed before the Adjudication Authority.
10. Further, the applicant relied upon Transaction Based Audit Report dated 29.09.2020 wherein the report stated as below:

“based on our overall review within the lockdown period and period beyond the lockdown period to cover symptoms of section 66 under IBC, we don’t have sufficient evidence or circumstantial evidence in our opinion which can be classified as “PUFE Transactions” (i.e. Preferential, Undervalued, Fraudulent

and Extortionate transactions).

However, listed aforesaid mentioned major observations in brief and detailed in below part of our reports, which we could be able to unearth on our review it appears serious lapses in internal controls, financial mismanagement by negative cash flows in working capital, disruption in business by adverse volatile prices of commodities, legal matters are the major reasons of company falling into the insolvency.”

11. The Applicant also pointed out the relevant discussions with regard to classification of Corporate Debtor as fraud in the Minutes of Meeting of the CoC on 03.10.2020 and 11.11.2020 and claimed that there were no discussions whatsoever relating to the ineligibility of the Resolution Applicant.
12. The Applicant claimed that the Resolution Plan was arbitrarily rejected with malafide intentions of liquidating the Corporate Debtor. The conduct of the Respondent is completely unconscionable and against the code.
13. The alleged action by Union Bank of India vide show cause notice dated 13.11.2019 is absolutely frivolous, vague and baseless. The show cause notice issued is in blatant disregard to the guidelines provided in the RBI circular for wilful defaulters. The applicant further claimed to have submitted reply to Union Bank of India denying the allegations pertaining to show cause notice and asked to withdraw the claim.
14. On 24.12.2020, Mr. Shyamal Panchamatia attended the meeting and provided substantial reason on which the account cannot be classified as fraud. The applicant also pointed out that they have filed WP No. 2248 of 2020 in September 2020 dated 13.11.2020 before Bombay High Court, Nagpur Bench. On 23.09.2020, an

order was passed by the Bombay High Court observing that the hearing should be conducted by Union Bank of India pertaining to wilful defaulter.

15. On 03.10.2020, in the 7th Minutes of Meeting the applicant was conveyed that the resolution plan was not considered as the accounts has been classified as fraud and wilful defaulter.

16. The applicant was granted personal hearing on 24.12.2020. The Union Bank of India has not followed any procedure and provisions of master circular of RBI and therefore the applicant claimed that is premeditated plan and is made of formality.

17. The Applicant relied upon the objects of the Code and stated that the resolution plan of the company is against the object of the code. Liquidation brings the life of a firm to the end. Further the applicant also claimed the goodwill of the Corporate Debtor in the market and is expertise in the industry and that the Resolution plan has complied with all the mandatory provisions of the Cde and further that Resolution Professional is eligible to submit the plan.

18. Therefore, the applicant prayed as follows:

“(a) That this Hon’ble Tribunal may be pleased to declare that the Resolution Applicant is eligible to submit a resolution plan;

(b) That this Hon’ble Tribunal may be pleased to set aside and declare that the act of the Committee of Creditors in its failure to consider the resolution plan as illegal and bad in law;

(c) That this Hon’ble Tribunal may be pleased to direct the Resolution Professional and the Committee of Creditors to consider the Resolution Plan dated 4 August 2020 afresh bearing in mind the principle of maximisation of the value as envisaged under the Code;

(d) Without prejudice to the above prayers, this Hon'ble Tribunal may be pleased to direct Union Bank of India to disclose the following:

(i) the date on which the account of the Corporate Debtor was declared as wilful defaulter and fraud as mentioned in the 7th and 8th Minutes of Meeting;

(ii) the reasons/ basis/ documents/ directives on which the account of the Corporate Debtor and the Applicant has been classified as fraud and wilful defaulter; and

(iii) the basis/ documents/ directives on which the Resolution Applicant is disqualified under section 29 (A) (j) of the Code.

(e) That this Hon'ble Tribunal may be pleased to declare that the decision of the Respondents in its 8th CoC meeting thereby resolving that the Corporate Debtor be liquidated is bad in law and illegal;

(f) Costs of this Application to be provided for; and

(g) For such further and other reliefs as this Hon'ble Tribunal may deem fit."

Reply of Respondent:

19. The Respondent stated that Union Bank of India having 92.63% voting share and the said Bank has issued show cause notice way back in the year 2019 vide notice dated 13.11.2019 to the Corporate Debtor and its guarantor to declare them as wilful defaulter. Therefore, the CoC in its 7th meeting held on 03.10.2020 did not consider the Resolution plan on the ground that the Corporate Debtor account has been classified as fraud and wilful defaulter.

20. The Applicant also submitted that they have filed an Interlocutory Application No. 1582 of 2921 alleging the fraud and the same is pending for consideration. Further the

application has been filed based on two contradictory transaction audit reports and there is prima facie possibility that fraud has been played.

21. The Responded also pointed out that Union Bank of India have initiated separate Criminal proceedings against the promoters and therefore, there is no doubt about their ineligibility. The Respondent also pointed out that it is evident from Minutes of the Meeting that CoC was not inclined to submit the Application and had made it very clear, the applicant therefore cannot demand the justification from the CoC by exercising rights and powers. The RP categorically mentioned that the action initiating their declaration had already commenced even before the commencement of CIRP and hence claimed that the application may dismissed.

Findings:

22. The only issue arises for consideration is whether CoC is right to the rejection of resolution plan by CoC on the ground that the applicant is ineligible to file resolution plan under section 29A of the Code.
23. Upon perusal of factual matrix it can be said that it is an undisputed fact that Union Bank of India have issued show cause notice dated 13.09.2019 to the Corporate Debtor, Resolution Applicant, director, guarantor, Mr, Shyamal Panchamatia, Mr. Vijaykumar to declare them as wilful defaulter. The admission of CIRP of the Corporate Debtor was passed on 19.11.2019. The COC in its 7th meeting held on 03.10.2020 have rejected the Resolution Plan on the basis that the accounts have been declared as wilful defaulter. The CoC in its 8th meeting held on 12.11.2020 outrightly rejected the plan without even putting it to vote on the ground that the account has been declared fraud and wilful defaulter. The applicant was

granted personal hearing on 24.12.2020.

24. At the outset it is necessary to examine whether applicant falls within the category of section 29A of the Code. Section 29A is reproduced below:

[29A. Persons not eligible to be resolution applicant. -

A person shall not be eligible to submit a resolution plan, if such person, or any other person acting jointly or in concert with such person—

(a) is an undischarged insolvent;

(b) is a wilful defaulter in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949 (10 of 1949);

(c) at the time of submission of the resolution plan has an account, or an account of a corporate debtor under the management or control of such person or of whom such person is a promoter, classified as non-performing asset in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949 (10 of 1949) [or the guidelines of a financial sector regulator issued under any other law for the time being in force,] and at least a period of one year has lapsed from the date of such classification till the date of commencement of the corporate insolvency resolution process of the corporate debtor:

Provided that the person shall be eligible to submit a resolution plan if such person makes payment of all overdue amounts with interest thereon and charges relating to nonperforming asset accounts before submission of resolution plan:

[Provided further that nothing in this clause shall apply to a resolution applicant where such applicant is a financial entity and is not a related party to the corporate debtor.

(d) has been convicted for any offence punishable with

imprisonment –

(i) for two years or more under any Act specified under the Twelfth Schedule; or

(ii) for seven years or more under any law for the time being in force:

Provided that this clause shall not apply to a person after the expiry of a period of two years from the date of his release from imprisonment:

Provided further that this clause shall not apply in relation to a connected person referred to in clause(iii) of Explanation I];

(e) is disqualified to act as a director under the Companies Act, 2013;

[Provided that this clause shall not apply in relation to a connected person referred to in clause (iii) of Explanation I;]

(f) is prohibited by the Securities and Exchange Board of India from trading in securities or accessing the securities markets;

(g) has been a promoter or in the management or control of a corporate debtor in which a preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction has taken place and in respect of which an order has been made by the Adjudicating Authority under this Code:

[Provided that this clause shall not apply if a preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction has taken place prior to the acquisition of the corporate debtor by the resolution applicant pursuant to a resolution plan approved under this Code or pursuant to a scheme or plan approved by a financial sector regulator or a court, and such resolution applicant has not otherwise contributed to the preferential transaction, undervalued transaction, extortionate credit

transaction or fraudulent transaction;]

(h) has executed 4 [a guarantee] in favour of a creditor in respect of a corporate debtor against which an application for insolvency resolution made by such creditor has been admitted under this Code [and such guarantee has been invoked by the creditor and remains unpaid in full or part];

(i) [is] subject to any disability, corresponding to clauses (a) to (h), under any law in a jurisdiction outside India; or

(j) has a connected person not eligible under clauses (a) to (i).

[Provided that nothing in clause (iii) of Explanation I shall apply to a resolution applicant where such applicant is a financial entity and is not a related party of the corporate debtor:

Provided further that the expression “related party” shall not include a financial entity, regulated by a financial sector regulator, if it is a financial creditor of the corporate debtor and is a related party of the corporate debtor solely on account of conversion or substitution of debt into equity shares or instruments convertible into equity shares 4[or completion of such transactions as may be prescribed], prior to the insolvency commencement date;]

25. This Bench is of the opinion that the applicant squarely falls within the definition of Section 29A (b) and is barred to present resolution plan under Section 29A of the Code. It is further noticed that the Union Bank of India vide its order dated 25.05.2021 categorically held that in terms of RBI master circular that the applicants are wilful defaulters and further that a show cause notice dated 13.11.2019 was served to the borrower/ promoter/ directors/ guarantors. The applicant was provided personal hearing/ opportunity on 08.09.2020 and 24.12.2020. The finding of the Committee further categorised

the applicant as wilful defaulter by diversion/ siphoning off the bank's fund. The said order was reviewed by the Union Bank of India on 01.07.2021 and the review committee has confirmed the categorisation of applicants as wilful defaulter. The said action of categorisation of wilful defaulter was challenged by way of Writ Petition before the Hon'ble Bombay High Court at Nagpur Bench in WP No. 3456 of 2021.

26. In the light of above, this Bench has no hesitation to conclude that the CoC has rightly rejected the resolution plan submitted by the Applicant herein and that he is ineligible to submit a plan under Section 29A of the Code.

27. Therefore, the IA 691 of 2021 is **dismissed**.

Sd/-

Anuradha Sanjay Bhatia
Member (Technical)

sd/-

Suchitra Kanuparthi
Member (Judicial)