

IN THE NATIONAL COMPANY LAW TRIBUNAL, AHMEDABAD
COURT - 2

ITEM No154

IA/145(AHM)2021 in CP(IB) 268 of 2018

Order under Section 60(5) IBC,2016

IN THE MATTER OF:

POSCO-India Pune Processing Centre Pvt. Ltd.

.....Applicant

V/s

Dhaval Jitendrakumar Mistry RP
for Poggenamp Nagarsheth Powertronics Pvt. Ltd.

.....Respondent

Order delivered on ..05/10/2021

Coram:

Madan B. Gosavi, Hon'ble Member(J)

Virendra Kumar Gupta, Hon'ble Member(T)

PRESENTS:

For the Applicant :

For the Respondent :

ORDER

The matter is listed today for pronouncement of the order.

The order is pronounced in the open court, vide separate sheet.


(VIRENDRA KUMAR GUPTA)
MEMBER (TECHNICAL)


(MADAN B GOSAVI)
MEMBER (JUDICIAL)

**IN THE ADJUDICATING AUTHORITY
NATIONAL COMPANY LAW TRIBUNAL
AHMADABAD BENCH
COURT 1**

**IA 58 of 2021 & IA 145 of 2021
In CP (IB) No.268/7/NCLT/AHM/2018**

IA 58 of 2021

An application for approval of resolution plan under Section 30(6) r.w Section 31 of the Insolvency and Bankruptcy Code, 2016 and read with Regulation 39(4) of the Insolvency and Bankruptcy Board of India (Insolvency Process of Corporate Persons) Regulations, 2016

In the matter of :

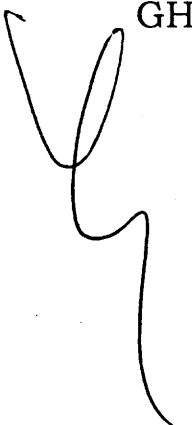
Mr. Dhaval Jitendrakumar Mistry
Resolution Professional of
M/s. Poggenamp Nagarsheth Powertronics Pvt. Ltd.
Having address at:
9B, Vardan Tower, Lakhudi Circle,
Naranpura, Ahmedabad-380014

... Applicant

Versus

Committee of Creditors of
M/s. Poggenamp Nagarsheth Powertronics Pvt. Ltd.
Represented through the UCO Bank
Having address at:
Plot No.445, Sector 16, Nr. Petrol Pump,
GH 5 Circle, Gandhingar

.... Respondent



IA 145 of 2021

An application filed under Section 60(5) of the Insolvency and Bankruptcy Code, 2016.

In the matter of :

POSCO India Pune Processing
Center Pvt. Ltd.

... Applicant

Versus

Dhaval Jitendrakumar Mistry
Resolution Professional of
Poggenamp Nagarsheth Powertronics Pvt. Ltd.
9B, Vardan Complex, Nr. Vimal House,
Lakhudi Circle, Navrangpura,
Ahmedabad-380014

... Respondents

Date of Hearing: 28.09.2021

Date of Pronouncement of Order 05.10.2021

**Coram: MADAN B. GOSAVI, MEMBER(J)
VIRENDRA KUMAR GUPTA, MEMBER (T)**

Appearance:

IA 58 of 2021

Learned FCA Mr. Kiran Shah for the Applicants.

Learned Counsel Mr. Abhay Itagi for Respondents.

IA 145 of 2021

Learned Counsel Mr. Abhay Itagi for applicant.

Learned FCA Mr. Kiran Shah for the Applicants.

ORDER

[Per: VIRENDRA KUMAR GUPTA, MEMBER (T)]

1. Both these applications pertain to the same Corporate Debtor. In IA 145 of 2021, the applicant is seeking consideration of its application on priority before approval of resolution plan and has also prayed for rejection of the application filed by the Resolution Professional for approval of resolution plan. It has also prayed that Resolution Professional has failed to discharge his obligation to assess the applicability of Section 29A of IBC, 2016. First, we shall dispose of IA 145 of 2021.
2. The facts, in brief, are that the CD had been admitted into CIRP on 22.01.2020. During the pendency, it is claimed by the applicant that Resolution Professional was apprised all the fact that the erstwhile promoters / Suspended Management were ineligible under Section 29A of IBC, 2016 to submit a resolution plan. Further, Resolution Professional vide its letter dated 12.08.2020 informed that Corporate Debtor had been converted into MSME and by virtue of Section 240A of IBC, 2016, ineligible under Section 29A of IBC, 2016 was not applicable. It is further claimed that IA 514 of 2020 had been filed wherein this Adjudicating Authority held that notification dated 01.06.2020 was prospective nature, hence, erstwhile promoters / Suspended Management was not eligible to submit resolution plan as

they were ineligible under Section 29A of IBC, 2016. Copy of order dated 06.01.2021 has been attached with the application. It has also been alleged that the said order of this Adjudicating Authority was not brought to the notice of CoC and therefore, approval of CoC is vitiated.

3. Resolution Professional in its reply has stated that Form-G was published as per regulations and a provisional list of all the resolution applicants was prepared on 13.07.2020 which was also provided to the applicant and in that list, the name of the applicant as well as Suspended Management of the Corporate Debtor was duly reflected. It has also been claimed that the applicant has sufficient opportunity in the law to raise objection but the applicant choose not to raise any objection and the final list was approved and also been claimed that the applicant was made aware of the facts that Suspended Management was not ineligible under Section 29A of IBC, 2016. It has also been claimed that due diligence was done by Resolution Professional as per the process and provision prescribed under IBC, 2016 r.w regulations made thereunder. It has also been claimed that there was no personal guarantee given by the Suspended Management of the Corporate Debtor at any point of time to the applicant and claimed that personal guarantee has not been honoured is without any evidence or material on record. It has also been claimed that the letter dated 03.06.2015 relied on by the applicant being of the nature of personal guarantee was considered by

CoC in its 6th meeting dated 26.08.2020 and it was held that such letter did not fall into the category of guarantee. It was also observed that it was merely a letter of assurance that was issued on letterhead and therefore, the same could not be considered as of the nature of the personal guarantee. It has also been claimed that applicants are having malafide intent as the applicant has not brought on record various correspondences which happened between the management of the Corporate Debtor and applicant in regard to such letter of assurance. As regard to the order dated 06.01.2021 relied on by the applicant, it is pointed out that such order was ambiguous and contradictory and CoC decided to seek various clarification on few points mentioned in the aforesaid order. It is also submitted that the respondent had filed pursis to that effect before this Authority on 18.01.2021. It has also been pleaded that even certificate of MSME was surrendered as Section 29A of IBC, 2016 was not applicable at all as the Suspended Management of the Corporate Debtor is not disqualified under Section 29A(c) of the IBC, 2016 because as on the insolvency commencement date i.e 24.01.2020, account of Corporate Debtor had not been classified as non-performing assets. It has also been claimed that the applicant is merely making baseless allegations with the malicious intention to stall the CIRP proceedings of the Corporate Debtor on false and frivolous grounds.

4. On behalf of Resolution Professional, it has been contended that assuming for a moment that Corporate Debtor was MSME post insolvency commencement date even in that situation, eligibility of Suspended Management/promoters to submit resolution plan cannot be challenged in view of the decision of Hon'ble NCLAT in Company Appeal(AT) (Insolvency) No.1034 of 2020 vide order dated 01.06.2021 wherein identical facts, a similar order of Adjudicating Authority has been reversed and held that in such situation, the appellant will be eligible to submit its scheme.

5. We have considered submissions made by both sides. Without going into detailed deliberation, in our view, the issue has been settled by the order of Hon'ble NCLAT as referred to hereinbefore, for this reason alone, this application has been liable to be dismissed. We are further of the view that the applicant has failed to bring material as regard to his ineligibility under Section 29A of IBC, 2016 can be attached to Suspended Management so that they cannot submit a resolution plan. A claim of guarantee not being honoured by the Suspended Management has also not been proved as such letter, in our view, cannot be considered as a guarantee.

6. Accordingly, IA 145 of 2021 is rejected and disposed of in terms indicated above.

7. Now, we shall take up the IA 58 of 2021 filed for approval of the resolution plan.

8. The facts, in brief, are that the Corporate Debtor was admitted into CIRP by order of this Adjudicating Authority dated 22.01.2020. IRP was appointed which was replaced by the applicant herein. IRP appointed two valuers and conducted the CIRP as per the provision of IBC, 2016 and regulations made thereunder. Form G was published on 18.06.2020 and two EOIs were received. Resolution Professional prepared information memorandum which was circulated to CoC as well as prospective resolution applicant. CoC in its 8th meeting discussed the resolution plan and requested the resolution applicant to increase the value of their proposal. It was also informed that as there were modifications of certain conditions and revised resolution plan was submitted. CIRP period including the extension of 90 days got over, hence, an application for a further extension was filed. The CoC ultimately approved the modified resolution plan of Gautam Nagarsheth jointly with Gaurang Nagarsheth by 100% vote. Thereafter, learned counsel for the Resolution Professional drew our attention to the main features of the resolution plan and also drew our attention to the fact that resolution plan was feasible and viable as in condition, paying off the creditors, resolution applicants have also proposed, therefore, infusion of a sum to Rs.15 crores as working capital and/or CAPEX in order to manage / active maximum assumption.

Performance security has also been provided. Learned counsel drew our attention to the relief and concession. However, the Bench in respect of such relief and concession made it clear that only such relief would be granted which this Adjudicating Authority is empowered to in view of the decision of the Hon'ble Supreme Court in the case of M/s Embassy Property Developments Pvt. Ltd. and Gujarat UrjaVikas Nigam Limited.

9. We have considered the submissions made by both sides and the material on record. As far as amount provided for various stakeholders in the resolution plan is concerned, the following chart is reproduced.

Sr. No.	Category of Shareholder *	Sub-Category of Stakeholder	Amount Claimed	Amount Admitted	Amount provided under the Plan#	Amount provided to the Amount Claimed (%)
1.	Secured Financial Creditors	(a) Creditors not having a right to vote under subsection(2) of section 21 (b) Other than (a) above (i) Who did not vote in favour of the resolution plan (ii) Who voted in favour of the resolution plan	- 44,14,62,054	- 44,14,62,054	- Principal 44,14,62,054 Interest 11,25,72,823	- 100%

		Total(a) + (b)	44,14,62,054	44,14,62,054	44,14,62,054	100%
2.	Unsecured Financial Creditors	(a) Creditors not having a right to vote under subsection(2) of section 21	5,00,53,807	5,00,53,807	5,00,53,807	100%
		(b) Other than (a) above				
		(i) Who did not vote in favour of the resolution plan	5,01,75,005	4,17,70,704	5,01,75,005	100%
		(ii) Who voted in favour of the resolution plan				
		Total(a) + (b)	10,02,28,812	9,18,24,508	10,02,28,812	100%
3.	Operational Creditors	(a) Related Party of Corporate Debtor				
		(b) Other than (a) above	30,63,16,341	28,57,36,075	61,26,326	2%
		(i) Government	15,31,418	15,31,418	30,628	2%
		(ii) Employees	45,72,352	23,36,134	23,36,134	100%
		Total(a) + (b)	31,24,20,083	28,96,03,627	84,93,088	
4.	Other dues and debt	-	-	-	-	-
Grand Total			85,41,10,949	82,28,90,189	66,27,56,778	

10. From the above chart, it is noted that for secured Financial Creditors, unsecured Financial Creditors and employees, 100% payment is given whereas to Operational Creditors,

only 2% of the admitted amount is given. The fair value and liquidation value of the Corporate Debtor are Rs. 6,643.26 lakhs and Rs. 4,561.66 lakhs respectively. The amount given to the Operational Creditor is more than liquidation value. In the Form-H in column no. 2 of clause 7, payment to unsecured Financial Creditors who voted in favour of the resolution plan has been mentioned as Rs. 4,17,70,701/- whereas in the same column amount of unsecured Financial Creditors stands at Rs. 10,02,28,812/- and in percentage terms has also been mentioned as 100%. Thus the figure of Rs. 9,18,24,508/- is inadvertently mentioned wrong. This factual position gets clarified from resolution plan itself wherein total payment to unsecured financial creditor stated as Rs. 10.02 crores which is the total of unsecured financial creditor not having a right to vote and who voted in favour of the resolution plan.

11. It is further noted that Form-H has been filed by Resolution Professional wherein all informations / details as regard to conduct of CIRP as well as process adopted for resolution plan have been given. It is further noted that certificate as regard to eligibility of resolution applicant under Section 29A alongwith undertaking of the resolution applicant to this effect has already been given. There are no preferential undervalued or extraneous transaction. We have also perused the contents of resolution plan and requirement of Regulation 36 to 39 of CIRP Regulations, 2016 have been complied with. We further note that resolution applicant

complies with the requirement under Section 30(2)(b) of IBC, 2016. We also find that the resolution plan addresses the cause for failure and also contains measures to run the Corporate Debtor in future. We also find that resolution plan is both feasible and viable as held by CoC and it also contains provision for its effective implementation. Accordingly, we approve the Resolution Plan and pass following order:

1. The applicant had sought 22 days delay condonation for filing this application from the last date of CIRP which we grant in the fact and circumstances of the case.
2. The approved 'Resolution Plan' shall become effective from the date of passing of this order.
3. The order of moratorium dated 22.01.2020 passed by this Adjudicating Authority under Section 14 of I&B Code, 2016 shall cease to have effect from the date of this order.
4. Resolution Applicant in Clause 2.6 and 2.7 of Resolution Plan (internal page 15) of general conditions has claimed that personal guarantees and corporate guarantees shall be released by assenting financial creditors immediately after the conclusion date and in case of dissenting financial creditors same shall be released by such dissenting financial creditors immediately upon the receipt of liquidation value. We hold that such relief cannot be granted in a blanket manner as that would be violative of provision

of Law of Contract relating to indemnity and guarantee. However, there will not be any bar for releasing of such guarantees in the event claims of both assenting financial creditors as well as dissenting financial creditors are satisfied as per their requirements and they give their consent to this effect.

5. The Resolution Professional shall forthwith send a copy of this Order to the participants and the Resolution Applicant(s).
6. The Resolution Professional shall forward all records relating to the conduct of the corporate insolvency resolution process and Resolution Plan to the Insolvency and Bankruptcy Board of India to be recorded in its database.
7. As regard to various reliefs and concessions which are being sought, we hereby grant following relief and concessions only as against relief and concession claimed by Resolution Professional:-
 - I. After the payment of the dues to the Secured Creditors, Unsecured Creditors, Operational Creditors, as per the resolution plan all the liabilities of the said stakeholders shall stand permanently extinguished after the approval of the resolution plan. We further hold that other claims including Government / Statutory Authority, whether lodged during CIRP or not, shall stand extinguished after the approval of the

resolution plan and the Corporate Debtor shall be removed from the list of defaulters/ black list of RBI. We further hold that contingent / unconfirmed dues shall also stand extinguished.

- II. On the effective date, all claims of the Suspended Management, erstwhile directors, and erstwhile shareholders shall stand permanently extinguished.
- III. On the effective date and with effect from the appointed date, all encumbrances on the assets of the corporate debtor prior to the plan shall stand permanently extinguished on satisfaction of liabilities due to creditors and completion of procedural formalities as provided in the Companies Act, 2013.
- IV. For reliefs and concessions sought from the concerned Income Tax Authority / GST Authority, we direct the resolution applicant to approach the concerned Authorities who shall decide the issues including waivers / exemption from taxes as per the provision of respective statute.
- V. Also for reliefs and concessions in regard to direction to Government of Gujarat and waiver from applicability of requirements for acquisition and transfer of land/ assets, we direct the resolution applicant to approach the concerned Authorities who shall decide the issues including waivers / exemption as per the applicable laws.


- VI. The resolution applicant shall be entitled to review, revise or terminate any appointments / agreements entered into by or on behalf of the corporate debtor in accordance with the terms and conditions of such agreements / MoUs / contracts.
- VII. The Resolution Professional shall complete the accounting entries to give effect to the resolution plan in the Books of Account as per the applicable Accounting Standards and provisions of the Companies Act, 2013.
- VIII. The management of the Corporate Debtor shall be handed over to the Board of Directors as may be nominated by the Resolution Applicant for proper running of the business operations of the Corporate Debtor.
- IX. The Board of Directors of the Corporate Debtor may be reconstituted and procedural compliances shall be done to give effect to such reconstitution.
- X. The existing equity shareholding is being maintained by the Resolution Applicant. The Resolution Applicant/Corporate Debtor can alter its structure or format and shall comply with the procedural requirement relating thereto as per the provisions of the Companies Act, 2013.
- XI. The Resolution Applicant shall, pursuant to the resolution plan approved under Section 31(1) of

the Code, obtain the necessary approvals required under any law for the time being in force within a period of one year from the date of approval of the resolution plan by the Adjudicating Authority under Section 31 or within such period as provided for in such law, whichever is later, as the case may be;

12. Accordingly, IA 58 of 2021 in CP (IB) No. 268 of 2018 is allowed and stands disposed of in terms of the above directions.
13. Urgent certified copy of this order, if applied for, to be issued to all concerned parties upon compliance with all requisite formalities.



(Virendra Kumar Gupta)
Member (Technical)



(Madan Gosavi)
Member (Judicial)

Prakash/Mansi