IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH-I
KOLKATA

IA (IB) No. 633/KB/2021
in
CP (IB) No. 455/KB/2018

An Application under section 33(3) read with section 74(3) and section 60(5) of the Insolvency and Bankruptcy Code, 2016.

CP (IB) No. 455/KB/2018

In the matter of:

Subrata Sarkar

… Operational Creditor

Versus

KND Engineering Technologies Limited

… Corporate Debtor

And

IA (IB) No. 633/KB/2021

In the matter of:

Indian Bank … *Applicant*

Versus

1. KND Engineering Technologies Limited
2. PND Infrastructure Private Limited
3. Mr. PessiNanabhoyDadina
4. Mr. Krishna Chakraborty
5. Mr. Ashish Kumar Manna

… Respondents

Order reserved on: 09 May 2022

Order pronounced on: 08 June 2022

Coram:

Shri Rajasekhar V.K.	:	Member (Judicial)
Shri Balraj Joshi	:	Member (Technical)

Appearances (through hybrid mode):

For the Applicant	:	Mr. Om Narayan Rai, Advocate

For Respondent No. 1 to 3 and 5	:	Ms. Urmila Chakraborty, Advocate Mr. Yash Vardhan Deora, Advocate
For Resolution Professional	:	Mr. Shaunak Mitra, Advocate Mr. Arun Kumar Gupta, P.C.A

ORDER

Rajasekhar V.K., Member (Judicial)

1. The present I.A. has been filed by Allahabad Bank (Indian Bank after amalgamation) under section 33(3) read with section 74(3) and section 60(5) of the Insolvency and Bankruptcy Code, 2016 ("Code").

Submissions of Mr. Om Narayan Rai, learned Counsel appearing for the Applicant

2. The Respondent No.1, KND Engineering Technologies Limited, was admitted into Corporate Insolvency Resolution Process ("CIRP") on an application made by Mr. Subrata Sarkar under section 9 of the Code registered as CP (IB) No. 455/KB/2018.

3. The Interim Resolution Professional made a publication in Form A.Committee of Creditors ("CoC") was formed which comprised of two members *i.e.,* Indian Bank and Katpadi Commodeal Private Limited.

4. The Resolution Plan submitted by the Respondent No. 2 *viz.,*PND Infrastructure Private Limited was approved by the CoC in its 16th CoC meeting held on 21 May 2019. The successful Resolution Applicant proposed to make payments in the following manner:

   a. ₹50,00,000/- (Rupees fifty lakh only) as CIRP Cost within fourteen days of approval of the Resolution Plan,

   b. ₹30,00,00,000/- (Rupees thirty crore only) to the Secured Financial Creditor within two years through the debtor's realisation/internal accruals, infusion of funds from promoters by debt and/or equity and sale of properties mortgaged with Indian Bank (Allahabad Bank) in separate tranches.

c. ₹5,00,000/- (Rupees Five Lakh only) to the Unsecured Financial Creditor within one month from the date of approval of the Resolution Plan by the Adjudicating Authority.

d. ₹7,11,543/- (Rupees seven lakh eleven thousand five hundred and forty-three only) to be paid to the Operational Creditors (other than workmen and employees) within fourteen days from the date of approval of the Resolution Plan by the Adjudicating Authority.

e. ₹49,09,813 (Rupees forty-nine lakh nine thousand eight hundred and thirteen only) to be paid to the employees within fourteen days from the date of approval of the Resolution Plan by the Adjudicating Authority.

f. ₹12,00,000/- (Rupees Twelve Lakh only) to the public shareholders within one month from the date of approval of the Resolution Plan by the Adjudicating Authority.

5. This Adjudicating Authority approved the Resolution Plan on 12 June 2019. The Respondent No. 2 has been committing serious breach of terms of the approved Resolution Plan.

6. The Applicant wrote to the Respondent No. 2 requesting for implementation of the Resolution Plan but the Resolution Applicant failed to make payments to the Applicant.

7. The Respondent No. 2 in its letter dated 15 September 2020 wrote that it would be getting ₹33,00,00,000/- (Rupees thirty-three crore only) that it had deposited with the Registrar, Hon'ble High Court of Calcutta in connection with a litigation with Fab Leathers Limited. However, the assertion made by the Resolution Applicant proved to be wrong as the Hon'ble High Court at Calcutta had dismissed the Arbitration Appeal, being A.P.O. 39 of 2020 on 24 December 2020.

8. The Respondent No. 2 never mentioned that the amounts specified in Resolution Plan would be paid by the successful Resolution Professional only after receipt of money that was held up in litigation.

9. That the Applicant has been affected by the violation of the Resolution Plan and hence the Applicant prays for liquidating the Corporate Debtor.

Submissions of Ms Urmila Chakraborty, learned Counsel for Respondent Nos.1 to 3 and 5

10. The Respondent No. 2 is involved in infrastructural projects and real estate activities with owned/leased properties. The liquidation value was estimated at ₹26,54,34,919/- (Rupees Twenty-Six Crore Fifty-Four Lakh Thirty Four Thousand Nine Hundred and Nineteen only) and the payment proposed by the successful Resolution Applicant is ₹31,18,90,031/- (Rupees Thirty One Crore Eighteen Lakh Ninety Thousand and Thirty One only).

11. The successful Resolution Applicant has paid in full to the following:

    a. Unsecured Financial Creditors- ₹5,00,000/-

    b. Operational Creditors (other than workmen and employees)- ₹7,11,543/-

    c. Operational Creditors (workmen and employees)- ₹49,09,813/-

    d. Public Shareholders- ₹12,00,000/-

12. According to the approved Resolution Plan, the successful Resolution Applicant has made the following payments to the Applicant:

    a. ₹1,00,00,000/- (Rupees one crore only) in August 2019;

    b. ₹1,22,00,000/- (Rupees one crore twenty-two lakh only) in December 2019;

    c. Bank Guarantees were returned to the Applicant after July 2019 for a total sum of ₹70,92,000/- (Rupees seventy lakh ninety-two thousand only);

    d. Pay Order of ₹1,50,00,000/- (Rupees one crore fifty lakh only) was offered to the Applicant on May 2021.

13. The Resolution Plan was approved wherein it was stated that majority of the repayment was on the basis of disposal of the properties that were mortgaged to the Bank.

14. Due the Covid-19 Pandemic and declaration of lockdown on 23 March 2020, the prices of the properties listed in the approved Resolution Plan dropped drastically and no buyers could be found at the price for the properties.

15. The Corporate Debtor issued a letter dated 21 May 2021 with a proposal for settlement/closure of the cash credit account maintained with the Applicant and the Respondent No. 1 deposited ₹1,50,00,000/- (Rupees One Crore Fifty Lakh only) *vide* Demand Draft No. 002646 dated 21 May 2021.

16. The Respondent No. 2 sat with the officials of the Applicant in June 2021 and discussed that the valuation done before the Covid-19 pandemic would no longer be valid and a fresh valuation was required to be conducted.

17. After the amalgamation of Allahabad Bank with Indian Bank, the process of negotiation slowed down, and hence the Resolution Plan could not be implemented.

18. The extinguishment of the claim of Fab Leathers Limited was part of the Resolution Plan as additional prayers and the same was approved by this Adjudicating Authority.

19. The amount outstanding at the time of approval of Resolution Plan was ₹43,00,00,000/- (Rupees forty-three crore only) and not ₹52,00,00,000/- (Rupees fifty-two crore only). The Corporate Debtor during CIRP brought down the Applicant's exposure by returning the Bank Guarantees, hence the discount was ₹43,00,00,000/- (Rupees forty-three crore only)settled at ₹30,00,00,000/- (Rupees thirty crore only).

20. The successful Resolution Applicant has taken steps to implement the Resolution Plan and it is only due to the Covid-19 Pandemic that there is a delay in such implementation of the Resolution Plan.

Rejoinder by Mr. Om Narayan Rai, learned Counsel to the submissions made by the Respondent Nos. 1 to 3 and 5

21. The Applicant Bank was paid a sum of ₹96,00,000/- (Rupees ninety-six lakh only) and not ₹1,00,00,000/- (Rupees one crore only). As per the payment schedule, the successful Resolution Applicant was to make a payment of ₹10,00,00,000/- (Rupees ten crore only) within nine month from the effective date i.e. 12 March 2020. The lockdown for Covid-19 pandemic began on 25 March 2020.

22. The Respondent No. 2 sought to enter into a one-time settlement with the Bank and made an offer to the tune of ₹20,00,00,000/- (Rupees Twenty Crore only). The Respondent No. 2 deposited an upfront payment of ₹6,00,00,000/- (Rupees Six Crore only) which was ultimately refunded to the Respondent No. 2 upon rejection of the offer for one time settlement.

23. It would have been impermissible for the Applicant to enter into a One-Time Settlement as it would have amounted to the modification of the approved resolution plan, which would not have been permissible. Mr. Om Narayan Rai placed reliance on the judgment rendered by the Hon'ble Supreme Court in ***Ebix Singapore Private Limited vs Committee of Creditors of Educomp Solutions Limited and Anr***[1] ***(Paragraphs 220 to 222*** **at page 541).** The learned Counsel submitted that in ***Ebix Singapore (supra),*** the Resolution Plan was pending approval before the Adjudicating Authority. In the present I.A., the Resolution Plan has already been approved by the Adjudicating Authority.

[1] (2022) 2 SCC 401 decided on 13 December 2021

24. Mr. Rai placed reliance on ***Yavar Dhala vs JM Financial Asset Reconstruction Company Ltd. &Ors.***[2] wherein the Hon'ble NCLAT held that in view of the specific provision provided in section 33(3) of the Code, the Adjudicating Authority has no option but to pass an order of liquidation.

Analysis and Findings

25. Heard the learned Counsel appearing on behalf of the Applicant and the learned Counsel appearing on behalf of the Respondent No. 1 to 3 and 5. Respondent No. 4 was set *ex-parte vide* order dated 28 December 2021.

26. On perusal of the record, it is seen that the successful Resolution Applicant has implemented half of the plan and according to the Respondents, payments have been made to the other creditors.

27. The Respondents have given One Time Settlement offers to the Applicant, but the Applicant has refused to accept the same and has also refunded the amount given as guarantee.

28. The conduct of the successful Resolution Applicant does reflect poorly on the successful Resolution Applicant and whether the successful Resolution Applicant should be given an opportunity to make the payments as resolved under the Resolution Plan is a very doubtful question.

29. But at the same time, we cannot forget the main object of the Code and that is the revival of the Corporate Debtor. Further, we need to consider the repercussions if we order the Corporate Debtor to get liquidated.

30. Firstly, the payments made under the Resolution Plan would have to be refunded unless otherwise stated in the Resolution Plan.

31. Secondly, the Resolution Plan was approved in 2019, whether the assets of the Corporate Debtor have depreciated in value or increased in value would be a moot question, especially in the light of the pandemic.

[2] Company Appeal (AT)(Ins.) No.13 of 2019 decided on 08 March 2019

32. Thirdly, liquidating the Corporate Debtor would result in dissolving a corporate entity, which has a chance of being revived at this stage.

33. In the interest of the integrity of the process of resolution with an ultimate aim to allow the enterprise once again to stand on its feet, all the stakeholders should strive towards reviving the Corporate Debtor and avoid the liquidation to the extent possible.Hence, we direct the successful Resolution Applicant to pay the balance amount to the Applicant, as agreed in the Resolution Plan within two months from the date of this order, failing which an appropriate course of action shall be followed keeping the tenets of the code in right earnest,.

34. The Applicant and Respondents shall report the progress of such settlement on 25.08.2022. Liberty to mention is granted.

35. The Registry is directed to send e-mail copies of the order forthwith to all the parties and their Ld. Counsel for information and for taking necessary steps.

36. Certified Copy of this order may be issued, if applied for, upon compliance of all requisite formalities.

BALRAJ JOSHI

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Date: 2022.06.08 18:07:41 +05'30'

Balraj Joshi
Member (Technical)

Rajasekhar V K

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Rajasekhar V.K.
Member (Judicial)

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