IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH -I
KOLKATA

IA (IB)No.961/KB/2021
in
CP (IB) No.1127/KB/2019

An application under section 60 (5) of the Insolvency and Bankruptcy Code, 2016 read with Rule 11 of the National Company Law Tribunal Rules, 2016

And

In the matter of:
Swatch Group (India) Private Limited, a Company incorporated under the provisions of the Companies Act, 1956 and a Company within the meaning of the Companies Act, 2013 and has its registered office at Rectangle One Building, Plot D-4, Saket District Centre, Floor-4th, New Delhi-110017 having CIN No: U74999DL2000PTC105409.

...Operational Creditor

-Versus-

Prime Retail India Limited, a Company incorporated under the provisions of the Companies Act, 1956 and a Company within the meaning of the Companies Act, 2013 and has its registered office at 1/1 Camac Street (A.K.A. 8/1, Middleton Row, Kolkata-700071, West Bengal, having CIN No: U63090WB1990PLC048986.

...Corporate Debtor

And

In the matter of:
BMS Commercial Private Limited, a Company incorporated under the provisions of the Companies Act, 1956 and a Company within the meaning of the Companies Act, 2013 and has its registered office at 18, R.N Mukherjee Road, 2nd floor, Kolkata-700001, West Bengal, having CIN No: U51909WB1989PTC047145.

……. Applicant/Successful Resolution Applicant

-Versus-

Kamalesh Kumar Singhania Convenor of the Implementation & Monitoring Committee, **& Ors.** ....Respondents

Date of hearing: 11/03/2022

Date of pronouncement: 21/04/2022

Coram:

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

Appearances (via videoconferencing:)

For the Applicant/SRA	:	Mr. Jishnu Chowdhury, Adv. Mr. Ratul Das, Adv Mr. Anuj Kumar Mishra, Adv
For the Respondents	:	Mr. Pranay Agarwal, Adv
For State Bank of India	:	Ms. Aparajita Rao, Adv Mr. Sanwal Tibrewal, Adv

ORDER

Balraj Joshi, Member (Technical)

1. The Court convened through video conference.

2. This is an Interlocutory Application filed under section 60 (5) of the Insolvency and Bankruptcy Code, 2016 (‘the Code’) by **BMS Commercial Private Limited**. (‘Applicant’) against **Kamalesh Kumar Singhania & Ors.**, praying for various reliefs, predominant being the following:

3. *An order directing the respondents to forthwith issue a no-objection certificate and facilitate the transfer of premise no.1, Camac Street, Kolkata, and premise no. 8, Camac Street, Kolkata-7000016.*

   The financial creditors viz. State Bank of India and Indian Bank are arrayed as respondents.

Facts of the Case

4. The Corporate Insolvency Resolution Process (‘CIRP’) of Prime Retail India Limited was initiated, pursuant to an ‘order of admission’ dated 27.08.2019 in CP (IB)1127/KB/2019 filed by Swatch Group (India) Limited (hereinafter referred to as “Operational Creditor”), against Prime Retail Limited or (“the corporate Debtor”) under the provisions of the Insolvency and Bankruptcy Code 2016 (“Code/IBC”).

5. The CoC approved the Resolution Plan submitted by BMS Commercial Private Limited ("Successful Resolution Applicant") with an 89.21% voting share on February 13, 2020. The RP applied for approval of the Resolution Plan of the

Successful Resolution Applicant with this Adjudicating Authority which was thereafter approved by this Adjudicating Authority vide order dated July 15, 2020In terms of the approved Resolution Plan Implementation & Monitoring Committee ('IMC') was formed as per the terms of the approved Resolution Plan for its implementation with the secured financial creditors viz. **State Bank of India**, **Mr. Manoj Budhia**, representing Resolution Applicant as a member, and **Mr. Kamlesh Kumar Singhania**, Resolution Professional as convener of the IMC. The 1st meeting of the IMC was held on 21st July 2020. This was followed by a number of meetings wherein the status of the Resolution Plan was discussed and attended actions were deliberated. It is seen that at least six IMC meetings were held on 21.07.20, 17.11.20, 30.11.20, 04.03.20, 25.05.21, and 3.09.21 under the chairmanship of the convener and attended by the financial creditors who were also members of the erstwhile CoC. The period of 270 days for completion Corporate Insolvency Resolution Process of the Corporate Debtor got over on 27.04.2020. Subsequently, various extensions have been granted by the IMC to the SRA for making payments.

6. Even though the upfront payment was made as per the plan, the Successful Resolution Applicant faltered in making the necessary payments in the scheduled time, due to various reasons cited in the application including predominantly the Pandemic. Therefore, due to non-payment by the SRA strictly as per the Resolution plan, the IMC recommended the matter to this Adjudicating Authority for ordering the liquidation of the corporate debtor. The SRA however contends that it had inter-alia proposed to sell the non-business assets of the CD for making some portion of the payments required to be made under the plan, for which, the NOC for which has been held back by the IMC itself and as such it could not implement the plan thus far.

7. The sale of such assets was an intrinsic part of the Resolution plan.

8. As such the applicant has filed this application under section 60(5) of the IBC, *inter alia* praying for the following reliefs:

a. Direction upon the respondents to forthwith issue a no-objection certificate and do all acts and/or deeds for facilitating the transfer of premises nos.1/1 Camac Street and 8, Camac Street Kolkata -700016.

b. If necessary, an order be passed extending the time for making payment by the application under the resolution plan approved on 15th July 2021

c. Directions upon the respondents to compute the time to make the payment under the Resolution plan on and from the date of the order to be passed herein.

Submissions by the Applicant:

9. In terms of the resolution plan the Applicant was permitted to dispose of the non-business assets of the Corporate Debtor for the purpose of making payment under the Resolution Plan. The respondents were required to provide such no objection or issue certificate as may be required to in as much as the upfront payment has been received since the IMC comprising of the erstwhile RP (and now convener) and the two members of the CoC were the agency for the implementation of the plan in the true spirit.

10. It is contended that the respondents have acted in contravention of the provisions of the resolution plan by causing a delay in granting such a no-objection certificate. Therefore, the period for compliance with the resolution plan could not have been computed as the Respondents have failed to provide the required certificate or no-objection in terms of the Resolution Plan. Therefore, the Respondents have acted in a mala fide and unfair manner in not providing such a certificate.

11. The Applicant submits that while the IMC was deliberating on the issue of granting extension to the SRA and also whether to press for the liquidation of the Corporate Debtor, it received a proposal for the sale of the ‘non-business assets’ of the Corporate Debtor and the proposal was intimated to the IMC vide letter dated 24th March 2021 requesting for ‘sell-approval in terms of clause 6 of the Resolution Plan for running smooth course. The Applicant submits that

it wrote to Respondent Nos.2 and 3 dated 24.03.2021 and 20.09.2021 seeking NOC for the sale of the asset but the respondent was reluctant to even reply. Even though in the 5th IMC meeting the approval for selling the property at 1/1 Camac Street was recorded in the minutes, the required NOC was still not issued without which it was not possible to sell the asset, being an interest of the financial creditors.

12. In this regard the applicant has also attached the letters dated 29th Oct 2021 and 30th Oct 2021 (pages 123 & 124 of the petition) from prospective buyers expressing their continued interest and giving concrete offers in respect of the said properties. Snapshots of the Demand drafts in favour of the CIRP account of the CD are also attached on pages 106 & 107 of the petition.

13. The applicant has appended a chart showing payments as Annexure-L on page 118 of the petition made by him which includes the upfront payment made to the financial creditors, upon the receipt of which they were obliged to issue the discharge certificate, no-objection certificate, or other documents as may be required by the applicant, as provided in clause 9.1.2 of the resolution plan.

Submissions by counsel for the respondent(s)

14. No reply affidavit has been filed by the respondent

15. However, during the hearings, the Ld. Counsel appearing for the financial creditors as well for the convener has not denied the contents of the payment chart on page 118 of the petition.

16. It has been submitted that the said properties which are being proposed for sale were in fact the security interest of both the banks namely the State Bank of India as well as Allahabad bank (now Indian Bank) and as such, they were in the process of getting requisite approvals from their competent authorities.

17. This Adjudicating Authority had directed the concerned bank authorities to be present in the court *vide* order dated 28.02.2022.

18. On the next date of hearing the Ld. Counsel appearing for the State Bank of India presented a draft NoC which was a conditional document that did not explicitly say that the Bank would have no objection if the subject properties were disposed of.

Analysis and Finding

19. From the submissions made by the applicant it is seen that out of the total plan size of ₹11,05,00,000/- a sum of ₹8,07,00,000/- which works out to about 73.03% of the total consideration.

20. Even though the upfront payment of ₹5.0 Cr was made as per the plan, the SRA was not able to make the requisite payment as per the plan due to intervention by Pandemic and also due to the fact that two units of the business of the corporate debtor were not handed over to him by the IMC. The payment plan got further derailed due to holding back of the NOC by the financial creditors/IMC.

21. In terms of the approved resolution plan attached with the application, it is seen that the SRA had proposed to dispose of non-business assets of the CD in accordance with Regulation 37(a) & (d) of the CIRP regulations, and had stated that the same may be used for payment of the Resolution amount proposed under the plan. The Applicant had at least twice written to Respondent Nos. 2 and 3 dated 24.03.2021 and 20.09.2021 seeking NOC for 'sale of the asset but the respondent did not issue the same. Had this NOC been issued on time the remaining proceeds of the plan could have been met from the sale of the assets which were otherwise provided for in the resolution plan.

22. Another aspect that comes to the fore from the uncontested averments of the applicant is that the Implementation and Monitoring Committee (hereinafter 'IMC') has not properly facilitated and implemented the Resolution Plan and neither managed the operations of the business of the Corporate Debtor in a professional manner despite having taken over sometime in Feb-March 2021.

While the operations at two business units at Rangoli Mall and Durgapur were not even restarted, the electricity connection to the main showroom of the corporate debtor at Kolkata was disconnected by the mall authorities due to non-payment of electricity charges.

23. Further whereas IMC had extended the time for payment till 11.03.2021 as depicted in the minutes of the 4th meeting of the IMC, still on 22.02.2021, chose to file ***I.A No.252/2021*** before this Tribunal for proceeding with the liquidation of the corporate debtor and pursued the application despite receiving sizeable payments in March 2021, thus showing their disinterest in putting the Corporate Debtor back on its feet in accordance with the approved resolution plan.

24. In light of the facts stated in the application and the submissions made, we make the following order:

    a) The application is allowed in terms of its prayer (a) and we direct the financial creditors to issue a clear NOC as required under the terms of the approved resolution plan.

    b) The SRA is directed to take further action in the matter expeditiously and implement the resolution plan in all seriousness within a period of 6 weeks from the date of issue of this order.

    c) The Implementation & Monitoring Committee shall supervise the implementation of the Resolution Plan and shall file a Status Report of its implementation before this Adjudicating Authority within eight weeks.

    d) Needless to say, the Financial Creditors are at liberty to proceed against the personal guarantors for recovery of the remaining sums due to them, but not against the properties of the corporate debtor which are being disposed of in accordance with the approved Resolution Plan. There is really no need to mention this in the NOC since it will have the effect of putting off prospective buyers of the corporate debtor's property.

25. The application bearing ***IA(IB)No.961/KB/2021*** is disposed of accordingly.

26. The Registry shall e-mail a copy of this order to the Counsel -on-record of the

parties, Successful Resolution Applicant, the erstwhile IRP for information, and for taking necessary steps.

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

BALRAJ JOSHI Digitally signed by BALRAJ JOSHI Date: 2022.04.21 19:58:26 +05'30'

Rajasekhar V K Digitally signed by Rajasekhar V K Date: 2022.04.21 18:13:30 +05'30'

(Balraj Joshi)
Member (Technical)

(Rajasekhar V.K)
Member (Judicial)

Sneh, LRA