

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOCHI BENCH**

IA/37/(KOB)/2021

In

IBA/21/KOB/2019

(Under Section 60(5) of Insolvency and Bankruptcy Code, 2016

Order delivered on 30th June 2021

Coram:

**Hon'ble Shri Ashok Kumar Borah, Member (Judicial)
Hon'ble Shri Satya Ranjan Prasad, Member (Technical)**

Applicant:

Jose Pradeep, S/o K.O.Devasia, aged 58,
R/o Valiyaprambil House, St.Vincent Road,
Ernakulam North, Kerala-682018.
Vs.

Respondents

1. CA, Jasin Jose,
5D, Skyline Riverscape, Thottumugham
Aluva, Kerala-683101.
2. The South Indian Bank Ltd having its
Regd.Office at SIB House, TB Road,
Thrissur-680001.
3. M/s Churakulam Tea Estates Pvt.Ltd
Vandiperiyar, Idukki-685533.

Parties/Counsel present (through video conference)

For the applicant	: Ms. Jagriti Sanghi, Advocate
For the respondent 2	: Shri Sunil Shanker, Advocate
For the Resolution Professional	: Shri Jasin Jose, RP

ORDER

The Successful Resolution Applicant Mr. Jose Pradeep has filed this IA/37/KOB/2021 under Section 60(5) of Insolvency and Bankruptcy Code,2016 (hereinafter referred as I&B Code,2016) read with Rule 11 of the National Company Law Tribunal Rules,2016 (hereinafter referred as “rules”) against South Indian Bank and others seeking the following reliefs: -

1. Resolution Plan be modified by incorporating the mutually agreed position regarding the grace period.
2. The Applicant be permitted to follow the revised timeline based on mutual agreement between the parties during the 9th CoC meeting or;
3. Considering the medical condition of the Applicant, grant an extension of two months to the timelines proposed under the Resolution Plan.

2, It is stated that on finalisation of their Application as Resolution Applicant on 23.03.2020, they submitted the first Resolution Plan on 26.08.2020. However, since the Resolution Plan cannot be accepted as such, Committee of Creditors (CoC) granted them time till 24.09.2020 to submit the revised Resolution Plan. Since they could not file the plan within the time, they filed IA/142/KOB/2020 seeking 30 days' time with effect from 13.09.2020. Vide Order dated 25.09.2020 this Tribunal directed to complete the Corporate Insolvency Resolution Process on or before 12.10.2020. In the meantime, the Resolution Applicant was tested Covid-19 Positive and remained in hospital from 24.09.2020 to 12.10.2020.

3, It is further stated that considering the Applicant's medical condition due to post Covid complications, the 8th CoC meeting resolved to grant an extension of two weeks to submit the revised Resolution Plan. Amid the Resolution Professional filed IA/173/KOB/2020 for further extension of time by 45 days from 12.10.2020 and the same was allowed vide order dated 21.10. 2020 extending the time upto 26.11.2020.

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As per the decision in 8th CoC meeting the Resolution Applicant submitted the revised Resolution Plan on 29.10.2020.

4, It is further stated that the revised Resolution Plan was approved by the CoC in their 9th meeting and that the Applicant and the Financial Creditor had mutually agreed in this meeting that, if the Resolution Applicant make any default in payments as agreed to under the Resolution Plan, the payments may be made within a grace period of 30 days or by 19.03.2021, whichever is later. The Resolution Plan Clause as agreed in the 9th CoC to meeting is as under: -

*"For any default in making payment as specified in this plan, a cure period of 90 days would be provided to cure the default/delayed payment. Representative from South Indian Bank informed further 90 days curing period cannot be permitted in the plan as already there is sufficient period inbuilt in the plan. **The Resolution Applicant informed for the first tranche payments he does not requires any grace period. However, considering the present pandemic situation if any adverse eventuality arises he requires some grace period and it is mutually agreed to have grace period of 30 days or up to maximum March 19th curing period to complete the plan implementation with regard to the payments.**"*

5. This mutually agreed position was also discussed in the 10th CoC meeting. Unfortunately, the applicant could not attend that CoC meeting due to post Covid illness, though the notice of the meeting was received by him. In this meeting the CoC approved the Resolution Plan and the Resolution Professional presented the same before the Tribunal for approval. Vide order dated 08.01.2021, the Tribunal approved

the Resolution Plan. In the final approved Resolution Plan under the head 'Infusion of Funds by Resolution Applicant' it is stated as under: -

“ The Resolution Plan proposes that the amount proposed in this Resolution Plan for settling all the dues of the Corporate Debtor at Rs. 26.75 crores would be sourced by the Resolution Applicant in the following manner:

- (I) Upfront contribution towards performance guarantee.
- (II) Immediate settlement of CIRP & Interim Fund with 2 weeks of approval of Resolution Plan by AA
- (III) Settlement of Operational Creditors including Employees & Workmen's Dues, Statutory Dues and Operational Creditors at least 7 days before the payment is made to the Financial Creditors.
- (IV) Settlement of 10.00% of approved financial claims to Financial Creditors on paid on or before 30 November, 2021 or 30 days from the date of approval of the Resolution Plan by AA whichever is later.
- (V) Settlement of balance 90.00% of approved financial claims to Financial Creditors on paid on or before 31 January, 2021 or 90 days from the date of approval of the Resolution Plan by AA whichever is later.

Further, the following has been included under 'Other Reliefs':

For any default in making the final payment to the financial creditors as specified in this plan, a cure period of a maximum of 20 days would be provided to cure the default/delayed payment.”

6. The Resolution Applicant stated that the mutually agreed understanding in the 9th CoC meeting is not considered while filing the final Resolution Plan for approval. It is further stated that the Applicant has already paid a sum of

₹1,00,00,000 (Rupees One Crore Only) as performance guarantee on 24.11.2020.

Hence, it is clear that the applicant is fully committed to comply with the conditions in the Resolution Plan.

7. In the reply filed by the Respondent No.2 (The South Indian Bank) it is contended that as per the Resolution Plan the applicant undertook payment of 10% and the balance 90% of the total claim amount Rs.17.42 Crores of the Financial Creditors within 30 days and within 90 days respectively from the date of approval of the Resolution Plan. It is also agreed by the applicant that the Interim Fund infused by the South Indian Bank Ltd along with the CIRP cost has to be repaid separately within two weeks from the date of approval of the Resolution Plan. The applicant failed to oblige the schedule of payment as agreed to in the Resolution Plan. Therefore, in the 1st meeting of the Monitoring Committee dated 02.02.2021, chaired by the Resolution Professional, decided to sell the Corporate Debtor as a going concern under Section 32 (e) of I&B Code,2016.

8. It is further contended that the Applicant is misinterpreting the minutes of the 9th CoC meeting held on 04.11.2020 stating that in the meeting, the Applicant proposed a cure period of 90 days to be provided for curing default payment. This was not allowed by the CoC stating that there is sufficient period inbuilt in the approved Plan. Applicant further informed the CoC that at the first tranche of payments, he does not require any grace period, however if any adverse eventuality arises he requires some grace period, to be mutually agreed 30 days or till 19.03.2021. There was no agreement on the grace period in the minutes of the meeting recorded by the Resolution Applicant. Therefore, Respondents seeks the leave of the Tribunal to rely upon the minutes of the meetings for their true intent and purport. It was further contended that there was never a mutually agreed

cure period as submitted by the Applicant. The request of the applicant for a mutually agreed cure period for the final payment as per Resolution Plan subject to maximum of 19.03.2021 was recorded.

9. It is also stated that pursuant to the default committed, the performance guarantee was invoked on 04-02-2021. It is clear from the events that the Resolution Applicant has found it difficult to comply with his commitments under the Resolution Plan, and the same clearly belies of his financial capacity. The Resolution Applicant had only made payment of interim fund within two weeks of approval of the Resolution Plan. The said amount approximating Rs 1.85 Crores is less than 10% of the commitment of the Resolution Applicant to the financial creditors under the Resolution Plan.

10. In the rejoinder the Applicant reiterated most of his contentions highlighting the medical condition of the Resolution Applicant, due to which he was unable to follow the timelines specified in the Resolution Plan, and not because of his financial inability. Applicant stated that if the Tribunal directs he is willing to prove the financial ability.

11. The Applicant denies that they had to make payments towards the Interim fund and CIRP costs by 22.01.2021. The Applicant received the copy of the approved Resolution Plan only on 12.01.2021. Therefore, two weeks' period should be calculated from the date of receipt of that order. It is also stated that this application has been filed to seek a short adjournment of time making the said payment on 29.01.2021. Meanwhile, Respondent No.2 has invoked the performance guarantee on 04.02.2021 i.e. after filing of this application. Therefore, the invocation of the Performance Guarantee by the Respondent No.2 is fraudulent and illegal.

12. It is further averred that this application is ought to be allowed in the light of the directions issued by the Hon'ble Supreme Court of India granting relaxation of timelines under both general and special statutes considering the Covid-19 crisis. Moreover, the performance guarantees successfully invoked by the Respondent No.2 shows that Resolution Applicant met his obligation under the Resolution Plan albeit he requires a short period of time for the same.

13. It is further stated that excluding the lockdown period from March 2020 to August 31, 2020, the Corporate Insolvency Resolution Process timeline is not expired. Therefore, the Applicant may be granted further time to comply with the terms of the Resolution Plan to make necessary payments according to the modified timelines as prayed for in the present Application.

14. We have heard the arguments advanced by the learned counsel appearing for the applicant as also the learned counsel for the Respondent No.2 Bank and had meticulously gone through the documents produced by them. In this case the Resolution Plan was approved on 08.01.2021 with specific direction to infuse the funds as under: -

a) *Infusion of Funds by resolution Applicant:-
The Resolution Plan proposes that the amount proposed in this Resolution Plan for settling all the dues of the Corporate Debtor at Rs. 26.75 Crores would be sourced by the Resolution Applicant in the following manner:*

- (i) Upfront contribution towards performance guarantee.*
- (ii) Immediate settlement of CIRP & Interim Fund with 2 weeks of approval of Resolution Plan by AA.*
- (iii) Settlement of Operational Creditors including Employees & Workmen Dues, Statutory Dues and Operational Creditors at least 7 days before the payment is*

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made to the Financial Creditors. (iv) Settlement of 10.00% of approved financial claims to Financial Creditors paid on or before 30th November, 2021 or 30 days from the date of approval of the Resolution Plan by AA, whichever is later. (v) Settlement of balance 90.00% approved financial claims to Financial Creditors paid on or before 31 January, 2021 or 90 days from the date of approval of the Resolution Plan by AA, whichever is later.

15. However, the Resolution Applicant has failed to honour his commitments under the Resolution Plan. The Resolution Applicant had only made payment of interim fund within two weeks of the approval of Resolution Plan to the tune of Rs.1.85 Crores which is less than 10% of the committed amount in the Resolution Plan. On some pretext or the other he was going on seeking extension of the period for payment of the committed amount. He has filed this IA/37/KOB/2021 on 03.02.2021 (after curing the defects) for a further extension of time for another two months while the time already granted has been expired long back. Such an attitude on the part of the Resolution Applicant cannot be accepted.

16. The prayer to modify the Resolution Plan incorporating mutually agreed position regarding the grace period and to follow the revised timeline based on that cannot be accepted by this Adjudicating Authority, because once a Resolution Plan is approved by the Adjudicating Authority, it cannot be reopened and add another condition in the Plan. In this connection, the decision of Hon'ble the Supreme Court in **Rahul Jain v. Rave Scans Pvt. Ltd** [CIVIL APPEAL NO. 7940 OF 2019] may be referred to, in which it was held that once a Resolution Plan is approved by the NCLT, it attains finality and cannot be disturbed. The National Company Law Appellate Tribunal (NCLAT) followed the same reasoning and conclusion in **QVC Exports Pvt. Ltd. v. United Tradeco FZC** [Company Appeal (AT) (Insolvency) No. 1351 of

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2019] and held that the Adjudicating Authority is not permitted to alter a plan under the guise of inherent powers. Orders which have attained finality cannot be reviewed under the inherent powers of the court.

17. Moreover, in the minutes of the CoC under the head 'Resolution Plan Clause' it is very clearly stated that the representative from the South Indian Bank opposed the granting of further 90 days curing period as already there is a sufficient period inbuilt in the plan. However, considering the present pandemic situation, if any adverse eventuality arises maximum 30 days' grace period or up to 19th March 2021 was recorded. Hence it is clear that only the request of the Applicant for a mutually agreed cure period for final payment as per Resolution Plan subject to maximum of 19th March 2021 was recorded.

18. Since, it is clear that the Applicant failed to honour his commitments in complying with the conditions in the approved Resolution Plan, grant of any further time is not called for in this matter.

19. In view of the aforesaid discussions, **IA/37/KOB/2021 is dismissed.**

Dated the 30th day of June, 2021.

Sd/-

(Satya Ranjan Prasad)
Member (Technical)

Sd/-

(Ashok Kumar Borah)
Member (Judicial)

