

**BEFORE THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, MUMBAI**

**M.A. No. 435 of 2018
IN
C.P.NO.1214/I&BC/NCLT/MB/MAH/2017**

In the matter of

Name of Applicant : Wig Associates Private Limited,
the Corporate Debtor,
A company incorporated under the
provisions of the Companies Act, 1956,
Having its Registered Office at 102,
Amar Residency, Punjabwadi, Deonar,
Mumbai-400 088, through Resolution
Professional Mr. Martin S.K. Golla appointed by the
Hon'ble NCLT, Mumbai Bench under the provisions
of the Insolvency & Bankruptcy Code, 2016.

Order delivered on : 04.06.2018

CORAM: SHRI M.K. SHRAWAT, MEMBER (JUDICIAL)

Present:

For the Applicant / Resolution Professional : Amir Arsiwala, Advocate.

Per : M.K. Shrawat, Member (Judicial).

ORDER

1) This Application is submitted on 8th May 2018 seeking permission to grant approval of the Resolution Plan submitted by the Resolution Applicant viz. Mr. Mahendra Wig, the only "Resolution Applicant" and to hold that he is not debarred or disqualified by the amended provisions of Section 29-A of the I&B Code 2016.

2) Initially, a Petition was filed on 19th July, 2017 by M/s. Wig Associates Private Limited under section 10 of I&B Code as a "Corporate Debtor" to initiate Corporate Insolvency Resolution Process against itself in respect of an admitted debt of Rs. 4,85,14,000/- of Bank of Baroda.

3) On due consideration of the facts, an **Order was pronounced on 24th August 2017 in C.P. No. 1214/I&BP/2017 through which the Petition was "Admitted"** and 'Moratorium' was commenced by appointing Mr. S.K. Gola as Interim Resolution Professional.

4) Time to time the Resolution Professional has submitted the Progress Report and the Meeting of the Committee of Creditors held as prescribed under The Code. The Insolvency Resolution Professional has also appraised the financial position by submitting provisional Financial Statements.

5) During the course of the third meeting of the CoC conducted by the Resolution Professional, held on the 5th of April, 2018, the sole financial creditor of the Corporate Debtor, the Bank of Baroda, informed the Resolution Professional that it had approved and



sanctioned a "One Time Settlement" offer issued by one Mr. Mahendra Wig. The Bank of Baroda further informed the Resolution Professional that they would seek to explore the option of treating the said "One Time Settlement" offer be treated as a Resolution Plan. A copy of the Minutes of the Meeting of the CoC Meeting held on the 5th of April, 2018 is considered.

6) The Resolution Professional has also informed that Valuation Reports have been procured depicting average Liquidation Value at Rs. 87.60 Lakhs. The claim of the Financial Creditor as per the statement stated to be was of Rs. 1067.39 Lakhs. The Resolution Plan of Mr. Mahendra Wig was placed before the CoC and in the fourth meeting held on 20th April 2018. In the meeting said Resolution Plan was approved.

7) While discussing this Resolution Plan, the Learned Resolution Professional had made it clear that 'Expression of Interest' was invited as per due process of law by publishing in the Newspaper on 4th April 2018 and in pursuance only Mr. Mahendra Wig had presented the impugned Resolution Plan, now stood approved by 100% Vote of the CoC.

8) Before examining the contents of the Resolution Plan to record "satisfaction" of the Bench a legal question is to be answered that in a situation when the Resolution Applicant Mr. Mahendra Wig is related to the Promoter Directors of the Corporate Debtor Company, whether his Resolution Plan can be entertained or admitted after the introduction of Section 29-A of the I&B Code. The point wise discussion is hereinbelow.

8.1 A New Section is introduced in the Insolvency and Bankruptcy Code, 2016. At the first stage an **Ordinance was promulgated on 23rd November 2017** under the title **"THE INSOLVENCY AND BANKRUPTCY CODE (AMENDMENT) ORDINANCE, 2017 No. 7 of 2017"**. As per this Ordinance Section 29-A prescribes that a person shall not be eligible to submit a Resolution Plan if such person is a "connected person". Under 'Explanation', below the Section, defined "connected person" means any person who is Promoter or in the management of control of the Resolution Applicant. Further we have noted that under section 29-A(h) a person who has executed an enforceable guarantee in favour of the creditor, in respect of a corporate debtor under insolvency resolution process or liquidation under this Code, is also not entitled to submit a Resolution Plan. The admitted factual position is that Mr. Wig does fall under this category of "such connected persons" after the introduction of Section 29-A.

8.2 Later on the said Ordinance took the shape of "Amendment" on **18th January 2018** as **"THE INSOLVENCY AND BANKRUPTCY CODE (AMENDMENT) ACT, 2017 No. 8 of 2018"**. It is important to note that as per Section 1 (2) it is clarified that the Amended Act shall be deemed to have come into force on the 23rd day of November 2017.

8.3 It is also relevant to note that vide Section 10(1) of the Amended Act it was declared that, The Insolvency and Bankruptcy Code (Amendment) Ordinance, 2017 is hereby repealed. Once the expression "hereby" is used in the language, hence there is no confusion



that the repealed Act has come into force from that day. In other words the term "hereby" is also to be read "henceforth".

8.4 Further vide Section 10(2) it was made clear that :-

"Notwithstanding such repeal, anything done or any action taken under the Insolvency and Bankruptcy Code, 2016, as amended by the said Ordinance, shall be deemed to have been done or taken under the corresponding provisions of the said Code, as amended by the Act."

This sub-section has thus made it clear that any action taken under the Code shall be deemed to have been done or taken under the corresponding provision of the Act, but this sub-section is silent about the retrospective applicability.

8.5 Although the amendment itself is very clear that the provisions of **Section 29-A** of the Code had come into force with effect **from 23rd November, 2017**, but to arrive at a final decision it is expedient to discuss the Law laid down relating to applicability of an amendment. Hence a brief description is required. In this regard few case laws are worth mentioning, named as under :-

- (i) **Municipal Corporation, Poona V/s Bijlee Products (India) Limited (1978) 4 SCC 214.**
- (ii) **Shyam Suinder V/s RamKumar (2001) 8 SCC 24.**
- (iii) **Zile Singh V/s State of Haryana (2004) 8 SCC.**
- (iv) **Videocon International Limited V/s SEBI (2015) 4 SCC 33.**
- (v) **Sou. Kamal V/s Anna, 2014 SCC OnLine Bom 1618.**



8.6 On due reading of these judgments it clearly emerges that the settled rule of interpretation of the statute is that any Amendment to a statute affecting the legal rights of an individual must be presumed to be **prospective** unless it is made expressly or is impliedly **retrospective**. It further emerges that when a repeal of an enactment is followed by a fresh legislation, such legislation does not affect the substantive rights of the parties on the date of the suit or adjudication of the suit unless such a legislation is retrospective and a court of appeal cannot take into consideration a new law brought into existence after the judgment appealed from has been rendered because the rights of the parties in an appeal are determined under the law in force on the date of the suit. So a cardinal principle of construction is that every statute is prima facie prospective unless it is expressly or by necessary implication made to have a retrospective operation. In one of the precedent viz. Videocon International (supra) an observation was made that **pending proceedings are to continue as if the unamended provision is still in force**. Respectfully following the Law pronounced in the afore cited proceedings it can be safely held that the present **amended section 29-A of the Code is effective from the date of passing of the Ordinance i.e. 23rd November 2017.**

9) The above view can further be buttressed by a supportive reasoning that the Insolvency Proceedings are the **continuous proceedings** therefore cannot be halted, altered or changed once commenced till its finalization. Otherwise also, it is well said in one of the judgement that once a game is started in a playground, it is unfair to alter the rule

of the game once started till it finishes. So one must not be allowed to change rules of a game in mid so as to get a desired result. Players/stakeholders must be aware of the rules at the commencement of the game/proceedings. To demonstrate that Insolvency Proceedings are continuous proceedings connected like rings in a chain we have perused few sections of the I&B Code. In Section 5 of "definitions" it is defined that the "insolvency commencement date" means the date of admission of an application for initiating corporate insolvency resolution process. It is applicable to all sections i.e. Section 7, 9 or Section 10 of the Code. A period is prescribed i.e. 180 days beginning from the commencement date. Continuity of the proceedings is also demonstrated from the "headings" of Section 10 that the process is initiated by the Corporate Applicant and to be completed under section 12 within a prescribed period which can be extended but once extended shall not further be extended. Even under Section 14 the period of Moratorium is effective during the Insolvency Process, however shall cease to have effect from the date of approval or Resolution Plan or pronouncement of Liquidation. In simple language the CIRP is a process and can be said to be that the process is nothing but continuous of one proceeding, which commences from the date of "Admission" of an Application either under Section 7, 9 or 10 and it ends till an Order is passed under Section 31, approving the Resolution Plan or under section 33 by initiating "Liquidation". Because of this reason in my humble opinion, once in this case or in like nature cases, CIRP had commenced and the Resolution Professional has invited Expression of Interest which resulted into submission of Resolution Plan by a Resolution Applicant the same is to be dealt with as per the provisions existed on the date when a Petition is "Admitted". Because of this alternate reasoning as well, the Resolution Plan is eligible on account of applicability of the old provisions of the Insolvency Code as they existed on the date of "Admission". The admitted factual position is that the Petition was "Admitted" on 24th of August 2017 by an Order of NCLT Mumbai, as against that the Ordinance was pronounced on 23rd of November 2017. It is hereby held that the impugned Resolution plan is eligible for due adjudication.

10) Once it is hereby held that the Resolution Plan as proposed by Mr. Mahendra Wig is eligible for due consideration, it is hereby required to examine the merits or demerits of the Resolution Plan to record the "satisfaction" prescribed under the statute. The Procedure as prescribed under The Code is that a Resolution Plan is required to be submitted by a **Resolution Application U/s 30 of The Code**. The Resolution Professional is to submit U/s 30(6) the Resolution Plan, as approved by the Committee of Creditors, to the Adjudicating Authority (AA). Thereafter, u/s 31, AA is to examine the contents of the Resolution Plan. The mandate of this section is that if the AA is "**satisfied**" that the Resolution Plan as approved by the Committee of Creditors meets the requirement as referred to in section 30(2), shall by an Order, approve the Resolution Plan. So the prerequisite is that recording of "**satisfaction**" by AA is a condition precedent. A "satisfaction" is to be recorded in writing in the Judgment approving the Resolution Plan. "Satisfaction" is required to be based upon a conscious decision on examination of the terms of the Resolution Plan. In our humble opinion a thorough study of a Resolution Plan is required before recording a "**satisfaction**" in writing by AA. The '**satisfaction**' as



mandated in the statute can either objective or subjective or both, but it is a condition precedent. Naturally 'satisfaction' is to be recorded in writing with reasons after proper application of mind. The **pros and cons** of the scheme is required to be studied before recording subjective satisfaction. If the CoC has submitted the scheme of Resolution after visualising the advantage and dis-advantage then such proposal can be termed as just and equitable fit for according satisfaction. An '**objective satisfaction**' revolves around the object of enactment of the Code as enshrined in the Preamble of the I & B Code i.e. to revive the financially stressed corporate body. And the '**subjective satisfaction**' depends upon logical analysis of the Financial Data supplied so as to match with the business model of the Corporate Debtor. A methodical scrutiny of Financial Statement is expected before concurring with approval of the CoC. Per contra, absence of recording of subjective satisfaction may lead to situation that, being sanctioned without judicial analysis, thus may not be sustainable in the eyes of law. There are no two views, and must not be, that this I & B Code provides greater accountability both on the Insolvency Professional, as also on CoC, mainly comprise of lender Banks. Their approval of a Resolution Plan ought to be judged with due diligence. Therefore, in our humble interpretation the recording of an analytical 'satisfaction' is a condition precedent before granting of approval.

11) To sum up the above discussion, the important features of the Resolution Plan as approved by the Committee of Creditors are to be scrutinized before recording "satisfaction" or granting sanction. The Resolution Applicant has narrated the business background of M/s Wig Associates that the Company was incorporated for manufacturing and trading of Plastic Moulded Items, such as, plastic food containers, plastic soap cases, plastic articles, plastic bags etc. The Company has also started fast moving consumer products (FMCG) like fruit jams, syrups etc. This business had extended all over India and also exported Overseas Markets. The Corporate Debtor has only one Financial Creditor viz. Bank of Baroda and the Principal Amount of the financial debt was ₹ 460.16 Lakhs. As against that, the proposed settlement amount is stated to be ₹ 355 Lakhs. The Resolution Applicant is the guarantor of the Corporate Debtor. In that capacity the Resolution Applicant had approached the Bank of Baroda for one time settlement (OTS) by moving Applications on 30th October, 2017 and 14th December 2017. It is further stated that one time settlement of ₹ 355 Lakhs as against ₹ 460.16 Lakhs was approved and sanctioned by Bank of Baroda vide a Letter dated 27th of March, 2018. The terms and conditions set out in OTS Letter dated 27th March 2018 and made part of this Resolution Plan are as under :-

- * The dues of Rs. 1067.39 Lacs of BoB as on Cut Off date shall be settled at Rs. 355.00 Lacs as per OTS Letter dated 27.03.2018.
- * An amount of Rs. 33.00 Lacs laying with BoB shall be adjusted against the said OTS amount.
- * The balance amount of Rs. 322.00 Lacs shall be payable on or before 30th June, 2018 along with interest @ 12% p.a. w.e.f. 01.04.2018 till the date of payment nor later than 30th June 2018.

- * Balance dues including interest, Penal interest, if any, other charges shall be completely written off by BoB.
- * All mortgaged property of the Corporate Debtor & Guarantor shall be released by BoB on receipt of entire settlement amount.
- * BoB shall issue "No Due Certificate" on receipt of entire settlement of amount as per Resolution Plan and shall satisfy all the outstanding charges."

12) That subject to the sanctioning of the Resolution Plan the total outstanding dues of the secured financial creditor (BOB) shall be written off, hence the waiver granted is narrated by the Resolution Applicant as under :-

Sr. No.	Name of the Creditor	Principal default Amount	Claim Amount Admitted As on 16.10.2017	Proposed Settlement Amount	Waiver / Write off of Balance
Rs. In Lacs					
1.	Bank of Baroda	460.16	1067.39	355.00	712.39
	Total	460.16	1067.39	355.00	712.39

13) The Resolution Applicant thus undertakes to make the payment as under :-

"Payment Schedule to the Financial Creditors:

Sr. No.	Particulars	Amount (Rs. In Lacs)
1.	The Settlement amount as OTS	355.00
	Less: amount shall be adjusted	33.00
	Balance amount payable on or before 30th June 2018	322.00

14) That there are other outstanding dues of Operational Creditors as follows

Sr. No.	Operational Creditors	Dues as on 24.08.2017
		Rs. In Lacs
1.	Creditors for Expenses	2.93
2.	Sale Tax & other withholding Taxes (Net)	5.00
3.	Income Tax	4.60
4.	Other Provisions (FBT)	0.49
	Total	13.02

14.1 That from the side of Resolution Applicant a summary of the entire Plan is also submitted; Only relevant portion is reproduced for the sake of completeness, as under:-

S. No	Criteria	Provision in Resolution Plan
1.	Provides for the payment of insolvency resolution process costs in priority to the repayment of other debts of the Corporate Debtor.	Paragraph 7 of the Resolution Plan relates to the payment of Insolvency Process Costs in priority to all other debts. <u>Total Insolvency Process Costs:</u> Rs. 8.85 Lakhs Corporate Applicant has already paid Rs. 5 Lakhs.

		<p><u>Remaining Insolvency Process Costs to be paid in priority to all other debts:</u></p> <p>Rs. 3.85 Lakhs</p> <p>See page 31 of MA.</p>
2.	Provides for the repayment of the debts of operational creditors in such manner as may be specified which shall not be less than the amount to be paid to the operational creditors in the event of liquidation of the corporate debtor under section 53.	<p>Paragraph 10 of the Resolution Plan relates to the payment of dues of Operational Creditors. A breakdown of the liquidation value due to each creditor under section 53 is provided in paragraph 16.2 of the Resolution Plan (page 37 of the MA). As can be see, the liquidation value available to be paid to the operational creditors (who are all unsecured creditors) is nil.</p> <p>As per the Resolution Plan, it is proposed to settle the operational creditors at 5% of their dues.</p> <p>Based upon the claims received by the Resolution Professional and the books of accounts of the Corporate Debtor the following emerges:</p> <p><u>Total Operational Debt:</u></p> <p>Rs. 13.02 Lakhs</p> <p><u>Liquidation value available for operational creditors:</u></p> <p>Rs.0/-</p> <p><u>Total Settlement amount for operational creditors:</u></p> <p>Rs. 65,000/-</p> <p>See Pages 32-33 of MA.</p>
3.	Provides for the Management of the affairs of the Corporate Debtor after approval of the resolution plan.	<p>in paragraph 14 of the Resolution Plan, it is proposed that the Resolution Applicant shall take over the management and control of the Corporate Debtor during the term of the Resolution Plan.</p> <p>As per paragraph 13 of the Resolution Plan, its term is 1 year.</p> <p>See page 36 of MA.</p>



4.	Provides for the implementation and supervision of the resolution plan.	Paragraph 15 of the Resolution Plan states that the Resolution Professional shall be appointed as the monitoring agency for the supervision and monitoring of implementation of the Resolution Plan. See page 36 of MA.
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Compliance with Regulation 38 of CIRP Regulations

S.No.	Criteria	Provision in Resolution Plan
1.	Source of funds for resolution plan.	As per paragraph 12 of Resolution Plan, the Resolution Applicant shall be infusing a total of <u>Rs. 326.50 lakhs</u> into the Corporate Debtor for the purpose of the present Resolution Plan (See page 25 of MA). The Resolution Applicant shall be bringing in the funds from various sources, including from family members and by liquidating some of his personal property. The Resolution Applicant has already brought in <u>Rs. 103 lakhs</u> and has handed over the same to the financial creditors to show his bona fides (See additional affidavit of Resolution Applicant indicating source of funds).
2.	Provides for the payment of insolvency resolution process costs in priority to the repayment of other debts of the Corporate Debtor.	Paragraph 7 of the Resolution Plan relates to the payment of Insolvency Process Costs in priority to all other debts. <u>Total Insolvency Process Costs:</u> Rs. 8.85 Lakhs Corporate Applicant has already paid Rs. 5 Lakhs. Remaining Insolvency Process Costs to be paid in priority to all other debts: Rs. 3.85 Lakhs See page 31 MA.



3.	Provides for the payment of liquidation value owed to operational creditors within a period of 30 days of approval of resolution plan.	Paragraph 10 of The Resolution Plan relates to the payment of Debt to Operational Creditors. A breakdown of the liquidation value due to each creditor Under Section 53 is provided in Paragraph 16.2 Of The Resolution Plan (Page 37 Of The MA). As can be seen, the liquidation value available to be paid to the operational creditors (who are all unsecured creditors) is nil. Therefore, there is no liquidation amount to be paid to the operational creditors as per this clause.
4.	Provides for payment of liquidation value to dissenting financial creditors in priority.	There are no dissenting financial creditors, as the COC comprises of only one financial creditor having 100% voting share, which has voted in favour of the Resolution Plan. See paragraph 8.2 of the Resolution Plan (page 31 of MA).
5.	Provides for term of the Resolution Plan and its implementation schedule.	As per paragraph 13 of the Resolution Plan, its term is 1 year (page 36 of the MA). <u>Payment Schedule to the financial creditor:</u> On or before 30.06.2018. See paragraph 9.2 of the Resolution Plan (page 32 of MA). <u>Payment schedule to operational creditors:</u> As per schedule set out in paragraph 10.5 of the Resolution Plan See page 34 of the MA.
6.	Provides for the Management of the affairs of the Corporate Debtor during the term of the Resolution Plan.	In paragraph 14 of the Resolution Plan, it is proposed that the Resolution Applicant shall take over the management and control of the Corporate Debtor during the term of the Resolution Plan. See page 36 of MA.



7.	Provides for adequate means of supervising the implementation of the Resolution Plan.	Paragraph 15 of the Resolution Plan states that the Resolution Professional shall be appointed as the monitoring agency for the supervision and monitoring of implementation of the Resolution Plan. See page 36 of MA.
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15) Thus final conclusion drawn is that although it is informed that there was no claim received from Sales Tax Department but a duty is hereby casted on the Resolution Applicant and the Management of the Corporate Debtor to get the Sales Tax dues resolved with the concerned Authorities. Likewise, the Resolution Applicant shall be responsible to discharge the Income tax dues payable earliest possible by fully cooperating with the Tax Authorities in getting the dispute resolved within six months' period for the date of this Order. It is hereby specifically observed that the 5% limit to settle the dues of Operational Creditors is not approved.

16) It is *suo moto* envisaged by the Resolution Applicant that all the Operational Creditors as outstanding in the Books of Accounts of WAPL as on the cut-off date shall be paid even though no claims have been received. The Payment Schedule affirmed as under :-

"Payment Schedule of the Operational Creditors"

Operational Creditors	Book Value as on Cut-Off Date	Settled Amount	Liquidation Value to be paid in 30 days	At end of Month next to Month in which Resolution Plan is Sanctioned	Payment of settled amount over and above liquidation value
					Rs. In Lacs
				1	
Creditors for Expenses	2.93	0.15	Nil	2	0.15
				1	
Statutory Dues	10.09	0.50	Nil	2	0.15
				3	0.15
				4	0.20
Total	13.2	0.65	Nil		0.65

17. That in the Resolution Plan it is stated that although in one of the Regulation it is provided that only Liquidation Value is to be considered for payment to Operational Creditor within 30 days, in priority to Financial Creditors, but the Resolution Applicant provides for repayment of dues to the Operational Creditors more than the liquidated value. Considering the undertaking of the Resolution Applicant, it is hereby directed that the payment to the Operational Creditors be made as agreed upon, which may exceed the liquidated value, within the time schedule as described in the Resolution Plan. The Resolution Applicant has also explained the means of finance to meet the costs of the Resolution Plan as under :-

"Cost of Resolution Plan and Means of Finance:

	Cost of Resolution Plan	Rs. In Lakhs
A	Insolvency Resolution Process Cost	3.85
B	Settlement of dues of Secured Creditors	322.00
C	Settlement of dues of Operational Creditors	0.65
	TOTAL	326.50
	Means of Finance	
	Infusion of funds by Guarantor	326.50
	TOTAL	326.50

18. The Resolution Applicant has thus finally proposed for total infusion of ₹ 326.50 Lakhs in the following manner :-

	Cost of Resolution Plan	Rs. In Lakhs
A	Insolvency Resolution Process Cost	3.85
		322.00
		.65
	TOTAL	326.50
	Means of Finance.	
	Infusion of funds by Guarantor	326.50
	TOTAL	326.50

18.1. That through an Affidavit the Resolution Applicant has affirmed that a sum of Rs. 103 Lakhs has also been paid to BOB towards OTS proposal and affirmed to make the balance payment as per the Resolution Plan.

19. That subject to the qualifications made hereinabove in the Resolution Plan and the corresponding directions pronounced, this Bench record its satisfaction for granting approval to the Resolution Plan. Henceforth the Moratorium Order shall cease to have effect. The Resolution Professional shall further act upon as prescribed, on approval of the Resolution Plan to forward the records to the concerned Authorities and to intimate the closure of the Insolvency Proceedings.

20. Resultantly the case-file is now required to be consigned to Records.

SD/-


M.K SHRAWAT
Member (Judicial)

04.06.2018.

Aah



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On 06.06.18


Assistant Registrar
National Company Law Tribunal Mumbai Bench