(2023) 05 NCLT CK 0078

In the National Company Law Tribunal

Case No : IA No.17/2023 In CP (IB) No.218/ALD/2019

?American Express Banking Corp Vs JML Marketings Pvt. Ltd ?

Date of Decision : 23-05-2023

Acts Referred:
Insolvency and Bankruptcy Code, 2016 — Section 7, 33, 33(2), 34(1), 60(5)

Citation : (2023) 05 NCLT CK 0078

Hon'ble Judges : Praveen Gupta, Member (J);Ashish Verma, Member (T)

Bench : Division Bench

Advocate : Abhishek Devgan

Final Decision : Disposed Of

Judgement

1. The present application (IA No.17/2023) has been filed by the Resolution Professional (RP) of the Corporate Debtor seeking directions for initiating liquidation proceedings of the Corporate Debtor in terms of Section 33(2) of the Code and to appoint the applicant Mr. Madan Mohan Dhupar, Resolution Professional as the Liquidator of the Corporate Debtor, and further seeking directions to approve the Liquidator fee to be paid.

2. Briefly stated the facts of the case are that in pursuance of an application filed U/s 7 by the Financial Creditor, the application was admitted vide order dated 18.04.2022 passed by this Tribunal and an Interim Resolution Professional (IRP) was appointed to conduct the CIRP of the Corporate Debtor. In pursuance of the admission order, the public announcement of Corporate Insolvency Resolution Process (CIRP) of the Corporate Debtor, appointment of IRP and invitation of claims from the creditors was made in FORM-A on 21.04.2022 in two newspapers namely 'Jansatta' and 'Financial Express', and on 22.04.2022 in newspaper 'Prayagraj Amrit Prabhat'.

3. The IRP received some claims in response to the publications and accordingly a Committee of Creditors (CoC) was also constituted. In one of the subsequent meetings i.e. in 3rd CoC meeting held on 15.07.2022, the eligibility criteria for inviting Expression of Interest (EoI), Evaluation Matrix for evaluating resolution

plan and major terms of RFRP were duly approved through the e-voting and it was resolved to publish Form G. The RP in the 3rd CoC meeting also requested the members of the CoC to ratify and approve the name of the valuers proposed by the erswhile IRP as in terms of Regulation 27 of the CIRP Regulations. The valuation was to be done by appointing two valuers for each class of assets of the Corporate Debtor i.e. Plant & Machinery, Land & Building, Securities and Financial Assets.

4. In the 4th meeting of CoC held on 08.08.2022, the RP informed the CoC that in response to the publications, he did not receive any EOIs from the Prospective Resolution Applicants (PRAs) and accordingly, a resolution for the extension of time for submission of EOI by 15 days i.e. upto 24.08.2022 was proposed and approved by the CoC. The publications were again made in the newspapers for seeking EOI during this extended period of time. Ultimately, five (5) PRAs submitted their EOIs and after exercising due diligence based on the material on record, the names of two PRAs were published. The RP further shared the link of Virtual Data Room (VDR) containing the Information Memorandum, Evaluation Matrix and a request for Resolution Plan with the PRAs on 08.09.2022, and published the list of final PRAs containing the name of two PRAs on 18.09.2022 for submitting Resolution Plans upto 08.10.2022.

5. Based upon the reports of the valuers received from two valuers, the RP determined the average fair and liquidation value of the Corporate Debtor, and the average fair value and liquidation value of each class of assets, on the basis of the values determined in the valuation reports, are annexed as Annexure A-12 at page 115 A. The average fair value has been determined as Rs.5.67 Cr. and the average liquidation value has been determined as Rs.4.69 Cr. On the basis of the requests received from the PRAs, the CoC in its 6th meeting held on 07.10.2022 resolved to extend the timeline of submission of Resolution Plan by 30 (thirty) days and as a consequence, a Resolution Plan was received from a PRA namely Worldfa Exports Private Limited, which was opened in the 7th CoC meeting, where the highlights of the Plan were shared and discussed and the RP/ Applicant herein shared the queries and observations with the Resolution Applicant, however, the aforesaid Resolution Appicant failed to respond to the aforesaid observations/ queries, and the matter was thereafter further discussed in the 8th CoC meeting held on 02.12.2022, wherein the CoC resolved to re-issue the request for Resolution Plan to the existing PRAs and granted them 10 days to submit such Plan. However, neither any response nor any clarifications was received from the concerned PRAs in response to the observations/ queries, which were raised to the said PRAs in pursuance of the Resolution of the 8th CoC meeting.

6. In this background, the 9th CoC meeting was held on 16.12.2022 to inform the members of the CoC about these developments. The minutes of the 9th CoC meeting has been attached as Annexure A-16 with the present application starting from page 150-181. The agenda item no.C-2 was thus put up in the 9th

CoC meeting held on 16.12.2022 and a Resolution was passed thereon by the CoC recommending liquidation of the Corporate Debtor under the provisions of Section 33(2) of the Code and the RP was authorized to file an appropriate application before the Adjudicating Authority about the recommendations of the CoCs to liquidate the Corporate Debtor. The relevant part of the agenda item no.C-2 as well as the Resolution passed thereon is as under :-

Item No. C-2 : To decide the way forward in the CIR Process of Corporate Debtor and approve necessary resolutions accordingly.

The Chairman informed the members that CIRP in the matter of JML Marketings Private Limited commenced on 18.04.2022 by Hon'ble NCLT, Allahabad Bench, admitting the application of American Express Banking Corporation under Section 7 of IBC. Accordingly in compliance of IB Code 2016 and regulation of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulation 2016, the RP, after his appointment on 06.07.2022, is conducting CIR process and details were placed before members in CoC Meetings.

After approval of CoC, Form G/ Revised Form G was published in the newspapers. Four entities submitted the EOI alongwith the specified refundable security deposit and out of which two entities had qualified for the final list of PRAs. They were provided access to the Virtual Data Room containing the IM and necessary documents. Last date of submission of Resolution Plan was extended by CoC up to 28.10.2022.

Consequently, the RP was in receipt of a Resolution Plan from Worldfa Exports Private Limited on 28.10.2022 which was opened in the presence of members of CoC in the 7th CoC held on 31st October, 2022. Thereafter, Resolution Plan was examined by the RP as per the provisions of IBC, 2016, CIRP Regulation and provisions contained in RFRP. The observations on the aforesaid resolution plan was sent by RP on 16.11.2022. However, no clarification was received from RA on the aforesaid observations till date which made the plan non-compliant. The Committee took the note of the same and accordingly after through deliberation in the 8th CoC held on 02.12.2022, unanimously resolved to re-issuance of RFRP to the prospective resolution applicants mentioned in the final list of the Corporate Debtor, to submit their resolution plan, if any, within (10) days from the date of such request, to further explore the possibility of any resolution, as a final attempt. The last date of such submission was 13.12.2022. However, the undersigned has neither received any plan nor the reply to the observations of the RP in respect of the plan submitted by Worldfa Exports Pvt. Ltd., (RA).

The Committee was requested to decide the way forward and approve necessary resolutions keeping in view that the extended CIRP period of 270 days in expiring on 13.01.2023 and sufficient time is not left for invitation of fresh Expression of Interest (EoI) and From G has already been published twice and RFRP has been re-issued to the PRAs appearing in the final list and inspite of same no complaint resolution plan has been received for the Corporate Debtor. Under the circumstances, the CoC was requested to discuss and if deem fit, approve the resolution for the Liquidation of the Corporate Debtor.

Accordingly, the Chairman put the following Resolution for the consideration and approval of CoC:

“RESOLVED THAT Pursuant to provisions of Section 33(2) of Insolvency and Bankruptcy Code, 2016, the Committee of Creditors, hereby recommends for the liquidation of J.M.L. Marketing Private Limited, Corporate Debtor;

“RESOLVED FURTHER THAT the Resolution Professional is authorized to file a necessary application before the Adjudicating Authority conveying the decision of the Committee of Creditors to liquidate the Corporate Debtor”

Pursuant to Regulation 25(3) of CIRP Regulations, Chairman requested the Members of the Committee, present in the meeting to vote for the resolutions.

All Members of CoC proposed to put the above resolution to be taken up & decided through e-voting or email voting.

7. The above Resolution was passed by majority of 72.93% votes which includes the creditors namely Punjab National Bank, Union Bank of India, SIDBI, Tata Capital and American Express Banking Corporation, and another Financial Creditor constituting 27.07% vote namely J.C. Flowers Asset Reconstruction Private Limited abstained from voting. The voting result of the passing of the aforesaid Resolution is as under :-

Voting Result

S.

No.

Name of CoC Member having Voting Power

Voting Percentage of CoC Member

Mode of Voting

Percentage of Votes in favour of Resolution

Percentage of Votes against the Resolution

Percentag e of Votes who Abstained from

Voting

1.

Punjab

National Bank

38.22

Offline

38.22

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2.

J.C. Flowers Asset Reconstruction

Private Limited

27.07

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27.07

3.

Union Bank of

India

12.94

Offline

12.94

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4.

Small Industries Development Bank of India

(SIDBI)

9.04

Offline

9.04

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5.

Tata Capital Financial Services

Limited

7.94

Offline

7.94

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6.

American Express

Banking Corp.

4.78

Offline

4.78

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Total

100%

72.93%

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27.07

The Members of CoC representing 72.93% out of total vote casted, voted in favour of Agenda Item C-2

Result

Approval of Agenda Item required 66% voting in favour of the Agenda Item. As the votes in favour of the Agenda Item C-2 are more than 66% of votes casted, hence, the Resolution/ Agenda Item C-2 is taken as approved.

8. We have perused the record and also we have heard the submissions made by the Ld. Counsel representing the RP.

9. Section 33(2) of the Code, under which the present application has been moved, is reproduced below :-

33. (2) Where the resolution professional, at any time during the corporate insolvency resolution process but before confirmation of resolution plan, intimates the Adjudicating Authority of the decision of the committee of creditors 1 [approved by not less than sixty-six per cent. of the voting share] to liquidate the corporate debtor, the Adjudicating Authority shall pass a liquidation order as referred to in sub-clauses (i), (ii) and (iii) of clause (b) of sub-section (1).

10. In view of the stated position as averred in the application and submitted by the Ld. Counsel for the RP as well as the provisions of Section 33 of the Code, we are inclined to allow the present application. We have found that despite having made of all possible efforts by the RP acting on the advice of the CoC for inviting EOI and for submission of the Resolution Plan by the PRAs, no concrete and final proposal could be submitted. Initially, even the time period was extended for inviting EOI and after receiving some response from the PRAs, the queries and the observations were raised to the concerned PRAs, which have not been responded by them. It was thereafter, only as per the commercial wisdom of the CoC in its 9th CoC meeting held on 16.12.2022, the conscious decision has been taken for initiating liquidation process and accordingly, the RP had been directed to move the present application. It has been stipulated U/s 33(2) as reproduced above that where the RP during the CIRP intimates the Adjudicating Authority of the decision of the Committee of Creditors approved by not less than 66% (sixty-six) per cent of the voting share to liquidate the Corporate Debtor, the Adjudicating Authority shall pass a liquidation order. In the present case, the Resolution to initiate the liquidation process has been taken by the CoC in tis 9th CoC meeting as referred to above, by a majority of 72.93%, thus, meet the bench mark of percentage share of voting prescribed under the aforesaid provisions of the Code.

11. We thus, allow the present IA. The RP, who has been acting so far as such, has also given his consent in Form AA to act as a Liquidator of the Corporate Debtor and the said consent has been placed as Annexure A-17 at page 182. As per Section 34(1) of the Code, it has been stipulated that, where the Adjudicating Authority passes an order for liquidation of the Corporate Debtor U/s 33, the RP appointed for CIRP shall act as Liquidator for the purpose of liquidation subject to the submission of written consent by the RP to act as a Liquidator. The provisions of Section 34(1) of the Code are reproduced here below :-

34. (1) Where the Adjudicating Authority passes an order for liquidation of the corporate debtor under section 33, the resolution professional appointed for the corporate insolvency resolution process under 1 [Chapter II 2 [or for the pre-packaged insolvency resolution process under Chapter III-A] shall, subject to submission of a written consent by the resolution professional to the Adjudicatory Authority in specified form,] shall act as the liquidator for the purposes of liquidation unless replaced by the Adjudicating Authority under sub-section (4).

12. The credentials of the RP, who would act as a Liquidator, have been verified by the LRA Ms. Aditi Kharbanda, from the IBBI website, and are found to be correct and valid.

13. In view of our foregoing discussions, we pass the following orders :-

(i) The present IA is allowed for initiation of the liquidation proceedings of the

Corporate Debtor in terms of Section 33(2) of the Code.

(ii) The RP Mr. Madan Mohan Dhupar is appointed to act as a Liquidator.

(iii) The Stakeholder Consultation Committee (SCC) would be constituted as per Regulation 31A of IBBI (Liquidation Process) Regulations, 2016 and the list of SCC would be filed before this Tribunal in accordance with the provisions of the Code and Regulations made therein.

(iv) Fees of the Liquidator are to be paid in accordance with Liquidation Process Regulations, 2016, and to be decided in the meeting of SCC.

14. In view of the aforesaid order, the IA No.17/2023 stands disposed off accordingly.

