
(2022) 11 NCLT CK 0038

In the National Company Law Tribunal

Case No : IA No. 2847 of 2021 IA No. 2666 of 2021 IA No. 2685 of 2021 In CP/IB/MB/No. 1138 of 2017

Amit Gupta

APPELLANT

Vs

Anil Kohli

RESPONDENT

Date of Decision : 11-11-2022

Acts Referred:

Insolvency and Bankruptcy Code, 2016 — Section 60(5)

Citation : (2022) 11 NCLT CK 0038

Hon'ble Judges : P.N. Deshmukh (Retd.), Member (J); Shyam Babu Gautam, Member (T)

Bench : Division Bench

Advocate : Kevic Setalwad, Gyanendra Kumar, Abhishek Anand

Final Decision : Partly Allowed

Judgement

1. The present Application is filed by the Applicant i.e. the successful Resolution Applicant seeking following prayers :-

- a. To direct the Respondent/Monitoring Professional to handover the complete control over the Corporate Debtor to the Applicant being the Successful Resolution Applicant forthwith including the right to operate the Bank Accounts of the Corporate Debtor;
- b. To reduce the Professional fee of the Respondent/Monitoring Professional to Rs. 25,000/- per month;
- c. Or in alternative to prayer ©, Substitute the Monitoring Professional who can charge Rs. 25,000 per month;
- d. Pass any other or such further order(s) as this Hon'ble Tribunal may deem fit and proper in the facts and circumstances of the case and in the interest of justice;

Submissions of the Applicant are as follows:-

2. The Resolution Plan of the Applicant was approved vide Order dated 26.11.2019. The Order wrongly mentioned the time for the payment under the Resolution Plan as 30 months instead of 3 months. Thereafter the Resolution Professional approached the Tribunal for rectification of the Order dated 26.11.2019 without making the Applicant herein as the party to the said Application. It was only on 11.02.2020, the Applicant came to know of the said rectification of the Order.

3. Thereafter, the Applicant filed an Application being IA 661 of 2020 for extension of time for making the payment. There were attachments/liens/encumbrances on the assets of the Corporate Debtor. Further, the Applicant filed another Application being 1327 of 2020 requesting that the Applicant may be permitted to pay amount under the Plan within two months from lifting of attachments/encumbrances. The said two Applications were decided vide Order dated 30.04.2021. the Tribunal was pleased to direct the Applicant to pay interest @ 12% from the date of the amount becoming due. The Applicant filed an appeal being aggrieved by levy of interest and shifting obligations to remove the attachments on the Applicant. The said subject matter of appeal is sub judice before Hon'ble NCLAT.

4. Further, the Respondent itself in its reply has accepted the fact that the entire payment has been made by the Applicant as per the Resolution Plan. Therefore, the Applicant was entitled to receive the handover of complete control of the Corporate Debtor. However, the Respondent failed to do so.

5. Further the Applicant has also filed an Affidavit cum undertaking dated 14.01.2022 wherein the Applicant has undertaken to pay interest in accordance with the Order dated 30.04.2021 passed by this Tribunal subject to final outcome of Appeal pending before Hon'ble NCLAT. Hence, nothing remains on the part of the Respondent to object the prayer of the Applicant.

6. Another issue raised by the Applicant is that the Applicant is entitled to get the assets of the Corporate Debtor free from encumbrances. The assets of the Corporate Debtor are under attachments of ED, MPID Court etc. The Resolution Professional has not taken any effective steps for lifting the attachments and also reflects that no work has been undertaken by the Resolution Professional as he was responsible to lift the attachments and has only conducted one meeting each year in 4 consecutive years and has been charging an exorbitant fee of Rs. 5.5 Lakhs per month exclusive of GST.

7. The Applicant has paid the entire payment of Rs. 87.10 Crores in accordance with the terms of the Resolution Plan. The Applicant states that the Applicant is entitled for complete control of the management as well as the operations of the Corporate Debtor. Further on the payment of the entire amount under the Resolution Plan, the Applicant cannot be made to wait for an indefinite period for the sake of Monitoring Professionals undue gain of approximately Rs. 6.49 Lakh per month.

8. The fees of the Resolution Professional is unreasonable and also does not reflect the work done in by four years also as enumerated above. This is leading to the fate of the already distressed Company into Liquidation at the fault of the Resolution Professional. The Resolution Professional has conducted only four meetings from 2019 till 2022 i.e. only one meeting in each year. The last meeting conducted on 21.01.2022 was convened only to seek time with an intention to prolong the matter as nothing conclusive resulted from the said meeting.

9. The Respondent also does not provide the copy of minutes to the Applicant. The Respondent is charging an unreasonable amount parallel to the amount of work done.

10. Further in a recent judgement in "Devarajan Raman vs. Bank of India Limited" the Supreme Court has observed; -

"15. The Insolvency and Bankruptcy Board of India has issued a circular on 12 June 2018. The circular, inter alia, requires the insolvency professional to ensure that the fees payable to him during the CIRP are reasonable and the approval of the CoC for the fee or other expenses is obtained, wherever approval is required."

"16. The appellate authority has merely proceeded in an ad hoc manner on the ground that the amount of Rs. 5,00,000 as fee, in addition to the expenses, appears to be reasonable. Both the orders suffer from an abdication in the exercise of jurisdiction. In the absence of any reasons either in the order of the NCLT or the appellate authority, it is impossible for the Court to deduce the basis on which the payment of an amount of Rs. 5,00,000 together with expenses has been found to be reasonable."

Submissions of the Respondent are as follows :-

11. The Respondent states that the Order for approval of Resolution Plan was passed on 26.11.2019 and the order inadvertently recorded 30 months instead of 3 months to make payment under the Resolution Plan.

12. Further taking advantage of such inadvertent error, the Applicant filed an Application IA 661 of 2020 praying that the time to make payment under the Resolution Plan be reckoned from 27.01.2020 i.e. the date on which the Order was rectified.

13. That due to covid-19 pandemic and implementation of lockdown by the Central Government, the functioning of the Tribunal was affected. Thereafter, the Order was pronounced on 30.04.2021. Vide the said Order the prayer sought by the Applicant was partly allowed and time period to make complete payment in terms of the approved Resolution Plan subject to payment of interest at a commercial rate of 12% from the reckoned date i.e. 27.01.2020 till the entire payment is made.

14. Further it was made clear that the payment of interest is the condition precedent to the extension of time for making payment which was not honoured by the Applicant. The Order dated 30.04.2021 is not complied with by the Applicant but instead filed an Appeal No. 445 of 2021 in Hon'ble Appellate Tribunal praying for waiver of interest.

15. Further the Applicant also in its IA No. 661 of 2020 had sought prayers for making fundamental changes in the Plan which had effect of modifying/altering the terms of the Resolution Plan and it was rightly rejected by this Tribunal vide Order dated 30.04.2021.

16. The Respondent states that after the Resolution Plan was approved by the Adjudicating Authority and granted extension of time to the Applicant to make payment however, subject to pre-condition i.e. payment of interest. Further the Hon'ble NCLAT has not granted any stay on the aforesaid issue of interest and hence the Applicant until and unless makes payment in terms of the approved Resolution Plan, reliefs sought for handover by the Applicant is neither maintainable but the same is contrary to the approved Resolution Plan. Further the Adjudicating Authority has not been vested with power to review and modify its own Order.

17. Further, it is well settled law that once a Resolution Plan is approved by the Adjudicating Authority, it attains finality and cannot be altered or modified.

18. Further, the Applicant is estopped in law as once the Resolution Plan is approved it includes the fee of the Monitoring Professional till complete payment is made. As per the approved Resolution Plan, the management and control of the business of the Corporate Debtor is as under :-

Management and control of the business of the Corporate Debtor.

"The Resolution Applicant note that post approval of the plan by Hon'ble NCLT, till the time the financial obligations proposed by him is not paid, the Resolution Applicant will be allowed to carry the operations and management of the Corporate Debtor under the supervision and control of a Monitoring Committee appointed by the CoC, which consists of existing RP, an independent person representing CoC and a representative of resolution application. Further though no cost will be leviable or borne by the Resolution Applicant in any manner for such supervision. The remuneration of the Resolution Professional in Monitoring Committee may continue at the current fee till the complete handover of CD to RA. Any act been performed by the Monitoring Committee will be done under the trust and for the benefit of the Resolution Applicant as well as Corporate Debtor."

19. The Applicant cannot seek modification of an approved Resolution Plan or can challenge the commercial wisdom of the CoC who have approved the Resolution Plan. The Applicant in its Plan has stated that the Monitoring Professional will be paid fee as of the Resolution Professional continuing in the Monitoring Committee till the complete handover of the Corporate Debtor to the Resolution Applicant

which cannot be challenged by the Applicant who is not only estopped in law but also has no locus to challenge the commercial wisdom of the CoC who have approved the Resolution Plan.

20. Also, the Respondent states that due to noncompliance of the Order dated 30.04.2021 by the Applicant, the Financial Creditors have decided not to handover of the possession until the Order dated 30.04.2021 is complied by the Applicant.

21. Since the Appeal preferred by the Applicant is pending for adjudication in the Hon'ble Appellate Tribunal, the Financial Creditor suggested to keep amount equivalent to the interest in interest free no lien account of the lead Bank to which the Applicant dissented. Hence, the undertaking given by the Applicant demonstrates that the Applicant does not wish to comply with the directions of this Tribunal.

FINDINGS

22. We have heard the Counsels appearing for the Applicant and the Respondent. We have also considered the above narrated facts and examined the merits of the present IA.

23. At this juncture it is important to refer certain facts which needs to be considered. The Resolution Plan was approved by this bench vide Order dated 26.11.2019. Thereafter, the RP moved an application for removal of typographical errors which had occurred in para 18(g) of the Order. It was mentioned therein that the total amount due under the Resolution Plan shall be payable within 30 months instead of 3 months. The said error was rectified to this extent that payment of total amount due under the Plan to be payable within 3 months from the date of approval of the Resolution Plan. In view of the same IA No. 661 of 2020 was filed by the Resolution Applicant seeking prayer to extend the time line for making total payment of amount due under the Resolution Plan to be reckoned from 27.01.2020 instead of 26.11.2019. This Bench vide its Order dated 30.04.2021 partly allowed the time for making outstanding amount from 27.01.2020 subject to payment of interest at the rate of 12% p.a. The payment of interest was to be payable from the due date of remaining amount till the entire payment under the Plan was made. To this the Applicant preferred an Appeal which is pending for its Adjudication. The Respondent herein are reluctant to handover the complete control of the Corporate Debtor due to non-compliance of the interest by the Applicant.

24. In view of the above facts we hereby are of the considered view that as the Applicant has paid entire amount in accordance with the terms of the Resolution Plan, the Respondent is hereby directed to handover complete control, Management as well as the operations of the Corporate Debtor Company to the Applicant i.e. the Successful Resolution Applicant subject to the Applicant to pay Interest @ of 12% p.a. from due date of remaining amount of payment of Resolution Plan until the entire amount paid under the Plan by the Applicant.

Further it is observed in a Judgement passed by Hon'ble Supreme Court in "Gajendra Sharma V/s UOI" wherein the plight of the borrower/entrepreneur was duly considered in making payment of EMI during Covid-19 period and also observed that date of making payment of such due instalment can be deferred but there can be no waiver of interest accrued even during the pandemic situation. Hence the Applicant herein is liable to pay interest on amount due for such delayed/deferred payment in the light of the above decision. The Applicant is directed to deposit the said Interest amount in an Escrow account to be opened with the lead Bank.

25. Further in light of the decision of the Hon'ble Supreme Court in the matter of "Ghanshyam Mishra and Sons Private Limited V/s Edelweiss Asset Reconstruction Company Limited" and also in "Jaypee Kensington Boulevard Apartments Welfare Association and Others V/s NBCC (India) Limited" and other landmark decisions of the Hon'ble Supreme Court, it is a settled law that all the liability of the Corporate Debtor which are prior to CIRP and prior to approval of the Resolution Plan and before transfer of the assets of the Corporate Debtor to the Resolution Applicant shall stand extinguished. The Successful Resolution Applicant is eligible to have encumbrance free transfer of the assets of the Corporate Debtor after the approval of the Resolution Plan. Therefore, the Applicant can approach the statutory authorities on the strength of the Hon'ble Supreme Court ruling and can get lifted the attachment and the prohibitory orders passed creating encumbrances on the assets of the Corporate Debtor to be removed.

26. The Monitoring Professional is directed to extend necessary co-operation to the Applicant to approach the Government Authorities of Central and State Government for lifting the attachment/removal of prohibitory Orders encumbrance over the assets of the Corporate Debtor prior to CIRP and before the transfer of assets of the Corporate Debtor to the Resolution Applicant on approval of the Resolution Plan.

27. Further, this Bench also observes that as the Plan has been approved and the Resolution Professional being one of the Member of the Monitoring Professional and as the work has substantially been reduced, the fee charged by the Respondent is excessive and exorbitant Hence, the fee of the Respondent/Monitoring Professional is fixed at Rs. 2,00,000/-per month.

28. Further, as the Applicant has paid the entire amount under the Resolution Plan, the prayers in the Applications being IA 2666 of 2021 and IA 2847 of 2021 have now become infructuous. Hence, these Applications are disposed of.

29. With the aforesaid observation, the present IA No. 2847 /2021 is partly allowed.