
(2023) 02 NCLT CK 0051

In the National Company Law Tribunal

Case No : IA Nos. 1091/2022, 118/2022 and 560/2022 in CP (IB) No. 269/Chd/Pb/2019

Anita Bhandari Vs Vivek Kumar Arora ?

Date of Decision : 22-02-2023

Acts Referred:

Citation : (2023) 02 NCLT CK 0051

Hon'ble Judges : Harnam Singh Thakur, Member (J); Subrata Kumar Dash, Member (T)

Bench : Division Bench

Advocate : Karan Kaushal, Reshab Bajaj, Arora Vishwas Kumar, Pulkit Jain, Yogesh Kumar, Prateek Gupta, Rahul Soi

Final Decision : Disposed Of

Judgement

Subrata Kumar Dash, Member (Technical)

IA Nos. 1091/2022 & 118/2022

1. As the issues involved in IA Nos. 1091/2022 & 118/2022 are overlapping and inter-connected, these IA's are taken up together for discussion and adjudication.

2. IA No. 1091/2022 is filed by Chanchal Packagers Private Limited and Sochi Exports Private Limited (Applicants) against Canara Bank (Respondent No. 1), Pegasus Asset Reconstruction Private Limited (Respondent No. 2), Vivek Kumar Arora, Resolution Professional of M/S Bhandari Deepak Industries (Respondent No. 3) and M/S Dev Raisins Pvt. Ltd. (Respondent No. 4) under Section 31 read with Section 60 (5) of Insolvency and Bankruptcy Code, 2016

3. IA No. 118/2022 is filed by BEIL Infrastructure Private Limited (Applicant No. 1), A.N. Enterprises (Applicant No. 2) and Orient Enterprises (Applicant No. 3) against Canara Bank (Respondent No. 1), Pegasus Asset Reconstruction Private Limited (Respondent No. 2) and Vivek Kumar Arora, Resolution Professional of M/s Bhandari Deepak Industries (Respondent No. 3) and M/S Dev Raisins Pvt. Ltd. (Respondent No. 4) under Section 60(5) of Insolvency and Bankruptcy Code, 2016. The applicant has filed an amended memo of parties wherein applicant

No.1 has withdrawn from the application by order dated 28.02.2022, and amended memo of parties has been filed by diary No.00295/5 dated 29.07.2022. Hence, the present application is contested by Applicant No. 2 & 3.

4. It is prayed by the applicants in IA No. 1091/2022 to dismiss IA No. 480/2021 in CP(IB) No. 269/Chd/HP/2019 seeking approval of the resolution plan submitted by Respondent No. 4 as the same is in contravention of Insolvency and Bankruptcy Code, 2016. In IA No. 118/2022, It is prayed by the applicants to direct the Committee of Creditors to reconsider the claims of the applicant.

5. The brief facts as stated in applications are that IA No. 1091/2022

5.1 The applicants in IA No. 1091/2022 are the operational creditor of the corporate debtor whose claims are duly admitted by the Resolution Professional. During the course of business, the applicants have advanced a collective amount of Rs. 14,25,546/- for the supply of goods. The CIRP proceedings were initiated against the corporate debtor, and the applicants have submitted their claims along with proof to the Resolution Professional. The total operational debt of the corporate debtor is Rs.8,60,06,894/- and the said debt has been bifurcated into 'Operational Creditors' amounting to Rs. 7,35,93,416/- and 'Advance from Customers' amounting to Rs.1,21,13,478/-. The Resolution Plan provides for the payment to the Financial Creditor and the operational creditors are being paid 7.5% of their admitted claims which amounts to Rs. 53,25,523/- and applicants are paid NIL amount.

IA No. 118/2022

5.2 The applicants In IA No. 118/2022 were also the suppliers to the corporate debtor. During the period of business, a certain amount becomes due and payable by the corporate debtor. After the initiation of CIRP of the Corporate Debtor, the applicants filed the claim, and Resolution Professional admitted the Claims of the applicants as Operational Creditors. The Resolution Professional has created a subdivision on the operational debt of the Corporate Debtor as narrated above. Applicant No. 2 was put within the category of 'Advance from Customers' and against his admitted debt of Rs. 1,03,16,131/-, and he has been paid NIL Value. In the case of Applicant No. 3 has an admitted amount of Rs. 34,45,012/-, and he has been paid an amount of Rs. 2,49,763/- which is a waiver of 92.75%. The claims of operational creditors have been absolutely sidelined in the resolution plan.

6. It is further submitted by applicants that the Resolution Plan, as approved by the CoC, discriminates between similarly situated creditors, and the Code does not differentiate between any kind of operational debt. Therefore, it is ought to be rejected. The total operational debt of the corporate debtor has been illegally bifurcated and has been treated differently. The 'Commercial wisdom' of the CoC is not a defence to defeat the interest of the applicants. In support of the contention of the applicants, reliance is placed on the case of Binani Industries Limited vs Bank Of Baroda & Anr Company Appeal (AT) (Insolvency) No. 82 of

2018 dated 14.11.2018, wherein it has been held that

"XXXXX

i The liabilities of all creditors who are not part of 'Committee of Creditors' must also be met in the resolution.

ii. The 'Financial Creditors can modify the terms of existing liabilities, while other creditors cannot take risk of postponing payment for better future prospectus. That is, 'Financial Creditors' can take haircut and can take their dues in future, while 'Operational Creditors' need to be paid immediately.

iii. A creditor cannot maximise his own interests in view of moratorium.'

iv. If one type of credit is given preferential treatment, the other type of credit will disappear from market. This will be against the objective of promoting availability of credit.

v. The 'I&B Code' aims to balance the interests of all stakeholders and does not maximise value for 'Financial Creditors'.

vi. Therefore, the dues of creditors of 'Operational Creditors' must get at least similar treatment as compared to the due of 'Financial Creditors'.

XXXXXX" (emphasis supplied)

7. The Respondent No.4/Successful Resolution Applicant has filed its reply in IA 1091/2022 by diary No.01962/3 dated 08.02.2023 stating that the applicant has no locus standi to challenge the distribution of the amount offered and to the resolution plan, which has already been approved by the committee of creditors. The Applicant is an Operational Creditor and is not a part of the Committee of Creditors, and the amount due to the Applicant is much less than 10% of the total debt. Accordingly, the Applicant herein has no right to challenge or object to the resolution approved by the members of the CoC with a requisite voting share in their commercial wisdom.

8. It is further submitted that the Hon'ble Adjudicating Authority, whilst approving a Resolution Plan in terms of Section 31 of the Code, is required to ensure compliance of Section 30(2) of the Code in order to ensure that decision taken by the Committee of Creditors while approving a Resolution Plan is in accordance with the provision of law. It is submitted that the Hon'ble Supreme Court, in the matter of Committee of Creditors of Essar Steel India Limited Through Authorised Signatory v. Saleh Kumar Gupta and Others, 2019 SCC Online SC 1478, had held that the commercial wisdom of the Committee of Creditors is paramount and the judicial review is very limited.

9. Respondent No.1 has filed its written statement by Diary No.00295/9 dated 18.10.2022 stating that the resolution plan has been approved in the 16th CoC Meeting held on 09.06.2021 with 84.38% voting share in accordance with the provisions of the Insolvency and Bankruptcy Code, 2016, the acceptance or

rejection of any resolution plan is within the commercial jurisdiction of Committee of Creditors (CoC). The exercise of the said discretion is always regulated by several parameters, and neither the applicant nor anybody else can question the correctness of the decision taken by the CoC. Respondent No.4 has also filed its written statement by Diary No.00295/7 dated 04.01.2023, where the reply submitted by Respondent No.4 in IA No.1091/2022 is repeated and is not reproduced here for the sake of brevity.

10. In the rejoinder filed by the applicant by Diary No.00295/4 dated 29.07.2022 stating that repeating all the contentions given by the applicant in their application and short written submissions.

11. It is further averred by the applicant in written submissions filed by Diary No. 00295/9 dated 18.10.2022 that the principle of equality cannot be stretched to treating unequal as that will destroy the very object of the code. The contention raised by the applicant that the operational creditors is not at par with the amount being offered to the financial creditors under the resolution plan, and accordingly, the resolution plan cannot be upheld. As per Section 53 of the Code, the Operational Creditors are ranked much below the secured financial creditors of the Corporate Debtor.

12. We have heard learned counsel for the Applicant and respondent-Resolution Professional and have perused the record carefully.

13. After going through the averments made by the parties, it is noted that in the distribution made by the Coc, the operational creditors who have given advance have not been allocated any amount. As per Section 30 (4) of the Code, the manner of distribution proposed by the CoC will take into account the order of priority amongst creditors as laid down in Section 53 (1). In the catena of judgments, the Hon'ble Supreme Court has clearly laid down that the commercial wisdom of the CoC is not the subject matter of judicial review except on the limited ground as provided under Sections 30 and 61.

We are of the view that the facts of the present IAs don't warrant any interference from this Adjudicating Authority with the decision of the CoC.

14. In the result, IA Nos. 1091/2022 & 118/2022 are dismissed and disposed of accordingly.

IA No.560/2022

15. The present application is filed by Anita Bhandari (Applicant No. 1), Deepak Bhandari (Applicant No. 2) and Orient Enterprises (Applicant No. 3) against Vivek Kumar Arora, Resolution Professional of M/s Bhandari Deepak Industries (Respondent No. 1) Canara Bank (Respondent No. 2), Pegasus Asset Reconstruction Private Limited (Respondent No. 3) and M/S Dev Raisins Pvt. Ltd. (Respondent No. 4) under Section 60(5) of Insolvency and Bankruptcy Code, 2016.

16. It is prayed by the applicant to dismiss IA No. 480/2021 in CP(IB) No. 269/Chd/HP/2019, seeking approval of the resolution plan submitted by Respondent No. 4 as the same does not conform to the provisions of Insolvency and Bankruptcy Code, 2016 and to reverse the CIRP process and permit the applicants to submit their resolution plan.

17. The applicant has made certain objections to the resolution plan submitted by Respondent No.4. The resolution plan has been approved in the 16th CoC Meeting held on 09.06.2021 with 84.38% voting share and the resolution professional has filed IA No.480/2022 seeking approval of resolution plan. The main objections raised by the applicant against the resolution plan are that:-

i. There is an illegal transfer of the personal assets of the applicant as well of the personal guarantors of the corporate debtor. The Information Memorandum (IM) prepared by Respondent No.1/Resolution Professional includes the assets of the corporate debtor on the commencement date. It is alleged that certain personal assets of the applicant which are a residential flat situated at Gurugram and a residential situated at Jodhpur, Rajasthan, have been included in the Information Memorandum. The resolution professional has also not carried out any valuation of the personal assets and has also erred in permitting the transfer/realization of the personal assets of the applicant and guarantor to the resolution applicant.

ii. There is no treatment of debt owed to the corporate debtor along with trade receivables of the corporate debtor.

iii. The prime-facie collusion/connivance between the sole resolution applicant, resolution professional, and the CoC Member with majority voting share i.e., Canara Bank.

iv. The past conduct and antecedents of Mr Dinesh Jain and Mr Rajnish Jain (Promoters/Directors) of resolution applicant/respondent No.4.

18. Respondent No. 1 has filed a reply by Dairy No. 00914/2 Dated 18.07.2022, stating that the committee of creditors approved the resolution plan of Dave resins Pvt. Limited with more than 66% of voting share in accordance with the provisions of the Insolvency and Bankruptcy Code and an application bearing number IA 480/2021 is filed with this Adjudicating Authority for approval of the said plan. The applicants have levelled certain allegations against the previous conduct of directors of Successful Resolution Applicant, such as pendency of litigations and pendency of FIRs.

19. It is further clarified that as the applicant is declared ineligible to submit the resolution plan under Section 29A of the Code, therefore, they have been levelling frivolous and false allegations in order to harass the Respondent, and there is nothing on record to prove the allegations. The valuations have been conducted by independent professionals, and such professionals or valuers are duly registered with the Insolvency And Bankruptcy Board of India. The resolution professional appointed such professionals in order to arrive at fair

value and liquidation value of the corporate debtor, and the reports of valuers are independent in nature and are out of the scope of the resolution professional to arrive at. It is further submitted that for the purpose of valuations, no personal assets of the applicants or personal guarantors have been taken into consideration.

20. Respondent No. 4 has filed a reply by Dairy No. 00914/4 Dated 09.09.2022, stating that Applicant had also submitted its Expression of Interest to submit a resolution plan with the Resolution Professional and the same was rejected. The applicant approached this Adjudicating Authority by filing I.A. No. 304/2020, which was dismissed by this order dated 19.02.2021. The order dated 19.02.2021 was also upheld by Hon'ble Appellate Authority and Hon'ble Supreme Court. It is further stated that no personal assets of the suspended directors form part of the resolution plan submitted by the resolution applicant. The resolution plan only takes over the assets of the Corporate Debtor, and the resolution plan submitted by the Answering Respondent does not include any such asset.

21. It is further averred that the applicant has no locus standi to challenge the resolution plan, and the Resolution Plan submitted by the Answering Respondent complies with the provisions of the Code and underlying Regulations. Additionally, the commercial wisdom of the committee of creditors is paramount, and the same cannot be challenged. In support of its contention, Respondent No. 4 has relied upon the decision of the Hon'ble Supreme Court in the case of K. Sashidhar v Indian Overseas Bank & Ors, Civil Appeal No. 10673 of 2018 wherein it has been held that :-

"Indubitably, the inquiry in such an appeal would be limited to the power exercisable by the resolution professional Under Section 30(2) of the I & B Code or, at best, by the adjudicating authority (NCLT) Under Section 31(2) read with 31(1) of the I & B Code. No other inquiry would be permissible. Further, the jurisdiction bestowed upon the appellate authority (NCLAT) is also expressly circumscribed. It can examine the challenge only in relation to the grounds specified in Section 61(3) of the I & B Code, which is limited to matters "other than" enquiry into the autonomy or commercial wisdom of the dissenting financial creditors. Thus, the prescribed authorities (NCLT/NCLAT) have been endowed with limited jurisdiction as specified in the I & B Code and not to act as a court of equity or exercise plenary powers."

(Emphasis Supplied)

22. The Respondent No. 2-Canara Bank has also filed reply by Dairy No. 00295/2 dated 12.05.2022 wherein Canara Bank has prayed for dismissal of present application

23. We have heard learned counsel for the Applicant and respondent-Resolution Professional and have perused the record carefully.

24. We have carefully perused the relevant documents, specifically with regard to the transfer of personal assets of the corporate debtor. It is stated that the applicant is aggrieved on account of the proposed transfer/realisation of the personal assets of the guarantors-suspended directors, which is stated to be in contravention of Regulation 37 of CIRP Regulations, 2016. It is further argued that personal assets are given only for the sake of the 'security' of the financial creditor, and it is not tantamount to becoming the asset of the corporate debtor. The Successful Resolution Applicant, however, asserted that no personal assets of the suspended director form part of the Resolution Plan and has also categorically stated that none of the personal assets of the applicant has been taken into account for the purpose of valuation of the assets of the corporate debtor. In the course of the present proceedings, the applicant has also failed to specifically identify any of his assets which were included in the valuation report.

25. We have perused the valuation report, and it is seen that the residential flats at Gurgaon and at Jodhpur, Rajasthan, held by related parties and by the applicants, are nowhere mentioned in the valuation report. In this connection, we take note of the following provision stated in Part -B (3)(C) of the Resolution plan, which clearly states:-

"IX.Proposal for dealing with the personal guarantees given to financial creditors by directors/shareholders of the corporate debtor Wherever personal guarantees have been given by the existing promoters/directors/shareholders/they are related parties/entities of the corporate debtor, the same may continue in favour of their respective beneficiaries at the option of such beneficiaries. However, the exercise of their rights by such beneficiaries In respect of such beneficial arrangements shall not impose any liability whatsoever on the CD or on the RA."

26. The allegations made by the applicant regarding the collusion between the sole Resolution Professional and CoC Member are not corroborated by the facts before us and hence, are not entertained.

27. In the result, IA No. 560/2022 is dismissed and disposed of accordingly.