
(2019) 09 NCLT CK 0044

In the National Company Law Appellate Tribunal

Case No : Company Application No. 932(PB) Of 2019 In Company Petition No. (IB)-265(PB) Of 2018

Gain Chand Narang

APPELLANT

Vs

Sunstar Overseas Limited

RESPONDENT

Date of Decision : 12-09-2019

Acts Referred:

Insolvency And Bankruptcy Code, 2016 — Section 7, 12, 14, 18(1)(a), 22(3)(a), 29A, 30, 30(2), 30(2)(a), 30(2)(b), 30(2)(c), 30(2)(e), 30(2)(f), 30(4), 30(6), 31, 31(1), 32(2)(d), 53, 53(1), 60(5), 61, 62
Insolvency And Bankruptcy Board Of India (Insolvency Resolution Process Of Corporate Persons) Regulations, 2016 — Regulation 6(1), 27, 36B(4A), 39, 39(3)

Citation : (2019) 09 NCLT CK 0044

Hon'ble Judges : M.M. Kumar, CJ; Santanu Kumar Mohapatra, Member (Technical)

Bench : Division Bench

Advocate : Ramji Srinivasan, Abhishek, Tushar Tyagi, Nikhil Ramdev, Sylona, G.C. Narang

Final Decision : Disposed Of

Judgement

Santanu Kumar Mohapatra, Member (T)

1. This is an application filed by the Resolution Professional under Section 30(6) read with Section 60(5) of Insolvency and Bankruptcy Code, 2016 (hereinafter referred as the "Code") seeking approval of the Resolution Plan under Section 31 of the Code read with Regulation 39 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process of Corporate Persons) Regulations, 2016 in respect of the corporate debtor M/s. Sunstar Overseas Limited.

2. The facts in brief necessary for disposal of the present application are that ICICI Bank Limited one of the Financial Creditors had preferred an application under Section 7 of the Code for initiation of Corporate Insolvency Resolution Process against M/s. Sunstar Overseas Limited ("Corporate Debtor"). The application was admitted on 20.07.2018 imposing moratorium under Section 14

of the Code and the applicant, Mr. Gian Chand Narang was appointed as the Interim Resolution Professional.

3. Thereafter, in terms of Regulation 6(1) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations 2016 ("CIRP Regulations"), the Interim Resolution Professional made a public announcement in FORM A dated 24.07.2018 in the following newspapers:

Newspaper

Date

Language

Edition

Business Standard

24.07.2018

English

Delhi/NCR covering Sonapat

Rashtriya Sahara

24.07.2018

Hindi

Delhi/NCR covering Sonapat Region

The Economic Times

24.07.2018

English

Chandigarh Edition covering Amritsar Region

Daily Charhdikala

24.07.2018

Punjabi

Amritsar Edition

4. Subsequently, in terms of Section 18(1) (a) of the Code, the Interim Resolution Professional collated all claims submitted by the creditors pursuant to the public announcement and constituted a Committee of Creditors comprising of nine (9) financial creditors of the Corporate Debtor i.e. Karur Vysya Bank Ltd., Karnataka Bank Ltd., Corporation Bank, IDBI Bank Ltd., ICICI Bank Ltd., City Union Bank Ltd., Punjab National Bank, Invent Assets Securitization & Reconstruction Pvt Ltd. and Canara Bank on 13.08.2018.

5. The first meeting of the Committee of Creditors (CoC) was convened on 21.08.2018 where it was decided by 94.10% voting share to continue the Interim Resolution Professional (IRP) Mr. Gian Chand Narang as the Resolution Professional in terms of Section 22(3)(a) of the Code.

6. Subsequently, in terms of Regulation 27 of the CIRP Regulations the Resolution Professional appointed two registered valuers, i.e. M/s. Adroit Technical Services Pvt. Limited and M/s. Crest Capital Group Pvt. Limited to ascertain the fair value and liquidation value of the corporate debtor.

7. It is submitted that pursuant to the invitation of resolution plan the following EOIs were received from 4 Prospective Resolution Applicants (PRAs) till last date for submission of EOI, i.e. up to 30.10.2018.

M/s. Asset Reconstruction Company of India Limited (ARCIL).

M/s. Phoenix ARC Ltd.

M/s. Compact Capital Ltd.

Mrs. Lata Yadav, Mr. Ajay Yadav, Mr. Prahlad Gautam, Mrs. Sheela Gautam, Mr. Bharat Pal Singh (collectively referred to as Ajay Yadav & Company) and an SPV as proposed to be formed by them to submit Resolution Plan.

8. It is submitted in the application that though expression of interest was received from four eligible PRAs, only one Resolution Plan was received from Ajay Yadav & Company in the joint names of 'Umaiza Infracon LLP & Omkara ARC'. The Committee of Creditors, however, after much deliberations decided to make further efforts to scout for more resolution plans.

9. As the initial insolvency resolution period of 180 days was going to expire, with the approval of CoC an application seeking extension of CIRP period by 90 days was moved and allowed vide order dated 21.12.2018, extending the time period by 90 days beyond 180 days in terms of Section 12 of the Code.

10. It is submitted that one M/s. GRM Overseas Ltd filed an application seeking extension of the time for submitting the resolution plan by a period of 15 days which was allowed vide order dated 12.03.2019 extending the time for submission of resolution plan till 18.03.2019 with direction to the CoC to consider the same in accordance with the provisions of the Code.

11. In the tenth meeting of the Committee of Creditors convened on 27.03.2019 resolution professional apprised the CoC members that four out of the five Resolution Applicants (RAs) whose resolution plans were presented before the CoC in the last meeting and were given a chance to rectify their shortcomings had submitted their revised resolution plans. The revised resolution plans submitted by the Resolution Applicants were discussed with their representatives. The Resolution Applicants were again asked to submit a letter of declaration/affirmation in a sealed envelope addressing the issues discussed with them i.e. the plan shall contain no conditions precedent; final improved financial

consideration and terms of payment and undertaking to furnish performance security to the extent of 25% of consideration payable within 3 days of approval of their resolution plan by CoC. Three out of the five Resolution Applicants, namely M/s. GP Global Asphalt Pvt. Limited, M/s. Jatalia Global Venture Limited and Umaiza Infracon LLP (SPV of Ajay Yadav & Co.) submitted the required letter of Declaration/Affirmation to the CoC.

12. It is submitted that in the 11th meeting of the CoC convened on 30.03.2019 the modified/revised resolution plan as received from Ajay Yadav & Co. through its SPV Umaiza Infracon LLP was presented before CoC. The remaining two Resolution Applicants had not submitted revised plans since they had in their letters submitted on 27.03.2019 not agreed to make the modifications in line with the requirements stipulated by CoC. However, it was decided by CoC to evaluate the Resolution Plans of Umaiza Infracon LLP, Jatalia Global Ventures Ltd. and G P Global Asphalt Pvt. Ltd as per the evaluation matrix, while resolution plans of Outcome Commercial Pvt. Ltd. and GRM Overseas Limited were not considered as the resolution consideration amount offered by them was below the liquidation value.

13. It is appropriate to mention here that C.A No. 611/PB/2019 filed by the resolution professional for exclusion of time lost in the litigation was allowed on 03.04.2019 by excluding the period of 22 days for the purposes of calculation of statutory CIRP period of 270 days.

14. It is submitted that the e-voting for approval of Resolution Plan was conducted on 03.05.2019 and the Resolution Plan submitted by Ajay Yadav & Co. through its SPV M/s. Umaiza Infracon LLP, was unanimously approved by the members of the CoC by 100% voting share.

15. In terms of Section 30(6) of the Code the resolution professional has submitted the Resolution Plan unanimously passed by the CoC with 100% voting share for its approval.

16. Section 31 of the Insolvency and Bankruptcy Code, deals with the approval or rejection of a resolution plan by the Adjudicating Authority. Approval of the resolution Plan is accorded under the provisions of Section 31(1) of the Code.

17. Section 31 of the Insolvency and Bankruptcy Code, 2016 is reproduced below for ready reference.

"Approval of Resolution Plan-

31. (1) If the Adjudicating Authority is satisfied that the resolution plan as approved by the committee of creditors under sub-section (4) of section 30 meets the requirements as referred to in sub-section (2) of section 30, it shall by order approve the resolution plan which shall be binding on the corporate debtor and its employees, members, creditors, including the Central Government, any State Government or any local authority to whom a debt in respect of the payment of dues arising under any law for the time being in force, such as

authorities to whom statutory dues are owed, guarantors and other stakeholders involved in the resolution plan.

Provided that the Adjudicating Authority shall, before passing an order for approval of resolution plan under this sub-section, satisfy that the resolution plan has provisions for its effective implementation.

(2) Where the Adjudicating Authority is satisfied that the resolution plan does not confirm to the requirements referred to in sub-section (1), it may, by an order, reject the resolution plan.

(3) After the order of approval under sub-section (1), -

(a) the moratorium order passed by the Adjudicating Authority under section 14 shall cease to have effect; and

(b) the resolution professional shall forward all records relating to the conduct of the corporate insolvency resolution process and the resolution plan to the Board to be recorded on its database.

(4) The resolution applicant shall, pursuant to the resolution plan approved under sub-section (1), obtain the necessary approval required under any law for the time being in force within a period of one year from the date of approval of the resolution plan by the Adjudicating Authority under sub-section (1) or within such period as provided for in such law, whichever is later. " (Emphasis given)

18. Therefore, before approving the Resolution Plan, the Code mandates the Adjudicating Authority to ensure that,

(1) the Resolution Plan meets the requirements of Section 30(2) of the Code and

(2) the resolution plan has provisions for its effective implementation.

19. In respect of compliance of condition (1) above, it is necessary to refer to sub-section (2) of Section 30 of the Code which reads as follows:

"30. Submission of resolution plan. -

(1).....

(2) The resolution professional shall examine each resolution plan received by him to confirm that each resolution plan -

(a) provides for the payment of insolvency resolution process costs in a manner specified by the Board in priority to the payment of other debts of the corporate debtor;

(b) provides for the payment of debts of operational creditors in such manner as may be specified by the Board which shall not be less than-

(i) the amount to be paid to such creditors in the event of a liquidation of the corporate debtor under section 53; or

(ii) the amount that would have been paid to such creditors, if the amount to be distributed under the resolution plan had been distributed in accordance with the order of priority in sub-section (1) of section 53, whichever is higher, and provides for the payment of debts of financial creditors, who do not vote in favour of the resolution plan, in such manner as may be specified by the Board, which shall not be less than the amount to be paid to such creditors in accordance with sub-section (1) of section 53 in the event of a liquidation of the corporate debtor.

Explanation 1. -For removal of doubts, it is hereby clarified that a distribution in accordance with the provisions of this clause shall be fair and equitable to such creditors. Explanation 2. - For the purpose of this clause, it is hereby declared that on and from the date of commencement of the Insolvency and Bankruptcy Code (Amendment) Act, 2019, the provisions of this clause shall also apply to the corporate insolvency resolution process of a corporate debtor-

(i) where a resolution plan has not been approved or rejected by the Adjudicating Authority;

(ii) where an appeal has been preferred under section 61 or section 62 or such an appeal is not time barred under any provision of law for the time being in force; or

(iii) where a legal proceeding has been initiated in. any court against the decision of the Adjudicating Authority in respect of a resolution plan;]

(c) provides for the management of the affairs of the Corporate debtor after approval of the resolution plan;

(d) The implementation and supervision of the resolution plan;

(e) does not contravene any of the provisions of the law for the time being in force

(f) confirms to such other requirements as may be specified by the Board.

Explanation. - For the purposes of clause (e), if any approval of shareholders is required under the Companies Act, 2013(18 of 2013) or any other law for the time being in force for the implementation of actions under the resolution plan, such approval shall be deemed to have been given and it shall not be a contravention of that Act or law.

(3)
..... "

20. Sub-section 2 of Section 30 casts a duty on the Resolution Professional to examine the resolution Plan received by him to confirm that such Resolution Plan provides for the payment of insolvency resolution process costs, provides for the payment of the debts of the operational creditors and financial creditors in such manner as specified, provides for the management of the affairs of the corporate

debtor after approval of the Resolution Plan; the implementation and supervision of the Resolution Plan, that the Resolution Plan does not contravene any of the provisions of the law, and that the Resolution Plan conforms to such other requirements as may be specified by the Board.

21. The Resolution Professional has filed compliance certificate in Form H and inter alia has confirmed that he has examined and verified the Resolution Plan approved by the CoC, in the light of the requirements of the Code and Regulations and that it is compliant to the relevant provisions of the Code and Regulations.

22. In terms of Section 31(1) of the Code, Adjudicating Authority has also to examine whether the requirements of sub-section (2) of Section 30 have been complied with or not.

23. It has been submitted in the application and in Form H duly certified by RP that the final Resolution Plan unanimously approved by the CoC meets the requirements as laid down in various clauses of Section 30(2) of the Code.

24. In respect of compliance of Section 30(2)(a) of the Code, it is seen that there is a provision in the resolution plan at Clause 6.2.2 which provides for payment of CIRP costs in priority over payments to any other creditors. The Resolution Professional has confirmed in the compliance certificate given in Form H that the Resolution Plan provides for the payment of Insolvency Resolution Process costs. Be that as it may it is made clear that Insolvency Resolution Process cost shall be paid in its entirety by the resolution applicant in priority to other debts of the corporate debtor.

25. As regards compliance of clause (b) of Section 30(2) of the Code, the Resolution Professional has certified that clauses 6.3 and 6.4 of the resolution plan provide for the payment of the debts of operational creditors in such manner as may be specified by the Board which shall not be less than the amount to be paid to the operational creditors in the event of a liquidation of the corporate debtor under Section 53.

26. During hearing it was placed before us that the corporate debtor, being a going concern no workmen and employees' dues are outstanding. Nevertheless clause 6.3.2 (a) of the resolution plan provides for full and final discharge of the dues of workmen of the corporate debtor for the period of 24 months preceding the insolvency commencement date. On behalf of resolution applicant, it was confirmed that workmen's dues for the period of 24 months preceding the insolvency commencement date shall be paid in its entirety in terms of water fall provisions of Section 53 of the Code.

27. As per Form-H, financial creditors are provided 17.858 % of their dues in equal proportion of their voting share. Other operational creditors, excepting workers, are provided equally at 0.1098 % of their dues. Accordingly, there appears to be no discrimination in respective class of creditors, as same

treatment is provided to similarly situated each class of creditors.

28. Besides the resolution plan provides for the payment of the debts of operational creditors in such manner as may be specified by the Board which shall not be less than the amount to be paid to the operational creditors in the event of a liquidation of the corporate debtor under Section 53.

29. As a sequel to the aforesaid discussion it is seen that clause (b) of sub-section (2) of Section 30 of the Code stands satisfied.

30. In terms of Section 30(2)(c), the Resolution Plan provides for management of affairs of the corporate debtor after approval of the Resolution Plan. The management of the affairs and control of the business of the corporate debtor after approval of the Resolution Plan has been provided at Clause 7 of the Resolution plan which inter alia provides that the Company shall continue as a going concern and operate in its normal course of business upon implementation of the Resolution Plan. The Resolution Professional has confirmed in the compliance certificate given in Form H that section 7 of the Resolution Plan provides for the management and control of the business of the corporate debtor.

31. The fourth requirement envisaged by Section 32(2) (d) is that it must provide for the implementation and supervision of the resolution plan. The Resolution Professional has confirmed in the compliance certificate given in Form H that clause 9 of the Resolution Plan provides for adequate means for supervising its implementation. It has been ensured that there shall be a monitoring committee comprising of three members constituting a representative of CoC/FCs, the resolution professional as insolvency professional and one representative of the resolution applicant, to be chaired by the IP.

32. The fifth and sixth conditions in terms of clause (e) & (f) of sub-section (2) of Section 30 of the Code provide to ensure that the Resolution Plan does not contravene any of the provisions of the law and conforms to such other requirements as may be specified by the Board.

33. In this regard the resolution professional has certified that the said Resolution Plan complies with all the provisions of the Insolvency and Bankruptcy Code 2016, the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 and does not contravene any of the provisions of the law for the time being in force. Similarly, resolution applicant has undertaken at Clause 13.7.1 of the Resolution Plan that 'the resolution plan is not in contravention of the provisions of any applicable laws.' In terms of clause (e) & (f) of sub-section (2) of Section 30 of the Code, we make it clear that the Resolution Applicant shall comply with all applicable laws under the proposed Resolution Plan, whether or not specifically provided therein.

34. It is pertinent to state here that Section 29A of the Code prescribes certain eligibility criteria and disqualifications for persons who submit a resolution plan. Resolution applicant has given adequate declaration and undertaking on their

eligibility to submit the Resolution Plan. Resolution Professional has also confirmed that the Resolution Applicant M/s. Ajay Yadav & Co. through its SVP Umaiza Infracon LLP has submitted affidavit in this regard and are eligible to submit resolution plan and does not fall under any of the category as mentioned in Section 29A of the Code.

35. Regulation 36B(4A) of the CIRP Regulations requires that the Resolution Applicant shall provide a performance security. Resolution professional has certified that the Resolution Applicant has submitted Performance Guarantee of Rs. 44 Crores issued by AU Small Finance Bank Limited in compliance of Regulation 36B(4A) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

36. As a sequel to aforesaid discussions we are satisfied that all the requirements of Section 30(2) are fulfilled and no provision of the law for the time being in force appears to have been contravened.

37. The Resolution Professional has further certified that the Resolution Plan has been approved unanimously by 100% of voting share of financial creditors after considering its feasibility and viability and other requirements specified by the Code and CIRP Regulations. It is noted that there is no dissenting financial creditor who opposed the resolution plan.

38. Adjudicating Authority is not expected to substitute its view with the commercial wisdom of the CoC nor should it deal with the technical complexity and merits of Resolution Plan, unless it is found contrary to express provision of law and goes against the public interest. The object of the Code is to promote resolution and every effort must be made to try and see that resolution is made possible.

39. Accepting the Resolution Plan is advantageous to all the stake holders and amounts to maximisation of the assets of the Corporate Debtor and promotes entrepreneurship and to ensure that the Company continue to function as a going concern. The right of rejection or approval of a plan is with the CoC. In a particular case, what should be the percentage of claim amount payable to one or other 'Financial Creditor' or 'Operational Creditor' or 'Secured Creditor' or 'Unsecured Creditor' can be decided by the Committee of Creditors based on facts and circumstances of each case. What can be screened by this Bench is that whether the plan approved by CoC meets the requirements as referred to in sub-section (2) of Section 30 of the Code.

40. Hon'ble NCLAT in the case of Darshak Enterprise Pvt Ltd Chhaparia Industries Pvt. Ltd & Ors. Passed in Civil Appeal (AT) (Ins) No. 327 of 2017 has held that:

"In absence of any discrimination or perverse decision, it is not open to the Adjudicating Authority or the Appellate Tribunal to modify the plan. "

41. In the present case the resolution plan has been unanimously approved with 100 % voting share much above the statutory requirement of 66 % in terms of

Section 30(4) of the Code and has the requisite statutory voting share. Besides the decision of CoC is a reasoned and selfspeaking one as required under proviso to Regulation 39(3) of the CIRP Regulations, 2016. Needless to state here that the Resolution Plan cannot take care of total outstanding dues of the creditors in its entirety. It is however seen that the resolution applicant proposes to pay the total consideration amount of Rs. 196 Crores within 30 days from the date of approval of the resolution plan, which is higher than the liquidation value.

42. It is well settled proposition of law that commercial and business decisions of CoC are not open to judicial review. Adjudicating Authority cannot enquire into the commercial wisdom of CoC. The ground for rejection is limited to the matter specified under Section 30(2). It is however reiterated that the resolution plan in question meets the requirements specified in Section 30(2) of the Code and the reasoned commercial decision of CoC is neither discriminatory nor perverse.

43. In the facts we are satisfied that the requirements as per the Code and regulations have been complied with. Moreover, the Resolution Plan has been unanimously approved by 100 % voting share of the members of CoC and has been submitted in compliance of Section 30 of the Code for approval. In view of the aforesaid discussions and as no infirmity have been brought out upon screening of the Resolution Plan; we hereby approve the Resolution Plan under sub-section (1) of Section 31 of the Code.

44. We also approve appointment of 'Monitoring Committee' with modification that Resolution Professional (IP) shall be a member thereof at least for three months to monitor and supervise the implementation of the Resolution Plan. We also grant Liberty to the monitoring Committee to apply to the Tribunal for any further direction in order to ensure effective implementation of the plan, if such a necessity arises.

45. In respect of reliefs and concession sought for in the Plan which are beyond the jurisdiction of this Tribunal, Monitoring committee along with the Resolution Applicant can make such claim before the authorities which shall be considered in accordance with law.

46. The resolution applicant shall obtain the necessary approval required under any law for the time being in force within a period of one year from the date of this order or within such period as provided for in such law, whichever is later.

47. It is clarified that Section 30(2) (f) of the Code mandates that the resolution plan should not be against any provisions of the existing law. The Resolution applicant therefore, shall adhere to all the applicable laws for the time being in force under the proposed Resolution Plan, whether or not specifically provided therein.

48. We hereby exclude the period spent under adjudication and it is declared that the moratorium order passed by this Bench under Section 14 of the Code shall cease to have effect from the date of this order.

49. The Resolution Professional shall forward all records relating to the CIR Process and the Resolution Plan to IBBI to be recorded at its data base.

50. The approved 'Resolution Plan' shall become effective from the date of passing of this order.

51. C.A. 932 (PB) 2019 and CP No. (IB) 265 (PB)/ 2017 are disposed of accordingly.

Let the copy of the order be served to the parties.