(2020) 07 NCLT CK 0064

In the National Company Law Tribunal

Case No : Interlocutory Appeal 904, 1002/Mb.Iv Of 2020 In Company Application (CAA)/401/Mb.Iv Of 2020

Icici Bank Limited — APPELLANT

Vs

Supreme Infrastructure India Limited — RESPONDENT

Date of Decision : 27-07-2020

Acts Referred:

Companies (Compromises, Arrangements And Amalgamations) Rules, 2016 — Rule 6, 7

Companies Act, 2013 — Section 103, 230, 230(2)(a), 230(2)(c), 230(4)

Citation : (2020) 07 NCLT CK 0064

Hon'ble Judges : Rajasekhar V.K., J;V. Nallasenapathy, Member (Technical)

Bench : Division Bench

Advocate : Sharan H. Jagtiani, Bimal Rajasekhar, Jay Sanklecha, Santosh Paul, Hemant Sethi, Ashish Pyasi, Vijay Tiwari

Final Decision : Disposed Of

Judgement

Rajasekhar V.K., J

1. Preamble

1.1. This common order disposes of two Interlocutory Applications (IAs), as follows:-

(i) IA No. 904/MB.IV/2020 which is for intervention in CA (CAA) No. 401/MB.IV/2020; and

(ii) IA No. 1002/MB.IV/2020 seeking recall of the order dated 12.06.2020 passed by this Tribunal in CA (CAA) No. 401/MB.IV/2020 allowing Supreme Infrastructure India Limited, the original Applicant in CA (CAA) No. 401/MB.IV/2020, to conduct meetings of its Operational Creditors.

2. IA 904/MB.IV/2020

2.1. This IA is an application filed by the Applicant/ICICI Bank Limited seeking to intervene in CA (CAA) No. 401/MB.IV/2020, and to reject the said CA. It is the case of the Applicants herein that the Company Application--

(a) Is not in conformity with the statutory requirements of section 230(2)(a) and (c), inasmuch as the proposed Scheme has not been consented to by 75% of the Secured Creditors;

(b) The Creditors Responsibility Statement is not attached to the CA;

(c) There is no statement made in the CA with regard to safeguards for protection of other secured and unsecured creditors;

(d) The report by the auditor that the fund requirements of the company after the Corporate Debt Restructuring (CDR) as approved shall conform to the liquidity test based upon the estimates provided to them by the Board of Directors of the company, is not attached;

(e) The requisite statement that the company proposes to adopt the CDR guidelines specified by the Reserve Bank of India (RBI);

(f) Valuation report in respect of the shares and the property by a registered valuer is not attached; and

(g) The terms of the Scheme contemplate a debt restructuring of the financial creditors in addition to Operational Creditors.

2.2. Notice of the IA was duly served on the Respondent Company, viz., Supreme Infrastructure India Limited by the Applicant Bank. Affidavit in reply has been filed in this behalf on 12.07.2020 by Mr. Sidharth Jain, authorised representative.

2.3. In its reply, the Respondent Company has inter alia stated that --

(a) the Applicant Bank is holding not more five percent of the total debt, and therefore, the IA itself is not maintainable under section 230 of the Companies Act, 2013. Our attention has been drawn to the proviso to section 230(4) of the Act ibid, which stipulates that any objection to the compromise or arrangement shall be made only by persons holding not less than ten percent of the shareholding or having outstanding that amounts to not less than five percent of the total outstanding as per the latest audited financial statement;

(b) Even otherwise, the objections, if any, can be considered not at the Application Stage but at the time of final hearing for sanction of the Scheme;

(c) The Applicant Bank is holding out against signing of the Inter Creditor Agreement (ICA), while all other financial creditors have done so;

(d) The Scheme has been approved by the requisite majority as contemplated in the RBI Circular dated 07.06.2019, which amounts to requisite approval of 75% of the creditors.

2.4. We have heard the submissions of Mr. Sharad Jagtiani, learned Senior

Counsel appearing for the Applicant Bank, and Mr. Santosh Paul, learned Senior Counsel appearing for the Respondent Company, and perused the records.

2.5. Mr. Santosh Paul was at pains to clarify that it is the stand of the Respondent Company that the Scheme applies only to its Operational Creditors and not to the Financial Creditors. The Applicant Bank is admittedly a Financial Creditor of the Respondent Company. As far as the Applicant Bank is concerned, they are protected by virtue of the consent order dated 19.10.2018 passed by the Hon'ble Bombay High Court. The Scheme could have been phrased better to avoid the confusion regarding its applicability, he submitted.

2.6. Mr. Sharad Jagtiani submitted in response to the stand taken by Mr. Santosh Paul, that if the Scheme applied only the Financial Creditors, the Respondent Company may be directed to file an affidavit to this effect, and also circulate a revised Scheme removing all references to the applicability of the Scheme to the Financial Creditors. This was agreed to by Mr. Santosh Paul.

2.7. Accordingly, an affidavit was filed by the Respondent Company wherein it has inter alia been stated that the Scheme filed by the Respondent Company is meant only for arrangement with the operational creditors so that the Respondent Company can pay off its debts to them, and the same will not affect the financial creditors. The revised affidavit has also been served on the Applicant Bank, which has accepted the same.

2.8. Considering the submissions made by both sides, and upon perusal of the revised affidavit dated 23.07.2020 filed by the Respondent Company, it is hereby ordered as follows: -

(a) The Scheme filed by the Respondent Company shall apply only to the Operational Creditors (as defined under the Insolvency and Bankruptcy Code, 2016) and not to its Financial Creditors.

(b) The Respondent Company shall identify clauses in the existing Scheme that casts a shadow on the Financial Creditors of the Company, and remove the same. Therefore, the revised Scheme shall be circulated to all stakeholders to enable them to file objections, if any, to the Scheme.

(c) In so far as the Applicant Bank is concerned, their rights, remedies and interests, whether arising out of any court order, or bilateral arrangement or any undertaking given by the Respondent Company qua the Applicant Bank, shall remain wholly unaffected by the Scheme in any manner whatsoever.

(d) All objections to the Scheme, including the locus standi of any Objector, shall be considered at the time of final hearing of the revised Scheme. We are of the view that the stage of application for directions regarding meetings is not the correct stage to consider objections to the Scheme and the same shall be stood over till the time the Scheme is taken up for final hearing and disposal;

(e) As far as the Financial Creditors of the Respondent Company are concerned, they shall consider any Resolution Plan under the RBI circular of 07.06.2019 untrammelled and uninfluenced by anything stated in this Order. Any such plan will be de hors the present Scheme, since the present Scheme applies only to the Operational Creditors of the Respondent Company.

2.9. With these directions, IA No. 904/MB.IV/2020 shall stand disposed of.

3. IA 1002/MB.IV/2020

3.1. This IA is an application filed by the Applicant/ICICI Bank Limited seeking recall of the order dated 12.06.2020 passed by this Tribunal in CA (CAA) No. 401/MB.IV/2020 allowing Supreme Infrastructure India Limited, the original Applicant in CA (CAA) No. 401/MB.IV/2020, to conduct meetings of its operational creditors.

3.2. Mr. Sharan Jagtiani, learned Counsel for the Applicant Bank, has contended that--

(a) IA No. 904/MB.IV/2020 seeking leave of this Tribunal to intervene in and oppose the underlying Company Application in CA (CAA) No. 401/MB.IV/2020 was filed on 06.03.2020. The IA was served both on the Respondent Company, viz., Supreme Infrastructure India Limited as well as its advocates, vide the Applicant Bank's Advocate's letter dated 12.03.2020. Copy of the said letter is placed on record as Exhibit 'B' to the IA. The Respondent Company was, therefore, very well aware of the said IA No. 904/MB.IV/2020.

(b) IA No. 904/MB.IV/2020 was listed on 13.05.2020 before this Tribunal. The Applicant Bank's Counsel on record, Mr. Bimal Rajasekhar, sent an email on 13.05.2020 at 9.16 AM to the Respondent Company's Authorised Representative, Mr. Vijay Tiwari, Practising Company Secretary, requesting him to bring to the attention of this Tribunal the pendency of IA No. 904/MB.IV/2020. Copy of the said email is placed on record as Exhibit 'C' to the IA.

(c) Mr. Vijay Tiwari, Practising Company Secretary and Authorised Representative of the Respondent Company, sent a reply to the said email on the same day, i.e., 13.05.2020 at 9.33 AM, "I called you sir." To this, there is a response from Mr. Bimal Rajasekhar, learned Counsel for the Applicant Bank, thanking Mr. Vijay Tiwari for the call. He once again requested Mr. Vijay Tiwari to inform the Bench of the pending MA (sic IA). However, Mr. Vijay Tiwari failed to inform the Bench about the pending IA. On 13.05.2020, the Bench posted the matter for hearing to 02.07.2020.

(d) The Respondent Company filed IA No. 994/MB.IV/2020 for urgent hearing of CA (CAA) No. 401/MB.IV/2020. Therefore, the matter was posted for hearing on 12.06.2020.

(e) On 12.06.2020, this Bench allowed IA No. 994/2020, and took on board the CA (CAA) No. 401/MB.IV/2020 for hearing. Even on that date, no notice of hearing was given to the Applicant Bank, nor did the learned authorised representative bring to the attention of the Bench the factum of filing of the IA No. 904/MB.IV/2020 seeking to intervene and oppose the CA (CAA) No. 401/ MB.IV/2020. The Bench heard the learned Senior Counsel for the Respondent Company and allowed CA (CAA) No. 401/MB.IV/2020, giving directions for holding the meeting of the creditors of the company.

3.3. In this milieu, the Applicant Bank sought recall of the order dated 12.06.2020 and restoration of CA (CAA) No. 401/MB.IV/2020 to file for hearing. Pending disposal of this IA, the Applicant Bank prayed that the order dated 12.06.2020 be stayed.

3.4. The present IA was taken up for hearing along with IA No. 1002/MB.IV/2020 on 08.07.2020. The Respondent Company was directed to file replies in the matter by way of affidavit. The Counsel for the parties were also directed to file separate affidavit as to the knowledge of the pendency of IA No. 904/ MB.IV/2020. Interim prayer sought for by the Applicant Bank for stay of the order dated 12.06.2020 pending disposal of the present IA, was granted till 13.07.2020.

3.5. On 13.07.2020, the Bench posted the matter for hearing to 15.07.2020, and extended the interim stay until further orders.

(a) Mr. Vijay Tiwari, learned Authorised Representative appearing for the Respondent Company, has filed his affidavit dated 15.07.2020, wherein he has stated that he forgot about the intervention (application) of ICICI and that the client and arguing counsel were communicating directly and that the briefing also happened without his presence.

(b) Therefore, on 12.06.2020, this fact could not be mentioned by the arguing counsel before this Tribunal. He also claims that he forgot to give urgent hearing notice to the ICICI. Mr. Vijay Tiwari has, however, submitted that he regrets the inadvertent mistake and tendered his apologies in this regard. He submits that there was no intention to suppress or misrepresent in the matter.

3.6. This Bench has considered the affidavit filed by the Respondent Company as well as its authorised representative. Suffice it to say that we do not find the explanations altogether convincing. This is especially due to the fact that Mr. Vijay Tiwari had seen and replied to the email dated 12.05.2020 much before the hearing on that very day started. Therefore, there is no way we can accept the submission that he simply 'forgot' to inform the Bench regarding IA No. 904/ MB.IV/2020, even after being informed of it on the morning of the hearing. He has also sought to pin the blame on the Respondent Company and his arguing counsel for the error on his part.

3.7. The actions on the part of Mr. Vijay Tiwari amount to obtaining orders of the Bench behind the back of the Applicant Bank. This cannot be encouraged. Further, as a professional, it does not behove Mr. Vijay Tiwari to blame others for his mistake, when he is the professional on record representing the Respondent

Company. However, considering that the authorised representative is young and that he has a long way to go in his career, we restrain ourselves from imposing any costs. We, however, advise him to be more careful in future.

3.8. IA No. 1002/MB.IV/2020 is disposed of accordingly. Interim Orders shall stand vacated.

4. Further directions

4.1. Considering all factors, the following further directions are hereby given:

(a) The meetings referred to in this Tribunal's order dated 12.06.2020 shall be confined to that of Operational Creditors alone, and shall not include the Financial Creditors, who are outside the purview of the proposed Scheme.

(b) The sixty-day time limit to conduct the meetings shall now be counted from 27.07.2020 instead of 12.06.2020.

(c) In case physical meeting of the Operational Creditors is feasible, the same shall be held within the local limits of Mumbai City. In case the meetings of the Operational Creditors are convened through any audio-visual means capable of being recorded, then the unedited raw footage of the meeting to be conducted by videoconferencing shall be preserved for record and also submitted to this Tribunal along with an affidavit to this effect.

(d) It shall be the duty of the Respondent Company to ensure that the unedited raw footage of the meeting shall be preserved in good condition and that the same is not corrupted due to any reason whatsoever, whether technical or human. Any failure in this regard shall be viewed seriously.

4.2. Mr. Avdhesh Bairwa, Advocate [Mobile: 9988723233; Email: avdheshbairwalaw@gmail.com], having his office at No. 1304, Regent Chamber (13th Floor), Near Status Restaurant, Nariman Point, Mumbai 400 021, shall be the Chairman for the meeting of the Operational Creditors as aforesaid. He shall be paid remuneration of ` 1,50,000/- (Rupees one lakh and fifty thousand only) excluding all applicable taxes.

4.3. The Chairperson appointed for the aforesaid equity shareholders of the Applicant Companies to issue the notices of the meeting whether physically or audio-visually as referred to above. The said Chairperson shall have all powers under the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 in relation to the conduct of the meeting, including for deciding procedural questions that may arise or at any adjournment thereof or any other matter including an amendment to the Scheme or Resolution, if any, proposed at the meeting by any person and to ascertain the decision or the sense of the meeting by a poll.

4.4. Mr. Yogesh Choudhary, Practising Company Secretary [Membership No. F-8644] is appointed as Scrutiniser for the meeting of the Operational Creditors as aforesaid. The fee for the Scrutiniser shall be ` 75,000/- (Rupees seventy-five thousand only) excluding all applicable taxes.

4.5. That at least one month before the said Meeting of the Operational Creditors of the Respondent Company as aforesaid, a notice convening the Meeting at the place identified for this purpose, if held physically, or indicating the details of audio-visual means of the meeting, such as meeting ID, login particulars, date and time of meeting etc. shall be published. This Notice shall be accompanied by an explanatory statement disclosing the details of the Scheme, the effect of the Scheme on the Operational Creditors, and the effect of the arrangement on any material interests of the directors of the Company and other requisite particulars in terms of rule 6 of the Companies (Compromises, Arrangements & Amalgamations) Rules, 2016.

4.6. The Notice of the Meeting as aforesaid shall also be published in two newspapers, viz., Business Standard in English and Navshakti in Marathi, both having circulation in the State of Maharashtra, not less than thirty days before the date fixed for the meeting, and in terms of rule 7 ibid.

4.7. The provisions of section 103 of the Companies Act, 2013, shall apply to the meeting of the Operational Creditors of the Company, and any reference to "members" in the said section shall be read as reference to "Operational Creditors." In other words, the provisions of section 103 ibid shall apply mutatis mutandis to the meeting of the Operational Creditors.

4.8. Voting by proxy or by authorised representative in case of bodies corporate shall be permitted, provided that the proxy in the prescribed form, with applicable changes made therein such that the reference to members shall be read as reference to Operational Creditors, duly signed by the persons entitled to attend and vote at the meetings are filed with the Company at its Registered Office not later than forty-eight hours before the Meeting.

4.9. The value of the outstanding amount of each Operational Creditor shall be in accordance with the last audited books of the Company. Where the entries in the books are disputed, the Chairman of the Meeting shall determine the value of the outstanding amount for the said Meeting, and his decision in that behalf will be final.

4.10. The Chairman of the Meeting shall report to this Tribunal the results of the Meeting within seven days of the conclusion of the Meeting.

4.11. The Company is directed to serve notices to Regulatory and Statutory Authorities as ordered vide order dated 12.06.2020.

4.12. Notice of the meeting shall also be sent to the Securities and Exchange Board of India (SEBI), BSE Limited and the National Stock Exchange of India Limited where the shares of the Company are listed.

4.13. The said Notice shall also be hosted on the website of the Company.

4.14. The Company shall file compliance report with the registry in regard to the directions given in this Order in lieu of customary affidavit of service, due to lockdown situation prevailing now proving service of notices to the regulatory authorities as stated above and do report to this Tribunal that the directions regarding the issue of notices have been duly complied with.

