(2023) 03 NCLT CK 0072

In the National Company Law Tribunal

Case No : CA No. 669/MB/ 2022 and CA No. 452/MB/2022 in CP No. 3638 of 2018

Infrastructure Leasing And Financial Services Ltd. & Ors Vs VS Union Of India ?

Date of Decision : 28-03-2023

Acts Referred:
Insolvency and Bankruptcy Code, 2016 — Section 53
Companies Act, 2013 — Section 271(a)

Citation : (2023) 03 NCLT CK 0072

Hon'ble Judges : H.V. Subba Rao, Member (J);Shyam Babu Gautam, Member (T)

Bench : Division Bench

Advocate : Animesh Bisht, Aditya Sikka

Final Decision : Disposed Of

Judgement

CA No. 669 of 2022

1. This Application is filed seeking approval of this Tribunal for the following reliefs:

A. Approve the proposal to distribute the Residual KSEL Cash Amount of INR 887.34 crores (plus any interest accrued till the date of actual distribution) to the creditors of Khed Sinnar Expressway Limited (for claims admitted and verified by the Claims Management Consultant as of October 15, 2018) as per the Revised Distribution Framework (after discharging all outstanding liabilities accruing post October 15, 2018 and payment of Resolution Process Costs and retention of costs of winding up);

B. Direct that the Applicant be permitted to utilize and/ or pay from the Residual KSEL Cash Amount:

(i) an amount of INR 1.56 crores towards Resolution Process Costs that have accrued or been incurred or are likely to accrue in connection with the resolution of Khed Sinnar Expressway Limited as per Annexure 20 hereto; and

(ii) an amount of INR 50,00,000 (i.e. the Winding Up Costs) towards estimated costs of the proposed winding up of Khed Sinnar Expressway Limited to be maintained in a designated bank/ escrow account to be intimated by the Applicant/ Khed Sinnar Expressway Limited and direct that the same shall not be adjusted or set off against any other dues pertaining to any bank/financial institution;

(iii) amount of INR 0.41 crores towards discharging liabilities of Khed Sinnar Expressway Limited that have accrued post October 15, 2018.

C. Direct that the Applicant be permitted to distribute an amount of the balance Residual KSEL Cash Amount (being the Residual KSEL Cash Amount less Resolution Process Costs of INR 1.56 crores, less the Winding up Cost and less INR 0.50 crores and less 0.41 crores to be applied as per prayer B above) to the creditors of Khed Sinnar Expressway Limited as per the Revised Distribution Framework in the manner illustrated in Annexure 12 hereto for the claims verified and admitted up to October 15, 2018;

D. Declare and direct that upon payment of the Residual KSEL Cash Amount as per prayer C above:

(i) all claims against Khed Sinnar Expressway Limited (disclosed or undisclosed, and whether existing at or relating to a period prior to October 15, 2018) of all the creditors (including, the Central Government, any State Government, statutory, local or regulatory authorities to whom such claim is owed under any law including any claim arising out of regulatory or enforcement action which pertains to a period prior to October 15, 2018); and

(ii) all liabilities whether actual or contingent and whether existing at or relating to a period prior to October 15, 2018 including such claims in respect of which arbitration proceedings have been initiated against Khed Sinnar Expressway Limited, shall stand extinguished.

E. Approve the proposal to initiate winding up proceedings for Khed Sinnar Expressway Limited under Section 271(a) of the Companies Act, 2013 after distribution of the Residual KSEL Cash Amount as per prayer C above; and

F. Direct that the liquidator appointed pursuant to the initiation of winding up of Khed Sinnar Expressway Limited in terms of prayer E above, shall distribute any subsequent recoveries made on behalf of Khed Sinnar Expressway Limited to the Residual Creditors of Khed Sinnar Express Way Limited in the same proportion that the Residual KSEL Cash Amount was distributed to such creditors as per the Revised Distribution Framework in terms of prayer C above;

G. For any further reliefs as this Hon'ble Tribunal deems fit and proper in the facts and circumstances.

Facts leading to the present Application and Submissions advanced are as follow:

2. Khed Sinnar Expressway Limited (“KSEL”) is a wholly owned subsidiary of

IL&FS Transportation Networks Limited (ITNL) which in turn is a subsidiary of the Applicant. KSEL was incorporated as a SPV for the purposes of augmenting a section of the Khed Sinnar section of National Highway-50 in the State of Maharashtra (Project) in terms of the concession agreement dated May 9, 2013 ("Concession Agreement") between National Highways Authority of India ("NHAI") and KSEL. As per the business model followed by ITNL in road project SPVs including KSEL, ITNL acted as a contractor for the KSEL project and in turn appointed various agencies to execute various parts pf the project. Such sub-contractors were creditors of ITNL and are referred to as "KSEL Sub-Contractors".

3. Thereafter, in light of defaults by NHAI under the Concession Agreement and claims and counterclaims between KSEL and NHAI in respect thereof, KSEL proposed to terminate the Concession Agreement due to 'Authority Default' subject to payment of settlement amounts by the NHAI to KSEL. Such a proposal to terminate the Concession Agreement was approved by Justice (Retd.) D.K. Jain by his letter dated January 7, 2022, and thereafter by this Tribunal by an order dated 22.03.2022 in Company Application No. 27 of 2022 ("CA 27") filed by the Applicant.

4. Pursuant thereto, KSEL entered into a settlement agreement dated April 6, 2022 with NHAI to terminate the Concession Agreement and payment of the aggregate Settlement Amount of INR 930.41 crores by NHAI to KSEL as per the terms and conditions set out therein.

5. As a part of aforesaid settlement, on 08.06.2022, NHAI out of the aggregate settlement amount of INR 930.41 crores deposited INR 736.07 crores ("Residual KSEL Settlement Amount") in the escrow account of KSEL after certain deductions and payment of INR 139.34 crores to the KSEL Sub-Contractors. NHAI had directly paid the KSEL Sub-Contractors to enable KSEL's Project and its assets to be handed over to NHAI free and clear of all encumbrances.

6. The implementation of the proposal outlined in CA 27 was the first stage of the resolution of KSEL. Further, it was submitted that the final resolution of KSEL requires distribution of the Residual KSEL Compensation Amount (post payment to the KSEL Sub-Contractors as per the Settlement Formula) in accordance with the Revised Distribution Framework approved by the March 12 Order, subject to the approval of Justice (Retd.) D.K. Jain and this Tribunal after the resolution steps for KSEL have been finalised, which have been undertaken subsequently.

7. The Hon'ble NCLAT vide its Order dated 12 March 2020 permitted the resolution of the applicant to continue as per procedure suggested by the Original Petitioner which included a Resolution Framework. Thereafter, in compliance with the Hon'ble NCLAT Orders various progress reports were filed which inter alia sets outs resolution framework of the Applicant group.

8. The Resolution Consultant appointed by the New Board (Alvarez & Marsal) by a communication dated October 6, 2022, recommended the closure of KSEL by way of winding up under section 271(a) of the Companies Act, as substantial

business activities of KSEL have ceased to exist; and after the distribution of the Residual KSEL Cash Amount, KSEL will only have nominal residual assets and liabilities with no scope for monetization. The said recommendation is placed as Annexure 13 of the Application.

9. The Applicant submits that Amounts available for distribution KSEL's Creditors as of September 30, 2022 are as follows: (a) INR 736.07 crores is the Residual KSEL Settlement Amount lying in the KSEL Escrow Account; (b) INR 13.35 crores as the accrued interest on the fixed deposits amounts; and (c) INR 145.69 crores is out of operations lying in the KSEL Escrow Account and current accounts. Therefore, the total amount considered for distribution to creditors of KSEL is INR 895.11 crores (approx.) ("Residual KSEL Cash Amount").

10. The total admitted claims of creditors (including financial and operational debt and creditors in a class) in respect of KSEL as computed by the independent claims management consultant of the IL&FS Group (Grant Thornton Bharat LLP) as of October 15, 2018 (i.e., the Cut-off Date approved in the March 12 Order @para 67) aggregates to INR 2125.29 crores (approx.) [Annexure 11 (Claims Report)]. It is submitted that since the Residual KSEL Cash Amount is less than the total admitted debt of KSEL (as of October 15, 2018), the creditors of KSEL will be required to forgo certain outstanding in respect of their respective claims.

11. The Residual KSEL Cash Amount will be distributed as per the Revised Distribution Framework after an amount of INR 50 lakhs is retained in the KSEL escrow account towards meeting estimated costs for winding up process of KSEL. Any subsequent recoveries by liquidator is distributed pro rata to amounts received from such distribution. It is also submitted that since the distribution of the Residual KSEL Cash Amount constitutes the final resolution of KSEL, as per the Resolution Framework, all claims against KSEL shall stand extinguished.

12. By a letter dated November 22, 2022, Justice (Retd.) D.K. Jain accorded his approval for (i) distribution of the Residual KSEL Cash Amount to the creditors of KSEL; and (ii) initiation of winding up of KSEL under Section 271(a) of the Companies Act, 2013 thereafter. The Letter dated 22.11.2022 is placed at Annexure 19 of the Petition.

13. Further, the Board of KSEL, ITNL and the New Board vide their respective board resolutions dated 02.08.2022, 02.08.2022 and 04.08.2022 have granted their approval.

14. The Union of India has filed its affidavit in reply dated 03.02.2023 upon perusal of which it is observed that no objection has been raised by the Union of India.

CA No. 452/ 2022

15. This Application is filed by IDBI Bank Limited on behalf of the senior secured lenders of Khed Sinnar Expressway Limited (“KSEL/Respondent No. 1”) (“Lenders”) to expedite the distribution of amounts as per the revised

distribution framework approved by the Hon’ble NCLAT, New Delhi by the order dated 12.03.2020.

16. The following reliefs are sought by the Applicant in CA 452 of 2022

A. Direct that the Respondents immediately cease and terminate the process of seeking/ verification of additional claims in respect of KSEL and collation of the same;

B. Direct the Respondents to immediately distribute the Net Termination Payments lying in the designated escrow account/ fixed deposits at the earliest;

C. In the alternative to prayers A and B, direct that (i) the Respondents expeditiously complete the process of collation of claims of KSEL without giving any further extensions for submission of claims; (ii) thereafter, expeditiously distribute the Net Termination Payments lying in the designated escrow account/ fixed deposits at the earliest; and (iii) pending completion of collation of claims pursuant to the process already initiated, immediately distribute the monies received from the resolution of KSEL up to the average 'liquidation value' to the secured creditors of KSEL as per Section 53 of the Code in terms of the Revised Distribution Formula approved by the Hon'ble NCLAT vide the Final Order;

Findings:

17. We have considered the matter in hand in the background of facts and circumstances stated above; it is observed that the winding up of KSEL post the distribution has also been approved by Justice D.K. Jain former judge of the Hon’ble Supreme Court appointed by the Hon’ble NCLAT to oversee the resolution process of the Applicant Group and to enable a resolution of the Applicant Group in line with the Resolution Framework; and the mandate given by this Tribunal to the New Board.

18. Moreover, it is observed that KSEL was a SPV incorporated to undertake the specified project, therefore upon receipt of the Residual Settlement Amount from NHAI, KSEL does not have plans to undertake any business activity in the future. Hence keeping the entity alive will not serve any purpose.

19. Thus, we approve the proposal to distribute residual KSEL Cash Amount and initiate winding up process of Khed Sinnar Expressway Limited KSEL in the interest of justice.

20. In view of the Order passed in CA 669 of 2022 nothing survives in CA 452 of 2022, with the aforesaid observation present CA 452 of 2022 In C.P No. 3638/MB/C-I/2018 stands disposed of. CA No. 669 of 2022 In C.P No. 3638/MB/C-I/2018 stands disposed of as allowed in terms of prayer clause (A) to (F) in paragraph 1 hereinabove.

