
(2023) 05 NCLT CK 0065

In the National Company Law Tribunal

Case No : IA No. 1152 Of 22 & 440 Of 2021 In CP(IB) No. 119/Chd/Chd/2018

?Maruti Papers Limited Vs Rajiv Khurana ?

Date of Decision : 22-05-2023

Acts Referred:

Insolvency and Bankruptcy Code, 2016 — Section 32A, 32A(1), 60(5), 61(3)
Negotiable Instruments Act, 1881 — Section 138
National Company Law Tribunals, 2016 — Rule 11

Citation : (2023) 05 NCLT CK 0065

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

Bench : Division Bench

Advocate : Viren Sharma, Dyuti Ghai, Arora Vishwas Kumar, Aman Kashyap

Final Decision : Allowed

Judgement

Harnam Singh Thakur, Member (Judicial)

1) The above applications being on the same lines and relying on almost identical facts with the same prayers, are taken up together being interrelated and interconnected.

IA No.1152/2022

The present application has been filed under Section 60(5) of the Insolvency and Bankruptcy Code, 2016, read with Rule 11 of the NCLT Rules, 2016, on behalf of the operational creditor, i.e. M/s. A.P. Enterprises Private Limited with prayers, inter alia, to :

- a) Direct the Respondent No. 2-4, being the Successful Resolution Applicants, to pay the amount proposed to the operational creditors in terms of the Resolution Plan approved by this Adjudicating Authority vide order dated 18.03.2020;
- b) Direct the respondents to provide a copy of the approved Resolution plan in the matter of the corporate debtor during the pendency of the instant application;
- c) Direct Respondent No. 1 to supervise the implementation of the Resolution

Plan in the matter of the Corporate Debtor and ensure payment to the Applicants being the Operational Creditors in terms of the Resolution Plan approved by this Adjudicating Authority vide Order dated 18.03.2020.

2) In the present application, it is stated that the CIRP, in the case of the corporate debtor, was initiated by an order dated 13.11.2018 of this Adjudicating Authority. The Resolution Plan was approved by this Bench on 18.03.2020. It is further stated that the Resolution Plan provided certain amounts to the applicant-operational creditor, but the payments of the same have not been made to the applicant in terms of the Resolution Plan.

3) It is further submitted that the Resolution Plan is not a confidential document post its approval by the NCLT and in view of the decision of the Hon'ble NCLAT in the case of Association of aggrieved Workmen of Jet Airways (India) Limited & Ors in Company Appeal (AT)(INS) No. 643/2021. The applicant has, however, placed reliance on the judgment of the Hon'ble Apex Court in the case of Ebix Singapore Private Limited versus Committee of Creditors of Educomp Solutions Limited & Anr. in Civil Appeal No. 3224/2020 to state that the Resolution Plan submitted by the Resolution Applicant once approved by the CoC cannot be modified at any stage.

4) In its reply filed by Diary No. 02097/2 dated 19.01.2023, wherein it is stated by Respondent Nos. 2 to 4 that the applicants are having cheques of answering respondents, which are not returned till date. The same is required to be returned to the respondents, and also, the applicant is required to withdraw all the litigations, which include both criminal and civil, if any, pending before any Court in terms of the approved Resolution Plan, specially Clause 4.3 D ii 3.

5) It is stated that the applicant can ask for the complete implementation of the provisions of the Resolution Plan only after the return of these cheques.

IA No. 440/2021

6) The present application has been filed by the applicant, i.e., KR Pulp and Papers Limited under Regulation 39(9) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons), 2016, against the corporate debtors and the Directors with a prayer to direct the respondents to implement the Resolution Plan and make the payments to the applicant in terms of the Resolution Plan approved by this Adjudicating Authority on 18.03.2021.

7) In addition to the facts mentioned in paras above, it is also stated in the present application that the Resolution Professional is trying to delay the implementation of the Resolution Plan and attempting to force the applicant to withdraw its claim filed under Section 138 of the Negotiable Instruments Act, 1881 despite the fact that the Resolution Plan only crystallises the liability of the operational creditor only towards the corporate debtor not towards the director.

8) It is further submitted that the applicant is not bound to withdraw its complaint against the corporate debtor and its directors pending before the Court

even after the approval of the Resolution Plan as the Resolution Plan provides only for the withdrawal of the suits or civil proceedings pending against the corporate debtor.

9) In addition to facts narrated in IA 1152/22, the respondents have made a reference to Clause 4.3 D ii 3 and, as reproduced, the relevant Clause as under:

For ready reference clause 4.3 D ii 3 of the approved resolution plan is reproduced herein for ready reference:

"Since after the approval of the resolution plan the liability of the corporate debtor crystallizes to the amount of its payment proposed in the resolution plan, the previous liabilities of the corporate debtor stand modified. In light of this fact, RA proposed that the recovery suits/proceedings etc constituted by operational creditors against AP Enterprises Private Limited pertaining to such previous liabilities which are getting modified as a consequence of the approval of this resolution plan shall stand withdrawn/shall be withdrawn by the respective operational creditors."

(Emphasis Supplied)

10) The short written submissions have been filed by respondent No. 1 by Diary No. 00806/3 dated 03.03.202, wherein it is admitted that in terms of the Resolution Plan approved by this Adjudicating Authority on 18.03.2020, the applicant is required to pay Rs. 18,72,190/- in instalments, but the payment has not been made.

a. First Year: Rs. 7,02,071/-

b. Second Year: Rs. 9,36,095/- and

c. Third Year: Rs. 2,34,024/-

11) The short written submissions have also been filed by respondents No. 2 to 4, wherein it is admitted that the applicant is entitled to the payment of Rs. 18,72,190/-. It is further stated, as per Clause 4.3 D ii 3, the applicant-operational creditor to withdraw all the proceedings pending against the corporate debtor before the concerned Court. It is further stated that some of these cases have been filed under Section 138 of the Negotiable Instruments Act against the respondents. As the applicant has refused to withdraw the above-said complaints on the ground that the "proceedings" as mentioned in Clause 4.3 D ii 3 are civil proceedings whereas, in the above Clause, the word civil proceedings is nowhere mentioned. It is submitted that the proceedings under Section 138 of the Negotiable Instruments Act, which are criminal proceedings, should also be withdrawn as per the terms of the approved Resolution Plan by the applicant before he lays claim on the amount payable to him under the provisions of the same miscellaneous plan.

12) We have heard the learned counsel for the applicants and respondents and perused the available records carefully.

13) In the present case, the issues for adjudication are :

- i. Whether the applicant, i.e. operational creditor, is entitled to have a copy of the Resolution Plan, especially when the plan is already approved by the Adjudicating Authority;
- ii. Whether the applicant is bound to return the cheques issued earlier by the corporate debtor and held by the applicant appears to be the subject matter of litigation under Section 138 of the Negotiable Instruments Act;
- iii. Whether the applicant-Operational creditor can enforce the release of payments to be made under the Resolution Plan without handing over the impugned cheques of the corporate debtor to the latter.

14) With regard to the first issue, a reference is made to the following observations of the Hon'ble NCLAT in the case of the Association of aggrieved Workmen of Jet Airways (India) Limited (supra), the relevant part is extracted below:

"The above scheme of the Code also indicates that after Resolution Plan is submitted to the Adjudicating Authority and it is approved by the Adjudicating Authority, it no longer remains a confidential document, so as to preclude Regulator and other persons from access the said document.

26. We thus do not accept the submission of learned Counsel for Respondent No.4 that Resolution Plan even after approval, is a confidential document and cannot be disclosed to a claimant.

28. When the right to Appeal on the ground enumerated in subsection (3) of Section 61 is provided, unless the Appellant is aware of the contents of the Resolution Plan, how he will be able to satisfy the Appellate Court that the grounds enumerated in sub-section (3) of Section 61 are made out in reference to approval of the Resolution Plan. The provision of Section 61, sub-section (3) reaffirms our view that after approval of the Resolution Plan, Resolution Plan does not remain a confidential document, so as to deny its perusal to a claimant, who is aggrieved by the Plan and has come up on the Appeal. We, thus, are of the view that Resolution Plan after its approval by the Adjudicating Authority is no more a confidential document, so as to deny access to even a claimant, It is true that the Resolution Plan even though it is not a confidential document after its approval, cannot be made available to each and to anyone who has no genuine claim or interest in the process. On various grounds the access to Resolution Plan even if it is not a confidential document, after approval can be denied in proper and appropriate cases."

15) In the present case, as clarified in the reply filed by Dairty No. 0806/2 dated 19.01.2023, there are certain pending cases against the corporate debtor and respondent Nos. 2 to 4, i.e. Suspended Director (both Criminal and Civil cases) before the courts including under Section 138 of the Negotiable Instruments Act, 1881 which were pending at the time of initiation of CIRP. The respondent has

vehemently argued that as a part of the Resolution Plan approved by this Adjudicating Authority, all these cases should be withdrawn by the applicant. In this connection, it has made a reference to Clause 4.3 D ii 3 of the Resolution Plan, which states that 'In light of this fact, RA proposed that the recovery suits/proceedings etc. constituted by operational creditors against AP Enterprises Private Limited pertaining to such previous liabilities which are getting modified as a consequence of the approval of this resolution plan shall stand withdrawn/shall be withdrawn by the respective operational creditors.' The applicant has placed reliance on the decision of the Hon'ble Apex Court in the case of Ajay Kumar Radheshyam Goenka vs. Tourism Finance Corporation of India Ltd., Criminal Appeal No. 170 of 2023, which after a lengthy analysis of the provisions involved held as under:

"The upshot of all the decisions referred to above is where the proceedings under Section 138 of the NI Act had already commenced with the Magistrate taking cognizance upon the complaint, and during the pendency, the company gets dissolved, the signatories/directors cannot escape from their penal liability under Section 138 of the NI Act by citing its dissolution. What is dissolved is only the company, not the personal penal liability of the accused, covered under Section 141 of the NI Act.

86. I may draw my final conclusions as under:

"(a) After passing of the resolution plan under Section 31 of the IBC by the Adjudicating Authority & in the light of the provisions of Section 32A of the IBC, the criminal proceedings under Section 138 of the NI Act will stand terminated only in relation to the corporate debtor if the same is taken over by a new management.

(b) Section 138 proceedings in relation to the signatories/directors who are liable/covered by the two provisos to Section 32A(1) will continue in accordance with law."

(Emphasis Supplied)

16) In this connection, we note that even the aforementioned Clause 4.3 D ii 3 relied upon by the respondents refers to the withdrawal of recovery suits/proceedings instituted by the operational creditors against the Corporate Debtor, i.e. AP Enterprises Private Limited. It nowhere states that the cases pending against Respondent Nos, 2 to 4, i.e. suspended directors, should also be withdrawn by the operational creditor. We note that in the present case, the corporate debtor is an MSME, and the Successful Resolution Applicant is the previous management of the corporate debtor. Keeping in view the provisions of Section 32A of the IBC and the aforementioned decision of the Hon'ble Apex Court in Ajay Kumar Radheshyam Goenka (Supra), the corporate debtor taken over by the previous management can't claim relief from the liability of the prior offences. The Directors covered by the two proviso to S.32A (1) of the Code are also liable for prior offences. We, therefore, direct that all the cases-both criminal

and civil- including those under Section 138 of the Negotiable Instrument Act, 1881 to continue. The respondents' insistence that they will be making the payments as per the Resolution Plan only after the cheques of the Corporate Debtor are returned to them appears equally misconceived.

17) In view of the aforementioned discussion and reasons rendered hereinbefore, we direct the respondents to share a copy of the approved Resolution Plan with the applicant and also to make the payment as per the provisions in the Resolution Plan within two weeks of this order. The cases-both criminal and civil-including those under Section 138 of the Negotiable Instrument Act, 1881, against the Corporate Debtor to continue in accordance with law. All proceedings, including those under Section 138, in relation to the signatories/directors who are liable/covered by the two provisos to Section 32A (1), will also continue in accordance with law.

18) In the result, IA No. 1152/22 & 440/2021 are allowed with the aforesaid directions.