(2021) 09 NCLT CK 0059

In the National Company Law Tribunal

Case No : MA No. 447/2020 IN CP No. 1368 (IB)/MB/C-II/2017

Mr. Pradeep Suresh Kalbhor APPELLANT

Vs

M/s Sai Agro (India) Chemicals Successful Resolution Applicant Partnership Firm RESPONDENT

Date of Decision : 23-09-2021

Acts Referred:
Insolvency and Bankruptcy Code, 2016 — Section 7, 32A, 33(3), 33(4)

Citation : (2021) 09 NCLT CK 0059

Hon'ble Judges : Ashok Kumar Borah, Member (J);Shyam Babu Gautam, Member (T)

Bench : Division Bench

Final Decision : Disposed Of

Judgement

Shyam Babu Gautam, Member (Technical)

1. This is an application filed by Mr. Pradeep Suresh Kalbhor, the Attorney Holder authorized vide Power of Attorney on behalf of the employees of the Respondent No.1 being aggrieved by the contravention of the terms of the Resolution Plan as approved by this Tribunal vide its Order dated August 1, 2019, Seeking following prayers.

(a) Allow the present Application under Section 33(3) of the Insolvency & Bankruptcy Code;

(b) Pass an Order under Section 33(4) of the Insolvency & Bankruptcy Code, 2016 to liquidate the Corporate Debtor;

(c) Appoint a Liquidator from the panel of Liquidators registered with the Insolvency & Bankruptcy Board of India;

(d) In the alternative, direct the Successful Resolution Applicant, being Respondent No.1, Resolution Professional being the Respondent No.3 and /or 7 Circle Business Advisor, the Monitoring Agency being the Respondent No.4 to make the payment as per Resolution Plan to the employees being the Applicant herein;

(e) Pass such further and other orders as this Hon'ble Tribunal may deem fit and proper in the facts and circumstances of this case; and

(f) For costs.

2. The Corporate Debtor was placed under CIRP vide order dated 01.01.2018, on an Application filed u/s - 7 of the IBC by Karad Urban Co-operative Bank Ltd by the Financial Creditor and Mr. Kiran Gopal Kunte was appointed as IRP on the same day. By an Order dated August 1, 2019 in M.A. No. 662 of 2019, the Resolution Plan submitted by the Respondent No.2 was ratified. Therefore, this Tribunal has the jurisdiction to hear and decide the present Application.

Particulars of the Respondent:

3. The Respondent No.1 is the Successful Resolution Applicant who is now seized of the management of the Respondent No.2 Company/Corporate Debtor. The Respondent No.1 has retained all the employees of the Corporate Debtor by its Resolution Plan.

4. The Respondent No.2 Company is the Corporate Debtor who had employed the said Employees.

5. The Respondent No.3 is the Resolution Professional of the Respondent No.2 Company. Additionally, the Respondent No.3 is also a Partner in the Respondent No. 4 LLP who is appointed as the Monitoring Agency for the implementation of the Resolution Plan.

6. The Respondent No.5, 6 and 7 are the erstwhile Directors of the Corporate Debtor, i.e. the Respondent No.2 company.

Brief Background:

7. The Financial Creditor, being the Karad Urban Co-operative Bank Ltd. Initiated an Application under Section 7 of the Insolvency & Bankruptcy Code, 2016 against the Corporate Debtor for a default of Rs. 28,46,86,768/- (Rupees Twenty-Eight Crores Forty-Six Lakhs Eighty-Six Thousand Seven Hundred Sixty-Eight Only). After hearing the parties, this Tribunal was pleased to admit the said Application and initiated Corporate Insolvency Resolution Process and appointed an Interim Resolution Professional.

8. During the course of CIRP, the employees of the Corporate Debtor filed their claims as per Form E dated October 15, 2018 before the Resolution Professional through their authorised representative, Mr. Jaywant Dhanawade for a cumulative amount of Rs.87,39,196/- (Rupees Eighty-Seven Lakhs Thirty-Nine Thousand One Hundred Ninety-Six Only).

9. Thereafter, the Respondent No. 1 submitted its Resolution Plan before the Respondent No.3. The said Resolution Plan was approved by the Committee of

Creditors during its meeting held on February 9, 2019. Pursuant to the same, the said Resolution Plan was ratified by this Tribunal vide its Order dated August 1, 2019. It is pertinent to note that the Order dated August 1, 2019 passed by this Tribunal, specifically refers to the retention of the existing employees at Point 7(h) of the said Order. The relevant extract is reproduced herein for ready reference.

h.Retention of the Existing Employees

The Company shall continue with the existing manpower. Employee head count can be increased or reduced based on the Operational performance and growth of the Company. Key members of the current management, if any (excluding promoters/erstwhile directors) shall be retained for a period of at least 6-12 months to ensure smooth transition of management and stabilisation of operations.

10. Additionally, the Payment Terms at Point 8 of the Resolution Plan as reproduced in the Order dated August 1, 2019 also states that the pending salaries of all employees and workers shall be paid within a period of 180 days from the effective date, i.e. August 1, 2019. Thus, the Respondent No. 1 was expected to repay the pending dues of the Employees and workers on or before January 28, 2020.

11. It was only at his point that the said Employees gained knowledge that out of their cumulative claim of Rs.87,39,196/-, the Resolution Professional only admitted a claim to the tune of Rs.70,00,000/- (Rupees Seventy Lakhs Only) without attributing any explanation to the said Employees in respect of the rejection of their partial claim. The said Employees, being unaware of the entire process of the Insolvency & Bankruptcy Code, 2016 were not in a position to take any action at that time, and being in need of money, resumed their employment at the Company.

12. However, to the utter dismay of the said employees, the Respondent No.1 till date has not paid the employees their salaries due for the month of August and/ or September, 2019 to the employees, in accordance to their employment amounting to Rs.34,95,213/- (Rupees Thirty-Four Lakhs Ninety-Five Thousand Two Hundred Thirteen Only).

13. It is further pertinent to note that the Resolution Plan has provided for the appointment of M/s 7 Circles Business Advisors LLP, the Respondent No. 4 as the Monitoring Agency whose role was to start immediately after the Effective Date, i.e. the date of the Order of approval of the Resolution Plan, being August 1, 2019. However, it is blatantly evident that the Respondent No. 4 has grossly failed to ensure the proper implementation of the Resolution Plan.

14. In the Present case contention of Applicant is that Total outstanding to the tune of Rs.87,39,196/- (Rupees Eighty-Seven Lakhs Thirty-Nine Thousand One Hundred Ninety-Six Only) were not admitted, instead only Rs.70,00,000/-

(Rupees Seventy Lakhs Only) were admitted. Applicant also plead that they were not aware about this fact that there claim were not admitted in totality.

When the resolution Plan is approved with Rs.70,00,000/- out of Rs.87,39,196/- of Applicants claim, now at this juncture it can't be reverse by virtue of Section 32A of the IBC, there could be no question as to the successful Resolution Applicant, being saddled with the outstanding dues. Section 32A is retrospective in operation.

We also examine the facts of the case in the lights of Hon'ble Supreme Court in the matter of "Committee of Creditors of Essar Steel India Limited vs. Satish Kumar Gupta and Ors. (2019 SCC OnLine1478)" held that:

88. .... A successful resolution Applicant cannot suddenly be faced with "undecided" claims after the resolution plan submitted by him has been accepted as this would amount to a hydra head popping up which would throw into uncertainty amounts payable by a prospective resolution Applicant who successfully take over the business of the corporate debtor. All claims must be submitted to and decided by the resolution professional so that a prospective resolution Applicant knows exactly what has to be paid in order that it may then take over and run the business of the corporate debtor. This the successful resolution Applicant does on a fresh slate, as has been pointed out by us hereinabove. For these reasons, the NCLAT judgment must also be set aside on this count.

Further in "Ghanshyam Mishra and Sons Private Limited V/s Edelweiss Asset Reconstruction Company Limited in Civil Appeal No. 8129 of 2019" held that an amendment took place in Section 32A of the IBC, 2016 is retrospective. Relevant portion of the said Judgements is reproduced here below:

87. We have no hesitation to say, that the word "other Stakeholders" would squarely cover the Central Government, any State Government or any local authorities. The legislature, noticing that on account of obvious omissions, certain tax authorities were not abiding by the mandate of IB Code and continuing with the proceedings, has brought out the 2019 amendment so as to cure the said mischief. We therefore, hold that the 2019 amendment is declaratory and clarificatory in nature and therefore retrospective in operation.

15. Another prayer seeking to direct to make payment of Rs.87,39,196/- i.e. Total claimed amount where the claimed is Rs.70,00,000/- only, would be in nature of modification of the terms and conditions in the approved Resolution Plan. Approved Resolution Plan cannot be modified by this Adjudicating Authority as it is vested with no jurisdiction to modify such Resolution Plan in the light of recent decision of the Hon'ble Supreme Court in the matter of Jaypee Kingston Bonevalad Apartments Welfare Association V/s NBCC India Limited and others. The accepting and modifying terms and conditions laid down in the Resolution Plan fall within the domain of commercial wisdom of the CoC and this Adjudicating Authority is not expected to substitute its view in such Resolution

plan approved by the CoC. Hence such prayer cannot be allowed and is rejected.

16. With the above observations IA 447 of 2020 is disposed of as Rejected. Dated the 21st day of September, 2021

