
(2022) 03 NCLT CK 0090

In the National Company Law Tribunal

Case No : IA(IBC)/105(CHE)/2021 in IBA/307/2019

Rare Asset Reconstruction Limited

APPELLANT

Vs

Mr. Subrata M Maity & 7 Ors

RESPONDENT

Date of Decision : 29-03-2022

Acts Referred:

Insolvency and Bankruptcy Code, 2016 — Section 25(2)(h), 29A, 30(1), 60(5)
Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for
Corporate Persons) Regulations, 2016 — Regulation 36A(7), 36A(8), 36A(9)

Citation : (2022) 03 NCLT CK 0090

Hon'ble Judges : S. Ramathilagam, Member (J); Anil Kumar B, Member (T)

Bench : Division Bench

Advocate : E. Om Prakash, Ananth Merathia, V. Venkata Sivakumar, M. L. Ganesh

Final Decision : Dismissed

Judgement

Anil Kumar B, Member (Technical)

1. IA(IBC)/105(CHE)/2021 is an Application which is moved by the Applicants under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 (in short 'IBC, 2016') seeking relief as follows;

i) Declare that the Resolution Plan submitted by the Applicant herein is not in violation of any of the provisions of the Insolvency and Bankruptcy Code, 2016;

ii) Direct the 1st Respondent herein to place the Resolution Plan dated December 20, 2020 of the Corporate Debtor before the Committee of Creditors; and

iii) Consequently, direct the Committee of Creditors of the Corporate Debtor to consider the Resolution Plan dated December 29, 2020 submitted by the Applicant herein;

- iv) To pass any other relief as may deem fit and proper by the Hon'ble Tribunal;
2. IA(IBC)/508(CHE)/2021 is an Application which is again moved by the Applicant under Section 60(5) of IBC, 2016 seeking relief as follows;
- i) Grant an interim stay on the ongoing voting process of the Resolution Plan which had commenced on 17.05.2021 and which is scheduled to end on 24.05.2021 in order to facilitate the negotiations between the instant Applicant / RA and the CoC such that the Applicant's / RA Resolution Plan is also given a fair chance; or
- ii) Keep in abeyance any hearing and decision on any application filed by the RP under 30(6) for approval of resolution plan until the pendency of this Application;
- iii) To pass any other relief as may deem fit and proper by the Hon'ble Tribunal.
3. The Learned Counsel for the Applicant submitted that the Corporate Insolvency Resolution Process in respect of the Corporate Debtor viz. Bhatia Coke and Energy Limited was initiated by this Tribunal vide order dated 22.05.2019. The 1st Respondent herein was appointed as the Resolution Professional in respect of the Corporate Debtor on 30.12.2019. It was submitted that the Resolution Professional issued invitation for Expression of Interest on 15.01.2020 calling for prospective Resolution Applicants and that the Applicant herein being interested in taking over the Corporate Debtor as a going concern submitted its Expression of Interest to the RP on 31.01.2020 and further sought for the Information Memorandum from the RP.
4. It was submitted that the Applicant herein submitted a Resolution Plan on 11.03.2020 and the Applicant also furnished a copy of the TDR for Rs.2 Crore as mandated and in response to the same, the RP vide email dated 20.03.2020 has stated that the said Resolution Plan was not acceptable in its current form and further requested the original TDR to be provided and thereby directed the Applicant herein to resubmit the Resolution Plan by 27.03.2020. Subsequently, it was submitted that the Resolution Plan was submitted by the Applicant herein to the RP. Thereafter, it was submitted that due to the onset of Covid -19 pandemic and attendant lockdowns imposed by the Central / State Government the CIRP in respect of the Corporate Debtor came to a standstill.
5. The Learned Counsel for the Applicant submitted that the RP vide email dated 29.08.2020 forwarded a fresh Invitation to Expression of Interest in Form G to the Applicant and in response to the same the Applicant herein had sought the updated Information Memorandum to which the RP has responded stating that the Information Memorandum had already been given and further committed to provide the accounts as on 31.03.2020 and as on 31.08.2020.
6. While this being the fact, it was submitted that the RP vide separate email dated 29.08.2020 had stated that the Resolution Plan submitted by the

Applicant had not been shortlisted and was rejected and that the RP has not communicated the rejection of the Resolution Plan to the Applicant at an earlier point of time. However, it was submitted that the Applicant without getting into a quarrel on the rejection of the Resolution Plan dated 13.03.2020, the Applicant had decided to provide a new Resolution Plan on the instructions of the RP and thereby a new Resolution Plan dated 22.09.2020 proposing payment of Rs.185.75 Crore within a timeline of 2 years was submitted by the Applicant to the RP. Consequent to the same, it was submitted that the Applicant herein was declared to be one of the Final prospective Resolution Applicants along with 2 other Resolution Applicants vide e-mail dated 15.09.2020.

7. It was submitted that vide email dated 24.09.2020, the RP has sought for the password for the Resolution Plan submitted by the Applicant herein much before the CoC meeting was held and the Applicant wrote a mail to the RP requesting to ascertain if the settled process was that the opening of plans would have to be in the presence of the CoC and thereafter the RP is required to evaluate the Resolution Plan and submit the same to the CoC. In response to the same, it was submitted that the RP vide email dated 24.09.2020 stated that there is no settled process for presenting the plans to the CoC and that if the Applicant herein does not provide the passwords for the plan, the said plan would be rejected. However, the Applicant had thereafter immediately shared the password.

8. The Learned Counsel for the Applicant submitted that with regard to the Resolution Plan submitted by the Applicant, the RP responded vide email dated 27.09.2020 stating that the members of the CoC have requested the Applicant to increase the plan amount, also to reduce the payment timeline and further directed the Applicant to provide a declaration under Section 29A of IBC, 2016. It was submitted that in consonance with the said request of the CoC members, the Applicant herein vide email dated 30.09.2020 suitably altered the modalities of the Resolution Plan and also provided a declaration under Section 29A of IBC, 2016

9. The Learned Counsel for the Applicant submitted that after certain discussions made in the 9th CoC meeting, the RP vide email dated 23.10.2020 sought the following details to be provided by the Applicant;

- a. Revised Addendum to the Resolution Plan incorporating improvement in the Plan
- b. Declaration that the present Corporate Debtor is not making backdoor entry.
- c. Source of Funds
- d. Details of Independent Monitoring Committee (IMC) and plan to protect the interest of Lenders and Employee
- e. Remuneration of RP in IMC

f. Details of Technical team for operating Corporate Debtor

10. It was submitted by the Learned Counsel for the Applicant that the discussion between the Resolution Applicant and the FoC members was only with respect to the Resolution Plan amount, time line and not with regard to the above said details sought by the RP. It was submitted that despite the said fact, the Applicant herein vide email dated 29.10.2020 had suitably responded to the queries raised by the RP and the Applicant has also proposed to constitute the IMC with one nominee of the Financial Creditor, two nominees of the Applicant and the RP.

11. The Learned Counsel for the Applicant submitted that the RP vide email dated 01.11.2020 had again reiterated his queries stating that the explanation given by the Applicant with regard to the IMC is not satisfactory and thereby mentioned that the CoC members have mandated that the composition of IMC with one Member each from the Applicant herein, the Financial Creditors and a Representative of the RP and also further directed the Applicant herein to clarify the remuneration that needs to be paid to the RP in the IMC. In response to the same, it was submitted that the Applicant once again restated its stand as mentioned in the email dated 29.10.2020. Further, certain emails were exchanged between the parties and it was submitted that the RP was asking for details from the Resolution Applicant which was beyond the scope of RP.

12. The Learned Counsel for the Applicant submitted that the RP apart from raising numerous extraneous issues, has made a couple of observations with regard to the Resolution Plan submitted by the Applicant and the said observation pertains to the transactions between the Applicant herein and one M/s. Green Gold Global Resources LLP on the ground that the said Company is a related party and therefore the transaction debars the Applicant herein to provide the Resolution Plan for the Corporate Debtor. In this regard, it was submitted that to the best knowledge of the applicant neither the directors nor the promoters of M/s. Green Gold Global Resources LLP and that of the Corporate Debtor are same.

13. The Learned Counsel for the Applicant submitted that there is absolutely no bar for the applicant to provide the Resolution Plan in respect of the Corporate Debtor as the applicant is not in violation of any of the provisions of the IBC, 2016. Further, it was submitted that the aforementioned purported Related party is not a joint applicant / investor in the impugned Resolution Plan and it was submitted that when the applicant herein is not related party the RP has been seeking numerous affidavits to get confirmation that the Corporate Debtor and its promoters are not making a back door entry. In this regard, it was submitted by the Learned Counsel for the Applicant that the RP has tried his best to create an adverse impression on the credentials / standing of the Applicant and its Resolution Plan, for the reasons best known to him and that it was alleged that the RP has a vested interest in supporting the other

Resolution Applicants vis-a-vis the Applicant herein.

14. The Learned Counsel for the Applicant submitted that the Applicant herein has earlier withdrawn a Resolution Plan before this Tribunal citing RBI circular No. RBI/2019-20/110 DOR.NBFC (ARC) CC No.8/26.03.001/2019-20 dated 06.12.2019 and also the RP has sought assurance that the Applicant will not withdraw the instant Resolution Plan by relying upon the aforementioned RBI circular. In this regard, it was submitted that the said circular applies only when the funding is made by the financial institutions and that in the earlier case the proposed infusion of funds was by the financial institutions and the same was hit by virtue of the circular and thereby precluding the Applicant from progressing further in the said matter. However, in the present case, it was submitted that in the instant Resolution Plan, the funding is not made by any of the Financial institutions and therefore there is no possibility that the Applicant herein would withdraw the instant Resolution Plan.

15. The Learned Counsel for the Applicant submitted that the RP has further questioned that the introduction of M/s. Aqua Terra Logistics Private Limited as co-investor in the proposed Resolution Plan. It was submitted that the said investor has a commendable standing in the Coke and Coal business with group turnover of approximately Rs.12676 Crore and that the said Company is debt free with net worth of Rs.72 Crore and recently acquired a similar plot at Kharagpur and that despite providing the said fact, the RP vide email dated 06.01.2021 rejected the Resolution Plan of the Applicant stating that the plan has been rejected as it is in violation of the RFRP (Request for Resolution Plan). It was submitted that the RP has not assigned any concrete, specific reasons for rejecting the Resolution Plan of the Applicant and has rather provided a vague, ambiguous and open-ended reasons for rejecting it, that too after having sought various details and information.

16. The Learned Counsel for the Applicant submitted that the Applicant vide email dated 06.01.2021 requested the RP to provide further details of the purported violations of the RFRP and the response provided by the RP vide email dated 06.01.2021 is as follows;

"The Non Compliance has been shared with CoC. By this Trick you are trying to stall the Resolution Plan at the instance of Ex-promoters Bhatia. Besides you are not HI."

17. The Learned Counsel for the Applicant submitted that the above said response of the RP is untenable and unsustainable as the Resolution Plan submitted by the Applicant has no association with the erstwhile promoters and management of the Corporate Debtor and therefore there is no question of playing any kind of trick to stall the CIRP of the Corporate Debtor. It was submitted that the RP is the one, who for the reasons best known to him has been creating multiple obstacles and hurdles in the path of the Applicant, who wishes to have the Resolution Plan submitted before the CoC and have the

same deliberated and appropriately decided upon by them.

18. The Learned Counsel for the Applicant submitted that they gave the initial Resolution Plan on 13.03.2020 and thereafter the final Resolution Plan on 22.09.2020 and finally resubmitted on 29.12.2020 and that the Applicant has been dealing only with the RP with issues of no importance and has not been successful in discussing the vital issues with the CoC. It was submitted that the RP has not placed the correct and fair plan before the CoC and has deliberately allowed very limited interaction with CoC only on one occasion.

19. The Learned Counsel for the Applicant submitted that the Applicant herein is aggrieved and will sustain huge loss after having invested so much time and effort in participating in the Resolution of the Corporate Debtor and henceforth in the interest of justice and in equity, the Applicant has filed the instant Application. Further, it was submitted that the Applicant has informed the RP and the CoC members that it is willing to improve the offer / negotiate further to ensure value maximization and that the reason ascribed by the RP in rejecting the Applicant's Resolution Plan are not reasonable and germane. Under the said circumstances, the Learned Counsel for the Applicant prayed for relief as stated supra.

20. The Respondent has filed counter. The Learned Counsel for the Respondent submitted that as of now in respect of the Corporate Debtor is concerned, the Resolution Plan filed by one Earth Elements was approved by 100% of the CoC and the same is pending for approval before this Tribunal. The main ground for rejection of the Resolution Plan was that the Applicant was disqualified because of the non — compliance of Section 29A of IBC, 2016. Further, it was submitted that the Plan of the Applicant was placed before the CoC and the CoC has considered the plan and after taking into consideration all the relevant factors exercise the commercial wisdom and rejected the said Plan in the 18th CoC minutes which is reproduced as under:-

RP apprised the members that as it has been discussed on various occasions before, the plan submitted by RARE ARC. A legal opinion and the detailed note on non-compliance points of RARE ARC is already submitted to all the CoC members by RP on 08.04.2021. RP had at all occasion shared the plan of RARE ARC with the CoC members despite the plan not being compliant to the Code, Regulations, RFRP and EoI. He further informed the members that RARE ARC was requested to provide details of transactions with GGRL which was not provided despite several reminders as on 12th April 21.

RP apprised the members on

1. Legal and financial experts opinion, which he relied upon
2. Legal opinion obtained from Adv Vikram Hedge (Adv on Record Supreme Court of India)
3. RBI Circular which disqualify the ARC and RARE ARC sell confession in Jeypore

Sugars Limited case.

4. Judgments of Hon'ble Supreme Court in Anurag Jagatram in connection with Section 29A ineligibility. Also the Hon'ble Supreme Court has asked the provision of 29A has to be looked upon the principles of "See Though"

5. Fraudulent diversion of funds report confirmed by the forensic audit experts and the matter pending before Hon'ble NCLT.

6. Transaction with gold green which clearly establishes the disqualification.

7. The other RA may use this as a shield and take the dispute to a prolonged _litigation which may adversely affect the assets of the CD and greater interest of stakeholders.

A discussion then took place among the members and the RP, after which the Members were of the unanimous opinion that the Resolution Plan of RARE ARC as presented by RP was non-compliant and the members would consider only Plans that are compliance with the code, regulations and offer document they decided that the plan of RARE ARC need not be discussed. They also asked RP to certify the plan that is compliant and table it for discussion. The CoC members, in their commercial wisdom unanimously decided that they shall vote only on the plan that is compliant with the code, regulations and offer document and hence plan of RARE ARC will not be considered.

21. Further, it was submitted that as per the CA certificate from Page No. 67 to 69, the Applicant has not been compliant with Request for Resolution Plan (RFRP).

As per clause 2.1.5 of the RFRP, the following events / occurrences may cause the resolution plan to be considered "non-responsive", at the sole discretion of the resolution professional (acting on the instructions of the CoC):

1. As per clause (d), the resolution plan submitted by the resolution applicant is conditional in nature.

The plan submitted by Rare ARC is conditional as it gives out 2 conditions to the financial creditors for settlement of their dues. The conditions are for the amount proposed to be paid to the secured and unsecured financial creditors only. Looking at this, the offer of the RA proposed in the plan is not yet a final submission. Hence, the plan is liable to be considered "nonresponsive".

2. As per the eligibility criteria set out in the detailed EoI, where the EoI is being submitted by a consortium of joint bidders ("consortium"), a person cannot be a part of more than 1 (one) consortium submitting the EoI.

In the plan submitted by Rare ARC, the sponsor investor, M/s. Aqua Terra Logistics Pvt. Ltd. is the joint bidder and one of its group company, M/s. Avani Resources Pte Ltd is the joint bidder in the settlement proposal submitted by the promoters of the CD. Since, Aqua Terra and Avani Resources belongs to the

same group of companies, their submission of plan through two separate bidders is ineligible as per the condition set above.

3. As per clause (f), the resolution professional (acting on the instructions of the CoC) is of the opinion there is a conflict of interest with the resolution applicant participating in the resolution plan submission process.

Rare ARC has submitted the details of their proposed investor, M/s. Aqua Terra Logistics Pvt. Ltd. (ATPL), which is a part of an Indian multinational group engaged in manufacturing / trading of coke, coal and iron ore.

The group has the following companies.

- a. Aqua Terra Logistics Pvt. Ltd.
- b. Rawmet Resources Pvt. Ltd.
- c. Terramin Resources Pvt. Ltd.
- d. Avani Resources Pte. Ltd.

In the 11th CoC meeting dated 19.11.2020, while the erstwhile promoters were presenting their proposal to the members, they stated that their investor was Avani Resources Pte Ltd., which is a part of the same group company as Aqua Terra, who is the proposed investor of Rare ARC.

It is inferred that both the ex-directors and promoters and Rare ARC are proposing the same investor as their source of fund. Hence there may be conflict of interest in the participation of Rare ARC through Aqua Terra Logistics Pvt. Ltd.

4. As per clause (h), the Resolution Applicant makes any misrepresentation.

Rare ARC vide their email dated 24.11.2020 stated that their sponsor investor would be Mr. P.K. Jain, a NRI based in Singapore and his company. However, in the plan submitted on 29.12.2020, they changed their sponsor investor to M/s. Aqua Terra Logistics Pvt. Ltd. The 29A dues diligence for both the proposed investors have not been submitted till date by Rare ARC.

22. Thus, it was submitted that the RP was right in rejecting the Resolution Plan in respect of the Applicant.

23. Heard the submissions made by the Learned Counsel for both the parties. The question which is required to be adjudicated in the present Application is that whether the Resolution Plan of the Applicant can be placed before the CoC for its consideration. The main contention raised by the RP is that the Resolution Applicant's co-investor M/s. Aqua Terra Logistics Private Limited and one M/s. Avani Resources Pte Ltd. which backed the settlement proposal mooted by the promoters through Section 12A application belongs to the same group.

24. It is seen that, as already stated supra, the RP vide email dated 23.10.2020 sought for the following details to be provided by the Applicant;

- a. Revised Addendum to the Resolution Plan incorporating improvement in the Plan
- b. Declaration that the present Corporate Debtor is not making backdoor entry.
- c. Source of Funds
- d. Details of Independent Monitoring Committee (IMC) and plan to protect the interest of Lenders and Employee
- e. Remuneration of RP in IMC
- f. Details of Technical team for operating Corporate Debtor

25. However, the Applicant instead of providing the documents as sought for by the RP, has replied by way of an email on

29.10.2020 that it has made its stand clear with regard to Section 29A of IBC, 2016 compliance in the previous correspondence, therefore not required to provide any further information. Even after subsequent communication, instead of providing the information as sought for by the RP, the Applicant has sought to set up a meeting with the members of the CoC.

26. It is to be seen that it is the duty of the Resolution Professional under •Section 25(2)(h) of IBC, 2016 to invite the prospective Resolution Applicant, who fulfil the criteria laid down by the RP with the approval of the CoC and as per Section 30(1) of IBC, 2016 the Resolution Applicant is required to submit an affidavit that he is eligible under Section 29A of IBC, 2016 along with Resolution Plan. Further Regulation 36A of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 states that the RP shall specify the criteria for the prospective Resolution Applicant as approved by the CoC in accordance with clause of Section 25(2)(h) of IBC, 2016. At this juncture, it is relevant to refer to Regulations 36A (8) and (9) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, which is extracted hereunder;

36A. Invitation for expression of interest.

(8) The resolution professional shall conduct due diligence based on the material on record in order to satisfy that the prospective resolution applicant complies with

(a) the provisions of clause (h) of sub-section (2) of section 25;

(b) the applicable provisions of section 29A, and

(c) other requirements, as specified in the invitation for expression of interest.

(9) The resolution professional may seek any clarification or additional

information or document from the prospective resolution applicant for conducting due diligence Under subregulation (8).

27. Thus, it is seen that as per Regulation 36A (9) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, the RP is at liberty to seek any additional clarification or additional information or document from the prospective Resolution Applicants for conducting due diligence under Sub — Regulation 8 of Regulation 36A in relation to provisions of clause (h) of sub section (2) of 25 and provisions of Section 29A of the Code and other requirements as specified in the Invitation for Expression of Interest and the Resolution Applicant is duty bound to provide such information as sought by the RP. Further, Regulation 36A (7) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, states that the Expression of interest shall be unconditional. Thus, it is required to be noted that the RP is at liberty to seek additional information to conduct due diligence to find out the criteria mentioned in Information Memorandum and also to conduct due diligence that the prospective Resolution Applicant is not hit by Section 29A of IBC, 2016.

28. A conjoint reading of the aforesaid Regulations would posit the fact that the unless the Applicant is able to provide additional information falling under Regulation 36A (9) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 as sought by the RP, it cannot be said that the Resolution Plan submitted by the Applicant herein is in compliance with Section 30(1) of IBC, 2016.

29. In any case, at this point of time, the Resolution Plan submitted by one Earth Element has already been approved by the CoC in compliance with the provisions of IBC, 2016 and it has been stated that the plan approved by the CoC is far superior in value to the plan submitted by the Applicant. Further, we have also not found any legal infirmity in the action taken by the RP in conducting due diligence under Section 29A of IBC, 2016 as stipulated under Regulation 36A (8) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 and also the Applicant has failed to place on record the additional document as sought for by the RP under Regulation 36A (9) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. Under the said circumstances, both the Applications filed by the Applicant sans merit and deserves to be dismissed and accordingly IA(IBC)/105/CHE/2021 and IA(IBC)/508/CHE/2021 stand dismissed. No costs.