
(2021) 07 NCLT CK 0001

In the National Company Law Appellate Tribunal, Pricipal Bench, New Delhi

Case No : C.A. No. 1424/ND/2020 Connected with IB-1089/(ND)/2018

Tuf Metallurgical Private Limited

APPELLANT

Vs

Ex Resolution Professional

RESPONDENT

Date of Decision : 01-07-2021

Acts Referred:

Insolvency and Bankruptcy Code, 2016 — Section 43, 60(5), 66
National Company Law Tribunal (NCLT) Rules, 2016 — Rule 11

Citation : (2021) 07 NCLT CK 0001

Hon'ble Judges : P.S.N. Prasad, Member (J);Narender Kumar Bhola, Member (T)

Bench : Division Bench

Advocate : Vaibhav Mahajan, Abhishek Anand, Kunal Godhwani, Pathik Choudhary, Mohit Nandwani, Akshat Bajpai

Final Decision : Dismissed

Judgement

P.S.N. Prasad, Member (Judicial)

1. This is an application filed by the Successful Resolution Applicant and Monitoring Committee (Applicant No.1 and 2) under section 60(5) read with

Rule 11 of NCLT Rules, 2016 seeking intervention in support of C.A. (IB) No. 785/ND/2019 filed by Ex Resolution Professional under section 66

read with section 43 of IBC, 2016 and to allow the applicants access to all the reports, findings and other documents submitted in connection with

C.A. (IB) No. 785/ND/2019. The details of transactions leading to the filing of this application as averred by the Applicants are as follows:

i. The applicants submits that the original petition under section 7 of IBC, 2016 was admitted by the Honhle Tribunal vide order dated 02.01.2019

thereby, initiating CIRP of the corporate Debtor i.e., Albus India Limited.

- ii. The applicants state that COC was constituted having two Financial Creditors namely the applicant TUF Metallurgical Private Limited and the Central Bank of India. The applicants further submit that during the 1st COC Meeting held on 16.02.2019 Resolution Professional was authorized to conduct the forensic audit into the accounts of the Corporate Debtor in order to unearth the financial irregularities in accordance with the IBBI regulations and statutory scheme of the IBC, 2016. That vide the same COC resolution C.A Mr. C.P. Bhatia of M/s C.P. Bhatia & Associates was appointed as the forensic auditor for the said purpose.
- iii. The applicants submit that the said forensic auditor in its report dated 05.03.2019 pointed out huge diversion of funds, fabrication of transactions and fraudulent activities. Further on the basis of aforesaid findings the erstwhile Resolution Professional (Respondent No.1) had filed an application CA (IB) No. 785/ND/2019 under section 66 read with section 43 of IBC, 2016 against Respondent No.2 to 6 and the same is pending for final adjudication before this Tribunal.
- iv. The applicants further submitted that the resolution plan submitted by the Applicant No. 1 was unanimously accepted by the COC and was declared as the successful resolution applicant. Further, the Tribunal vide order dated 05.11.2019 also granted the approval to the same.
- v. The applicants submit in its application that upon approval of the Resolution plan, the resolution professional ceases to exist as per the proviso of section 23 of the code and as such the resolution professional has become functus officio in respect to C.A. (IB) No. 785/ND/2019 against Respondent No.2 to 6. The applicant further submitted that as per clause 13.1(b) of the Resolution Plan as approved vide order dated 05.11.2019 the Resolution Professional and COC has been discharged from their duties and Responsibilities as on the date of approval u/s 31(1) of IBC, 2016 i.e., from 05.11.2019 onwards the Resolution Professional has been relieved of his duties and responsibilities including the prosecution of C.A. (IB) No. 785/ND/2019.
- vi. That in terms of the clause 12 of the Resolution Plan, a Monitoring Committee (Applicant No.2) consisting of three members was conceptualized for supervising the implementation of the Resolution Plan by the successful Resolution Applicant. The applicants state that the Monitoring Committee

in its 1st meeting held on 18.11.2019 resolved as under:

RESOLVED THAT all pending application including application u/ s 66 shall be pursued by RA in consultation with MC & the erstwhile RP may continue

to cooperate as and when required by Hon'ble NCLT and the erstwhile RP is discharged from all functions from the date of order approving resolution plan.

vii. The Applicants submitted that by virtue of Schedule 4(3)(c)(i) any benefit that may arise out of the said Application C.A. (IB) No. 785/ND/2019 shall inure to the benefit of the Corporate Debtor / Successful Resolution Applicant and the same may also be shared with other Financial Creditors and therefore the Applicants have

a vested interest in prosecution and in intervention of the said Application with a right to be heard before final disposal of the said Application. The Applicant

further cited an order of Cuttack Bench in CA (IB) No. 401/KB/2018, TA No. 18/CTB/2019 in CP (IB) No. 371/KB/2017 titled as "State Bank of India & Ors. v/s

Adhunik Steels Limited & Ors. Stating that the Hon'ble tribunal in the aforesaid matter recognized the right of the Financial Creditor to have say in the disposal of application u/s 66 r/w 43 of IBC, 2016.

viii. The applicants further stated that the Monitoring Committee in its 2nd meeting held on 02.01.2020 has observed several facts and evidences in support of the

allegations made in C.A. (IB) No. 785/ND/2019 and the Applicants therefore wish to intervene in the said Application in order to agitate the same and assist the

hon'ble Tribunal at arriving at a just conclusion.

2. Consequent to the notice issued by this Tribunal, the Respondent No. 1 filed its reply in which the following contentions are made:

i. The Respondent No.1 in its reply submitted that the present application is not maintainable as according to section 60(5) the adjudicating authority can adjudicate

an application by or against either a corporate person or a corporate debtor whereas, the applicant No.2 i.e., Monitoring Committee is not a corporate person as per

section 3(7) of the Code and is not a legally incorporated entity. The Respondent further submitted that the. Present Application is not maintainable as the Applicant

No. 2 has exceeded its scope and overstepped the well- defined responsibilities under the Plan. Clause 12.2 of the Plan states that Applicant No. 2 will monitor,

supervise and implement the Plan and further -casts the scope and responsibilities of Applicant No. 2 in Clause 12.2(d). That Pursuing an application which was filed

by the answering Respondent in his capacity as a Resolution Professional during CIRP period, is not within the clearly defined scope of Applicant No 2.

ii. The Respondent No.I further submitted in its reply that the present Application is not maintainable as it is seeking intervention in an avoidance application (CA 785/ND/2019) which in itself cannot be adjudicated post approval of the Plan. The Respondent No.I cited a recent judgment of the Hon'ble High Court of Delhi in

Venus Recruiters Pvt. Ltd. vs Union of India & Ors. in WP(C) 8705/2019 & CM Appl 36026/2019, the Hon'ble Delhi High Court unequivocally decided that the

Ld. Adjudicating Authority Cannot exercise jurisdiction in respect of an avoidance application similar to the avoidance application i.e., CA. 785/ND/2019 after the

approval of the Resolution Plan. The relevant extracts of the judgement are reproduced herein below:

“73 the argument that avoidance applications relating to preferential and other transactions can therefore survive beyond the conclusion of CIRP is contrary

to the scheme of the code. “

“84. ...Section 26 of the IBC also cannot be read in a manner so as to mean that an application for avoidance of transactions under section 25(2)(j) can

survive after the CIRP process. Once the CIRP process itself comes to an end, an application for avoidance of Transactions cannot be adjudicated.”

“88. ...Moreover, if an avoidance application for preferential transaction is permitted to be adjudicated beyond the period after the Resolution Plan is

approved in effect, the NCLT would be stepping into the shoes of the new management to decide what is good or bad for the company. Thus, if the COC or RP are

of the view that there are any transactions which are objectionable in nature, the order in respect thereof would have to be passed prior to the approval of the

Resolution Plan.”

“89. ...The NCLT also has no jurisdiction to entertain and decide avoidance applications, in respect of a Corporate Debtor which is now under a new

management unless provision is made in the final Resolution Plan.”

“92. ...The Parties would have to be therefore left to their civil and other remedies in terms of the contract between them. The NCLT ought not to be

permitted to

now adjudicate the preferential nature of the Transaction under a contract which now stands terminated, after approval of the Resolution Plan.

Thus, the Respondent No.1 submits that the said application for avoidance of Transactions cannot be adjudicated beyond approval of the Plan hence, the present

application seeking intervention in the avoidance application is also not legally tenable.

iii. The Respondent No. 1 further referring to clause 2.4 of the Report of the Insolvency Law Committee (ILC) constituted by the Ministry of Corporate Affairs dated 20.02.2020 (ILC Report), the Hon'ble Delhi High Court in ""Venus Recruiters Pvt. Ltd. vs Union of India & Ors."" Observed that the Resolution Applicant

cannot be permitted to file avoidance applications, as the same was not factored in the bid. The Relevant extract of ILC report is reproduced as under:

2.4. The Committee also considered if the successful resolution applicant should be permitted to file such applications. However, it was agreed that this would possibly result in the resolution applicant being entitled to a return that was not factored at the time of submitting their bid. Therefore, the committee decided that the resolution applicant should not be permitted to file applications against improper trading or applications to avoid transactions.

iv. The Respondent No. 1 submitted that the applicants have heavily relied on the observations made by the Forensic Auditor in its interim report dated 25.03.2019

to show that there has been diversion of funds and fraudulent transactions. Whereas, the Respondent No.1 further submitted that the final report submitted by the

Forensic Auditor on 22.01.2020 stated that there were no fraudulent transactions and accordingly dropped the allegations against the suspended Board of Directors.

3. We have gone through the documents filed by the applicants and the Respondent No.1. Upon hearing the arguments made by the Learned

counsels for the applicant as well as the Respondent No.1, it is evident that the applicants prayed to intervene in C.A. No. (IB) 785/ND/2019 and to

continue the said application in place of the erstwhile Resolution Professional. Whereas, the Respondent No. 1 has contended that the present

application is not maintainable as it is seeking intervention in an avoidance application which in itself cannot be adjudicated post approval of the plan.

4. The learned counsel for the applicant No.2 while advancing the arguments submitted that w.e.f. 05.11.2019 the Resolution Professional

(Respondent No.1) having become functus officio, the application C.A. No.785 of 2019 still being sub-judice shall see the day of light.

5. The judgement of the Hon'ble High Court of Delhi in "Venus Recruiters Pvt. Ltd. vs Union of India & Ors. in WP(C) 8705/2019 & CM

Appl 36026/2019, wherein the Hon'ble High Court decided the question of whether an application filed under Section 43 of the Code, for

avoidance of preferential transactions, can be adjudicated upon by the National Company Law Tribunal (NCLT), after the approval of approval of a

resolution plan and conclusion of CIRP. The relevant extracts of the judgement have been reproduced below:

70. An avoidance application for any preferential transaction is meant to give some benefit to the creditors of the Corporate Debtor. The benefit is not meant for

the Corporate Debtor in its new avatar, after the approval of the Resolution Plan. This is clear from a perusal of Section 44 of the IBC, which sets out the kind of

orders which can be passed by the NCLT in case of preferential transactions. The benefit of these orders would be for the Corporate Debtor, prior to approval of

the Resolution Plan. Any property transferred or sum acquired in an order passed in respect of a preferential transaction would have to form part of the final

Resolution Plan. The Resolution Plan would have to take into consideration such amounts and benefits which can be given to the Corporate Debtor for the

benefit of the CoC. The benefit of an avoidance application is not meant for the company, after the Resolution Plan is considered by the CoC and approved by the

74. Moreover, an RP cannot continue to file applications in an indefinite manner even after the approval of a Resolution Plan under Section 31. The role of a RP

is finite in nature. He or she cannot continue to act on behalf of the Corporate Debtor once the Plan is approved and the new management takes over. To continue

a RP indefinitely even beyond the approval of the Resolution Plan would be contrary to the purpose and intent behind appointment of a RP. The Resolution

Professional (RP), as the name itself suggests has to be a person who would enable the resolution. The role of the RP is not adjudicatory but administrative in

nature. Thus, the RP cannot continue beyond an order under Section 31 of the IBC, as the CIRP comes to an end with a successful Resolution Plan having been approved. This is however subject to any clause in the Resolution Plan to the contrary, permitting the RP to function for any specific purpose beyond the approval

of the Resolution Plan. In the present case, no such clause has been shown to exist.

85. Clause 2.4 of Chapter III of the ILC Report, dated 20th February, 2020 is relied upon to urge that a Resolution Applicant ought not to be permitted to file an

avoidance application and the crux of this recommendation would, in effect, mean that the benefit for any of the avoidance applications cannot be given to the

Resolution Applicant. However, a closer look at the ILC Report shows that as per Clause 2.4 the successful Resolution Applicant cannot be permitted to file such

avoidance applications, as the same was not factored into the bid. The relevant extract reads as under:

â??2.4. The Committee also considered if the successful resolution applicant should be permitted to file such applications. However, it was agreed that this

would possibly result in the resolution applicant being entitled to a return that was not factored in at the time of submitting their bid. Therefore, the Committee

decided that the resolution applicant should not be permitted to file applications against improper trading or applications to avoid transactionsâ??

Thus, the Resolution Applicant whose Resolution Plan is approved itself cannot file an avoidance application. The purpose is clear from this itself i.e., that the

avoidance applications are neither for the benefit of the Resolution Applicants nor for the company after the resolution is complete. It is for the benefit of the

Corporate Debtor and the CoC of the Corporate Debtor. The RP whose mandate has ended cannot indirectly seek to give a benefit to the Corporate Debtor, who

is now under the control of the new management/Resolution Applicant, by pursuing such an application. The ultimate purpose is that any benefit from a

preferential transaction should be given to the Corporate Debtor prior to the submission of bids and not thereafter.

6. Â It is clearly evident from the aforesaid judgement that once the Resolution plan of a Resolution Applicant is approved it cannot file an avoidance

application under section 43 of IBC, 2016. It is pertinent to mention that the case in hand where the applicant No.1 is the successful resolution

applicant seeking to intervene in the Avoidance application filed by the erstwhile Resolution professional prior to the approval of resolution plan is not

maintainable and no direction prayed in the present application can be granted to the applicants.

7. Â Hence, in light of the above, after giving careful consideration of the entire matter and hearing the arguments of the applicants and the non-applicants, the present application is Dismissed.