

NATIONAL COMPANY LAW APPELLATE TRIBUNAL

PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 1079 of 2020

[Arising out of Order dated 26.10.2020 passed by the National Company Law Tribunal, Principal Bench, New Delhi in CA 1393(PB)/2019 (Resolution Plan Approval Application) and CA No. 2875(PB)/2020 (New Resolution Applicant's Application) in CP No.(IB)-50(PB)/2018]

In the matter of:

Interups Inc.

90 State Street, Office 700 – Suite

40 Albany Ny 12207

Through its authorized

Representative Mr. Mahesh Kumar Vellaboyina,

Having his address for communication at

Plot No.86, Road No.2, Dhanalaxmi Society,

Mahendra Hills,

Hyderabad – 500 026

...Appellant

Versus

1.Kuldeep Kumar Bassi

(Resolution Professional of

Asian Colour Coated Ispat Limited)

Unit No.410, Level 4, Centrum Plaza,

Glof Course road, Sector 53,

Gurugram- 122 001 Harayana .

...Respondent No.1

2. Committee of Creditors of

Asian Colour Coated Ispat Limited

Unit No.410, Level 4, Centrum Plaza,

Glof Course road, Sector 53,

Gurugram- 122 001 Harayana.

...Respondent No.2

**3.JSW Steel Coated Products Limited
(through its Authorised Representative)
JSW Centre Bandra Kurla Complex,
Bandra (East) Mumbai – 450 051**

...Respondent No.3

Present:

For Appellant: Mr. Neeraj Kishan Kaul, Senior Advocate with Mr. Abhishek Anand, Mr. Kunal Godhwani, Mr. Divyanshu Srivastav, Mr. Mohak Sharma, Mr. Viren Sharma, Mr. Pathik Choudhury and Mr. Rahul Adlakha, Advocates.

For Respondents: Mr. Ramji Srinivasan, Senior Advocate with Ms. Pooja Mahajan, Mr. Savar Mahajan, Ms. Mohana Nijhawan, Ms. Avni Shrivastava, Advocates for R-1.

Mr. Ankur Mittal, Ms. Meera Murali, Advocates for R-2.

Dr. Abhishek Manu Singhvi, Senior Advocate with Mr. Bishwajit Dubey, Mr. Shatrajit Banerji, Mr. Aditya Jindal and Ms. Madhavi Khanna, Advocates for R-3

ORDER

1. The present Appeal is filed by the Appellant under Section 61 of the Insolvency and Bankruptcy Code, 2016 (in short 'Code') against the Impugned order dated 26.10.2020 passed by the Adjudicating Authority (National Company Law Tribunal, Principal Bench, New Delhi) in relation, to CA No.1393(PB)/2019 (which was filed for approval of the Resolution Plan with respect to the Corporate Debtor) and CA No.2875(PB)/2020

(which was filed by the Appellant seeking directions for consideration of its resolution proposal) in CP No. (IB)- 50(PB)/2018.

2. The Appellant has a grievance that he has submitted his Expression of Interest (EOI) on 12.06.2020 and the Resolution Professional has not placed before Committee of Creditor (CoC) for consideration of its proposal inspite of the offer of the Appellant to pay an amount of Rs. 2000 Crore towards full and final settlement of outstanding debt of Corporate Debtor and Appellant being ready and willing to deposit a sum of Rs. 1000 Crore in Escrow account, if its proposal is allowed to be submitted, Resolution Plan amount would be 33% more than the amount offered by Respondent No.3 (Approved Resolution Applicant). However, the present Resolution Plan has emerged out of invitation for Expression of Interest inviting prospective Resolution Applicant on 01.10.2018.
3. The issue raised in this appeal filed by the Appellant for assailing the approved Resolution Plan of 'JSW Steel Coated Products Ltd' (the Approved Resolution Applicant) is that the Successful Resolution Plan is non-compliant as regard the mandate of Section 30(2) of the Code, 2016. The Appellant has also raised that the Corporate Insolvency Resolution Process (for short 'CIRP') defined period has already expired on 16.04.2019 and yet to approve CA 613 of 2019 for exclusion of time. In between the Adjudicating Authority has approved the Resolution Plan on 19.10.2020 in CP(IB) No. 50(PB)/2018.

4. The Appellant has sought the following reliefs:
 - a. Quash and set aside the impugned order dated 26.10.2020 (Pronounced on 19.10.2020) passed by Adjudicating Authority in relation to the CA No. 1393(PB)/2019 in CP No. (IB)- 50PB/2018 and CA No. 1875(PB)/2020 in CP No. (IB) 50(PB)/2018;
 - b. Consequently, direct the CoC to consider the proposal of the Appellant, for submission of detailed resolution plan, and put the same to voting by CoC;
 - c. Pass such other consequential orders as may be deemed fit by this Appellate Tribunal in order to meet the ends of the prayers at (a) and (b). etc
5. However, this Appellate Tribunal, in its first hearing after hearing, learned Senior Counsel Mr. Salman Kurshid, and Mr. Manu Singhvi, appearing for R-3. Mr. Ramji Srinivasan, appearing on behalf of Respondent No.1 and Mr. Angur Mittal, learned Advocate for Respondent No.2, asked the learned counsels to provide chronology of events, leading to approval of Successful Resolution Plan dealing with issue of maintainability of appeal and locus of Appellant to question the approval of plan of successful resolution applicant initially for consideration of appeal. In this context the Appellant & Respondents submitted chronology of events commencing filing of petition on 20.07.2018 to 19.10.2020.

6. The Appellant has submitted that any person may prefer an appeal before the Appellate Tribunal. The Appeal against the order of approval of Resolution Plan can be preferred on any of the ground as mentioned in the Section 61(3) which includes material irregularity in exercise of the powers by the Resolution Professional during the CIRP. It was also raised that the Adjudicating Authority impugned order itself made a determination that the Resolution Plan is in contravention to Section 30(2)(b) of the Code, para 133 to 137 of the impugned order which deals with the issue of more to Operational Creditor vis a vis dissenting unsecured Financial Creditors which is in contravention of Section 30(2) read with Section 53(1) of the Code. The Appellant has cited the judgment of Hon'ble Apex Court in the matter of Committee of Creditors of Essar Steel India Limited Vs. Satish Kumar Gupta & Ors., (2019) SccOnline SC 1478 and held in para "73. If the Adjudicating Authority finds, on a given set of facts, that the aforesaid parameters have not been kept in view, it may send a resolution plan back to the Committee of Creditors to re-submit such plan after satisfying the aforesaid parameters. The reasons given by the Committee of Creditors while approving a resolution plan may thus be looked at by the Adjudicating Authority only from this point of view, and once it is satisfied that the Committee of Creditors has paid attention to these key features, it must then pass the resolution plan, other things being equal."

That from the above judgment, it is categorically clear that the Adjudicating Authority is not empowered to modify the Resolution Plan while exercising the limited jurisdiction. It is submitted that once the Adjudicating Authority made a determination that the Resolution Plan is not in compliance to the provisions of the Code then the only recourse available with the Adjudicating Authority **was to either reject the Resolution Plan or send it back to CoC for reconsideration**, subject to CIRP period. Thus, the impugned order passed by the Adjudicating Authority modifying the Resolution Plan is in excess of jurisdiction vested with the Adjudicating Authority and it is settled principle of law that an order passed without jurisdiction is nullity and hence, the impugned order is liable to be set aside by this Appellate Tribunal.

Further, the Adjudicating Authority has approved the Resolution Plan in a mechanical manner and has abdicated in its duty to confirm whether the terms of the Resolution Plan are not in violative of provisions of Code or other provisions of law. The Adjudicating Authority in last para of the impugned order has itself recorded that entire resolution plan has not been examined and whichever provision is inconsistent with Section 30(2)(e) of the Code, it shall be treated as not approved by Adjudicating Authority. Relevant paragraph of the impugned order is reproduced herein below:

“249..... for this plan is spread in various schedules running into several pages, since all these aspects have not been brought to the notice of this Bench at the time of making submissions, we hereby held that whichever provisions is inconsistent with Section 30(2)(e) of the Code, it shall be treated as not approved by this Bench.”

It was also stated by the learned counsel for the Appellant that the Hon’ble Apex Court Judgment in the matter of Arcelormittal India Private Limited Vs. Satish Kumar Gupta and Ors. (2019) 2 SCC 1 as stated supra, it has been held that the Resolution Professional is not required to take any decision but merely to ensure that the Resolution Plan is submitted is complete in all respects before they are placed before the CoC who may or may not approve it and the Resolution Professional has committed ex-facie illegal act not to place the Appellant request before the CoC and clearly contravened the aforesaid Hon’ble Apex Court Judgment. The Appellant has stated that two members of CoC i.e. Commercial Bank of Dubai and IDBI Bank have expressed their willingness to consider the proposal of Appellant but Resolution Professional has failed to place it before the CoC so Resolution Professional failed to facilitate to place before the CoC and has assumed the power of CoC this is fundamentally wrong and violative of the provisions of the Code.

7. However, the Respondent No.1 i.e the Erstwhile Resolution Professional has informed that the Resolution Plan has been Successful implemented

and the Successful Resolution Applicant (Respondent No.3) is now in management and control of Asian Colour Coated Ispat Limited, corporate debtor. The learned Sr. Counsel for Respondent No.1 has also submitted the Resolution Plan of the Resolution Applicant was approved with 79.3% voting of CoC on 20.06.2019 and the Applicant seeking approval of Resolution Plan was filed by Resolution Professional under Section 31 of the Code on 10.07.2019. Learned Sr. Counsel has also submitted that Appeal to the Appellate Tribunal under Section 61(3) of the Code can be filed only by "Person Aggrieved" on grounds specified under Section 61(3) of the "Code", the Learned Sr. Counsel has stated that Successful Resolution Plan has been challenged on frivolous grounds and is merely seeking directions to the CoC to consider the proposal of the Appellant and permission to submit a Resolution Plan at a belated stage more than a year. Hence the Resolution Plan on the sole ground is not maintainable. Learned Sr. Counsel has also submitted that there is no provision under the Code under which a Resolution Plan duly approved by the CoC can be kept pending or rejected by the Adjudicating Authority on the basis that another high value plan is likely to be submitted or to be submitted. The Adjudicating Authority has no authority to challenge the Resolution Plan on commercial consideration. The relevant rules and acts provides for the procedure to be followed which starts from initiation of Expression of Interest to submission of Resolution Plan as provided by the relevant

regulations and suddenly in between some plan/ some proposal cannot be considered to jeopardize the system of CIRP and once this is permitted no Resolution Plan will ever be approved by the Adjudicating Authority. Learned Sr. Counsel has also placed Reliance on Chhatisgarh Disstillers Ltd. Vs. Dushyant Dave & Ors. Company Appeal (AT) (Ins) No. 461 of 2019, wherein this Appellate Tribunal dealt with a similar issue and held that the Adjudicating Authority “cannot direct the CoC to consider the second Resolution Plan submitted by the Authority although the second Resolution Applicant is ready to invest more amount in comparison to first Resolution Applicant. The Adjudicating Authority has rightly held that the Adjudicating Authority cannot suo motu direct the CoC to consider new resolution plan and reconsider already approved Resolution Plan”. It was further held that since the prescribed Authority (NCLT/NCLAT) have been endowed with limited jurisdiction as specified in the Code. “the second Resolution Applicant A-1 has failed to satisfy that the Appeal is maintainable on any of the grounds provided in Section 61(3) of the I&B Code.”

A review of the grounds raised by the Appellant would show that in a desperate attempt to show jurisdiction under Section 61(3) of the Code, the Appellant is seeking to challenge the Resolution Plan on the grounds that the Plan does not comply with Section 30(2) of the Code. It is submitted that the Appellant has no locus to either challenge the

provisions of the Resolution Plan or the implementation of the same. Since the Appellant is not a stakeholder, it is in no way an aggrieved party in respect of compliance or non-compliance of the Resolution Plan with Section 30(2) of the Code. Hence, any challenge to the Resolution Plan on these grounds cannot be raised by the Appellant. Without prejudice, it is submitted that the Resolution Plan complies with the provisions of Section 30(2) of the Code.

It is reiterated that the garb of challenging the Resolution Plan and the process followed by the RP, the Appellant is seeking directions to the CoC to consider its proposal, which it has no locus to do. Further, the Adjudicating Authority and the Appellate Authority do not have any jurisdiction to suo-moto direct the CoC to consider a proposal of another entity when the Successful Resolution Plan has already been approved by the CoC and the Adjudicating Authority.

8. The learned counsel for the Respondent No.2 (CoC) has submitted that the Appellant never participated in CIRP nor submitted any Resolution Plan. No EOI was submitted by the appellant within the stipulated timelines, nor does the appellant form part of any prospective resolution applicant list. Regulation 36A(5) of the CIRP Regulations requires that a prospective resolution applicant who meets the requirements under the invitation for EOI may submit its EOI within the time specified in the invite. Further, **Regulation 36A (6) clearly provides that an EOI received after such**

time (as stated above) shall be rejected. [*Amit Gupta vs. Yogesh Gupta and Ors. In Company Appeal (AT) (Ins) No. 903 of 2019; para 16; Appeal against this judgment (CA No.1435 of 2020) dismissed by Hon'ble Supreme Court vide order dated 20.02.2020*] A person who does not participate in the CIRP cannot claim to be aggrieved of the order passed by Adjudicating Authority approving the resolution plan, presented by a duly qualified Resolution Applicant.

The appellant is a rank outsider standing on the sidelines who has attempted to intervene in the Plan Approval proceedings at a much belated stage, by filing an application on 09.07.2020, and that too, for directions to the RP and CoC to consider its proposal, albeit without any proposal at all, for RP to provide access to data room and other information, to enable it to present a plan at such belated stage. Such intervention cannot be permitted at the instance of a busybody, as it has a cascading effect on the resolution of Corporate Debtor, and the very sanctity of the CIRP.

The Appeal filed by the Appellant, as well as the relief sought therein would amply reveal the mala fide intent with which the appeal has been filed. The Appeal filed by the Appellant, under the garb of challenging the Plan Approval Order as being non-compliant with the provisions of Section 30(2), is nothing but an attempt to weasel into the concluded CIRP of the Corporate Debtor and have some potential proposal considered by the CoC, thereby derailing the entire CIRP, which , after, much time and

consideration of all parties involved, has culminated in a resolution plan approved by the CoC in its commercial wisdom as being beneficial for all stakeholders.

It is submitted that the Resolution Plan submitted by the Respondent No.3 is approved by the CoC in its commercial wisdom, which commercial wisdom is non-justiciable. The Appellant cannot seek a mandamus for directing the CoC to revisit its commercial wisdom and consider any plan by the Appellant, at such belated stage.

The Respondent has submitted that in the present case, the Appellant is not even an unsuccessful Resolution Applicant, or for that matter, even a prospective Resolution Applicant. In light of this Appellate Tribunal's decision in Hindustan Oil Exploration Company Vs. Erstwhile CoC of JEKPL Pvt. Ltd (Company Appeal (AT) (Ins) No. 969 of 2020, whereby even an unsuccessful Resolution Applicant was held to have no locus, it is submitted that the Appellant, can by no stretch of imagination have any locus to challenge the plan approval order.

Commercial decisions of the CoC cannot be overturned under the garb of maximization of value.

- This Appellate Tribunal, has time and again given primacy to the commercial wisdom of the CoC. In Shrawan Kumar Agarwal Consortium Vs. Rituraj Steel Private Limited, 2020 SCC online NCLAT 380, held that even for maximization of value of the assets

of the Corporate Debtor, the Adjudicating Authority is not entitled to overturn the business decisions of the Corporate Debtor.

- Chhatisgarh Distilleries Ltd. Vs. Dushyant Dave & Ors., (Company Appeal (AT) (Ins) No.461 of 2019.

Value maximization of the Corporate Debtor has to be in a time bound manner and cannot be at the cost of infraction of due process of law.

9. The learned Sr. Counsel representing Respondent No.3 has submitted that Interups does have locus and the Appeal is not maintainable. Interups is not an aggrieved party in the present case, and therefore cannot maintain an appeal under section 61 of the Code, which allows only “parties aggrieved by the order” to appeal against an order. Interups never submitted an EOI, or a resolution plan during the CIRP to qualify as a prospective resolution applicant. After the CIRP was concluded. Interups submitted a bald proposal, which was rightly rejected by the Resolution Professional as grossly delayed.

Interups submitted a speculative proposal seeking to conduct due diligence on the Corporate Debtor and to formulate a resolution plan, nearly one year after the CIRP was concluded by approval of the JSW Plan by the CoC and application being filed by the Resolution Professional before the adjudicating Authority. Interups neither qualifies as a resolution applicant nor as prospective resolution applicant.

The Hon'ble Supreme Court has held that even a resolution applicant or prospective resolution applicant has no vested right to challenge the decision of the CoC and to have its plan approved or considered by the CoC under the IBC. Further, this Appellate Tribunal has held that any proposals or expression of interest to submit a resolution plan cannot be entertained after the CIRP period has expired. This Appellate Tribunal has also held that RP considering any plan after the deadline, would be illegal and liable to be set aside. The Respondent No.3 submitted that Interups has no interest or locus to challenge the impugned order and accordingly the appeal is not maintainable.

JSW Plan has already been implemented and attained finality.

It is submitted that admission of the appeal or any stay of the impugned order would be prejudicial to JSW and will be against the time bound principle enshrined in the IBC. JSW Plan has already been implemented. On 27.10.2020, Rs. 1,550 Crore has been paid by JSW; existing shares of the corporate debtor have been cancelled and new shares have been issued to JSW; new board of directors have been appointed and JSW has taken over the management of the Corporate Debtor. Consequent actions pursuant to the implementation of the JSW plan such as disclosures to the stock exchange etc. have also been carried out.

If the EOI by Interups is considered after another plan has received CoC approval, then statutory procedure enshrined in Section 30 of the Code will have no meaning. Such practice will be detrimental to the public interest because there will never be finality to resolution process and discouraged resolution applicants to invest time and money into submitted resolution plans. The Code provides for time bound resolution of a company and entertaining and EOI at this stage will make a mockery of the entire scheme of the Code. The Adjudicating Authority has limited jurisdiction to either approve the Resolution Plan or reject the Resolution Plan if it is not compliant with law, no more or no less.

Pendency of avoidance applications does not vitiate the approved JSW Plan.

Interups has contended that CA 613 (PB)/ 2019 titled Mr. Kuldeep Kumar Bassi Vs. Mr. Pradeep Aggarwal & Ors. (CA 613) which includes time exclusion had to be decided before the plan approval application.

Interups reliance on Delhi High Court's Judgment dated 26.11.2020 in Venus Recruiters Private Limited Vs. Union of India & Ors. (W.P No. 8705 of 2019) ("Delhi High Court Judgment") is misplaced, as it has not held that a resolution plan approved by an Adjudicating Authority will be vitiated / liable to be set aside if an avoidance application is kept pending while the resolution plan approval application is decided. Further in para 89 of the Delhi High Court Judgment it has been held that "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”. IN the present case such a provision has been provided for in the JSW Plan. The same is reproduced below:

“1.12 (o) Reversal of preferential transactions, undervalued transactions, extortionate transactions and fraudulent trading:

... The reversal of these transactions by the NCLT upon submission of the resolution plan to the NCLT for its approval, will be to the benefit of the Company and the Company will not be required to transfer any such amounts/assets to the creditors. Any claim from any counter party of the aforesaid transactions (in further) arising due to reversal of such transactions shall stand extinguished.

The Resolution Professional shall conduct and pursue the litigation for reversal of such transactions till their final disposal (including any appeals). The costs of such litigation for the Resolution Professional shall be borne by the Resolution Professional.

The decision on CA 613/2019 is not a pre-requisite for approval of resolution plan. Therefore, the Delhi High Court Judgment is inapplicable to the present case.

V. CIRP has come to an end.

The Adjudicating Authority in paragraph 198, has held that the Khapoli Land issue in CA 613/2019 will be heard with other avoidance applications. However, the prayer for extension of time is separate from the prayer regarding Khapoli Land issue, and the issue does not survive once the CIRP has been concluded with passing of the resolution plan and approval of the same by the Adjudicating Authority and COC.

The interim order of the Adjudicating Authority whereby CIRP was permitted to be continued beyond 16.04.2019, has merged with the final order i.e. impugned order and the CIRP has concluded as per the doctrine of merger of interim order with the final order.

Accordingly, the Appeal should be dismissed at the threshold.

10 We have carefully perused the submission made by the learned Sr. Counsel for the Appellant and the Respondents. As observed by this Appellate Tribunal on 17.12.2020 to initially consider the issue of maintainability of appeal and *locus standi* of Appellant to question the approval of Resolution Plan of Successful Resolution Applicant, we are first taking up this issue after hearing the learned Sr. counsels for the Appellant and learned Sr. Counsel for Respondent No.1 (Resolution Professional) & Respondent No. 3 (Successful Resolution Applicant) and learned counsel for the CoC on 11.02.2021 and the Written submission made by the parties.

Section 61(1) authorizes “any person aggrieved by the order of Adjudicating Authority under this part” can prefer an appeal before the Appellate Tribunal.

The **'part'** here refers to Part -II of the Code which comprises CIRP and Liquidation Process. Here what we observed that "any person aggrieved" comprises of stakeholders in the process of CIRP and Liquidation Process. The Appellant is stranger to the CIRP till 11th June, 2020. On 12.06.2020 the Appellant for the first time expressed its interest to submit a Resolution Plan for the Asian Colours Coated Ispat Ltd, this email was marked to all CoC members (*Annexure A-11 @pg. 209 Vol2*). No financial proposal was provided in the said letter.

RP issued Form G initially on 01.10.2018, revised on 14th December 2018. EoI was received from 12 Resolution Applicants, out of which 11 were found eligible. Last date for receipt of Resolution plan was 08th March 2019. Only one resolution plan was received from successful Resolution Applicant, whereas Appellant has asked for EOI on 12th June 2020 when application seeking approval of Resolution Plan was already filed by RP on 10th July, 2019 under section 31 of Code after 'Committee of Creditors' (CoC) Approval on 28th June 2019 with 79.3% voting share. All this reflect that Appellant wanted to enter fray nearly one year after CoC approval of Resolution Plan; it neither qualifies as Resolution Applicant nor as prospective Resolution Applicant or successful or unsuccessful Resolution Applicant and hence cannot be termed as aggrieved party. Appellant may be termed as an outsider standing on the sidelines. Corporate Insolvency Resolution Process is time bound, value maximization has also to be in timebound manner. All this lead

us to sum up that Appellant is neither an aggrieved party in the process of CIRP nor he has a locus standi to file the appeal.

Hence, Appeal is held to be not maintainable and Appellant has no locus to maintain it. The Appeal is accordingly dismissed.

Pending application, if any, stands disposed of.

No order as to costs.

**[Justice Bansi Lal Bhat]
Acting Chairperson**

**[Dr. Ashok Kumar Mishra]
Member (Technical)**

**[Dr. Alok Srivastava]
Member (Technical)**

Date of Order 15th March, 2021

RK