

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI
Company Appeal (AT) (Insolvency) No. 689 of 2020

[Arising out of Order dated 24th July, 2020 passed by the National Company Law Tribunal, Division Bench, Delhi Bench III in CA-441/ND/2019 filed in CP No.(IB)/22/ND/2018]

IN THE MATTER OF:

1. Naresh Kumar Sharma

Ex-Management of the Shekhar Resorts Ltd.
J-1817, GF, Chittranjan Park,
New Delhi – 110019.

2.Shri Chandra Shekar Sharma

J-1817, GF, Chittranjan Park,
New Delhi – 110019.

3. Shri K. K. Sharma

J-1817, GF, Chittranjan Park,
New Delhi – 110019.

...Appellants

Vs

1. Shekhar Resorts Ltd.,

Through Mr. Vikram Kumar, IRP
Having its Registered Office at:-
J 6A, Kailash Colony,
National Capital Territory of Delhi,
New Delhi - 110048.

2. NCJ Infrastructure Pvt. Ltd.,

Having registered office at
Basement Floor, D-5/7,
Vasant Vihar,
New Delhi – 110057.

...Respondents

Present:

For Appellants: Mr. Virender Ganda, Senior Advocate with Mr. Rakesh Kumar, Ms. Preeti Kashyap and Ms. Akansha Kaul, Advocates.

For Respondents: Mr. A. S. Chandhiok, Senior Advocate with Ms. Priya Agarwal, Mr. Viren Sharma, Ms. Sweta Kakad and Mr. Abhishek Anand, Advocates for Respondent No.1.

Mr. Arun Kathpalia, Senior Advocate with Mr. Abhishek Garg, Advocate for Respondent No.2.

J U D G M E N T

BANSI LAL BHAT, J.

This appeal has been preferred by the suspended Board of Directors of 'M/s Shekhar Resorts Limited' (Corporate Debtor) assailing order dated 24th July, 2020 passed in CA-441/ND/2019 filed in CP No.(IB)/22/ND/2018 by the Adjudicating Authority (National Company Law Tribunal) Division Bench, Delhi, Bench III, by virtue whereof Resolution Plan submitted by Respondent No. 2 - 'M/s NCJ Infrastructure Pvt. Ltd.', approved by the Committee of Creditors in its 15th Meeting convened on 4th June, 2019 with a voting percentage of 100%, was approved by the Adjudicating Authority. The approval was accorded by the Adjudicating Authority at the instance of Resolution Professional who had filed application under Section 31(1) of the

Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'I&B Code') while no application under Section 60(5) of the I&B Code was pending consideration before the Adjudicating Authority.

2. Before advertng to the factual matrix of the case in hand, it is apt to mention that the Resolution Plan submitted by Respondent No. 2 (Resolution Applicant) has been approved by the Committee of Creditors with 100% voting share, Performance Bank Guarantee as required under the Regulations has been deposited by the Resolution Applicant and all statutory and regulatory compliances have been made. The main issue raised in this appeal is in regard to the valuation of assets of the Corporate Debtor and same will be adverted to as we proceed further.

3. Advertng to the factual position as emerging from record it appears that CP No. 22/ND/2018 under Section 7 of the I&B Code came to be filed by 'Oriental Bank of Commerce' (Financial Creditor) seeking initiation of Corporate Insolvency Resolution Process against 'Shekhar Resorts Pvt. Ltd.' (Corporate Debtor) for default in regard to payment of financial debt amounting to Rs.19,67,64,134/- including interest. The Adjudicating Authority, in terms of order dated 11th September, 2018, admitted the application, appointed Mr. Vikram Kumar as Interim Resolution Professional (IRP) and slapped moratorium against the assets of the Corporate Debtor. The Corporate Insolvency Resolution Process proceeded with public announcement being made by the Interim Resolution

Professional and Expressions of Interest invited from Prospective Resolution Applicants. 22 Prospective Resolution Applicants came forward with Expression of Interest received from (1) 'Alchemist ARC' and (2) 'NCJ Infrastructure Pvt. Ltd.' alongwith demand drafts of Rs.50 Lakh. As the timelines were extended, 5 Prospective Resolution Applicants submitted Expression of Interest. The two Resolution Plans emanating from 'M/s NCJ Infrastructure Pvt. Ltd.' and 'M/s Krishna Constructions' were subjected to evaluation by the consultants. After analysis and evaluation, the Committee of Creditors approved the Resolution Plan submitted by 'M/s NCJ Infrastructure Pvt. Ltd.' (Respondent No. 2 herein). This happened in 15th meeting of Committee of Creditors convened on 4th June, 2019 with a voting percentage of 100% through e-voting. On consideration of the application filed by Resolution Professional under Section 31(1) of I&B Code, the Adjudicating Authority approved the Resolution Plan of Respondent No. 2 in terms of the impugned order which has been assailed in this appeal.

4. Appellants, being the ex-management of the Corporate Debtor, have assailed the impugned order on various grounds. Their primary objection to the approved Resolution Plan before the Adjudicating Authority was that the Resolution Plan of Respondent No. 2 offered Rs.143 Crores whereas the actual value of the properties of Corporate Debtor was Rs.490 Crores. According to Appellants, the assets of the Corporate Debtor comprises of three properties including Hotel Orient Taj at Fatehabad Road, Agra and some plots of land in Mauja Basai Mustakil, Agra and Greater Noida. It was

claimed that the Corporate Debtor has ownership of the above named five star Hotel at Agra in addition to having two more valuable properties and the Appellants had sought the valuation reports in relation thereto from Respondent No. 1 during the Corporate Insolvency Resolution Process and filed the applications in this regard. However, same were rejected by the Adjudicating Authority vide order dated 26th August, 2019 against which Company Appeal (AT) (Insolvency) No. 953 of 2019 was preferred in this Appellate Tribunal which came to be disposed of vide order dated 16th September, 2019 with direction to the Adjudicating Authority to look into the Hotel operation and valuation of the properties of the Corporate Debtor. The Adjudicating Authority passed orders dated 19th November, 2019 and 4th February, 2020 for ascertaining the valuation of such properties. Before consideration of Resolution Plan, the Adjudicating Authority was to examine the issue of valuation of properties. Meanwhile there was outbreak of COVID -19, the matter was listed on 8th June, 2020 and then adjourned to 22nd June, 2020. The Adjudicating Authority did not entertain the plea of Appellants for treating the matter urgent for hearing through virtual mode and put the matter for consideration of Resolution Plan on 3rd July, 2020, on which date it was pointed out that the performance guarantee given in the Resolution Plan had expired. The Adjudicating Authority directed the Respondent No. 1 to rectify the defects, the matter was adjourned to 20th July, 2020 though the order uploaded on 3rd July, 2020 stated that the order was reserved. Meanwhile, Appellants filed I.A. No. 2388 of 2020. The Appellants joined the virtual hearing on 20th July, 2020 when the

Adjudicating Authority observed that the matter had been reserved on 3rd July, 2020. The application for oral hearing was not listed for consideration and the same was projected before the Adjudicating Authority. However, on 24th July, 2020, despite circulating an urgency letter by Appellants, the impugned order came to be pronounced.

5. Learned counsel for Appellants submits that the Resolution Plan is approved of Rs.143 Crores while as per circle rate value of the property is Rs.410 Crores. It is further submitted that the actual outlay is only of Rs.105 Crore and rest of the Resolution Plan is window dressed. It is further submitted that the fair value has been ascertained at Rs.157 Crores while the liquidation value has been ascertained at Rs.125 Crores. Therefore, it is pointed out, that the value of Resolution Plan of Respondent No. 2 is Rs.50 Crore less than the fair value of Rs.157 Crore. Learned counsel for Appellants further submits that the impugned order cannot be sustained as the same has been passed by one member quorum while at the hearing there was quorum of two judges. It is submitted that the Appellants were not provided opportunity of hearing as regards rectification of defects by Resolution Professional. It is further submitted that this Appellate Tribunal is required to render its finding on the aspect of the Resolution Plan satisfying all criteria of Section 61(3) (i) to (v). Harping upon the issue of valuation as the main ground of appeal, it is submitted that the impugned order has been passed without taking complete note of the comparison of the fair value, liquidation value and the actual outlay in Resolution Plan. It

is further submitted that 100% claims of the Financial Creditors comprising the Committee of Creditors have been satisfied in terms of the approved Resolution Plan consuming about Rs.90 Crores, while the total liability of Corporate Debtor did not exceed Rs.120 Crores. If the assets of the Corporate Debtor had been sold at correct valuation price of Rs.410 Crores, Appellants would have got substantial surplus amount being the stakeholder of Corporate Insolvency Resolution Process. Thus, the Appellants have suffered prejudice.

6. Per contra it is argued on behalf of Respondent No. 1 – Resolution Professional that the appeal is not maintainable and the Appellants have failed to demonstrate as to how the Resolution Plan of Respondent No. 2 is in contravention of law or that there has been any material irregularity in exercise of powers by the Resolution Professional during CIRP. It is further submitted that in terms of law laid down in **‘Maharashtra Seamless Limited vs. Padmanabhan Venkatesh & Ors.’ (Civil Appeal No. 4242 of 2019) decided on 22nd January, 2020** challenge by Appellants to the liquidation value of Corporate Debtor cannot be sustained and the Appellants cannot also question the commercial wisdom of Committee of Creditors. It is further pointed out that the Appellants did not cooperate with the Resolution Professional during entire CIRP and it was at the instance of Resolution Professional that the Adjudicating Authority had to issue bailable warrants against the Appellants for seeking their cooperation. As regards, the passing of impugned order by a single bench, it is submitted

that the Bench hearing the matter was reconstituted by the Hon'ble President NCLT and Special Bench comprising of Shri Mohd. Sharief Tariq, Hon'ble Member Judicial was reconstituted, who passed the impugned order after hearing the parties.

7. Respondent No. 2 has reiterated the arguments advanced on behalf of Respondent No. 1. It is further submitted that the law has been settled by the Hon'ble Apex Court in '**Maharashtra Seamless Limited**' (*supra*) as regards valuation. It is pointed out that in SARFAESI proceedings initiated by the Financial Creditor – Oriental Bank of Commerce, way back in 2016, auction was conducted for the Hotel Property with reserve price fixed at Rs.110 Crores but not even a single buyer came forward at such reserved price. It is further pointed out that the Appellants have throughout tried to obstruct the entire Corporate Insolvency Resolution Process and failed to provide documents and information. The performance guarantee, bank guarantees had been provided to Resolution professional well within time, the Resolution Plan was compliant with provisions of I&B Code and opportunity was given to Appellants to file response to the additional affidavit filed by Resolution Professional on 9th July, 2020 but they did not file any response. However, their submissions were heard and considered. It is further pointed out that the Resolution professional has filed application under Section 66 of I&B Code for fraudulent transactions against the Appellants which are still pending before the Adjudicating Authority. The Resolution Plan of Respondent No. 2 approved by the

Adjudicating Authority takes into account the interest of all stakeholders with total amount of Rs.143.5 Crores offered by the Resolution Applicant in the Resolution Plan which exceeds the claims admitted by the Resolution Professional. It is lastly pointed out that 100% payment to all Financial Creditors, Operational Creditors, Workmen and Employees and even to Other Creditors who had not submitted their claims have been provided for in the Resolution Plan.

8. Having heard learned counsels for the parties as regards maintainability of the appeal, we are of the considered opinion that the appeal does not raise any question for determination with reference to grounds of appeal qua approval of a Resolution Plan as contemplated under Section 61(3) (i) to (v) of the I&B Code. It is not the Appellants' case that the Resolution Plan is in conflict with any extant law or that there has been any material irregularity at the hands of Resolution Professional during the conduct of Corporate Insolvency Resolution Process. The record, on the contrary, portrays a very dismal and distressing picture of the Appellants, being in ex-management of the Corporate Debtor, who have been playing truant and holding back while their cooperation was sought by the Resolution Professional in carrying forward the Corporate Insolvency Resolution Process. It is not in controversy that at one stage the Adjudicating Authority had to issue bailable warrants against the Appellants for thwarting the Corporate Insolvency Resolution Process in not extending cooperation to the Resolution Professional who had to file application before

the Adjudicating Authority praying for adopting of legally permissible coercive methods to compel obedience by the Appellants. The Committee of Creditors found the Resolution Plan emanating from Respondent No. 2 compliant in all respects, providing for the interests of all stakeholders as also the Resolution Costs and meeting the criteria specified by the IBBI in regard to various parameters including financial matrix, feasibility and viability. The Adjudicating Authority, on consideration of the application of the Resolution Professional under Section 31(1) of the I&B Code, found the Resolution Plan compliant with all statutory and regulatory parameters and providing for all stakeholders besides, not being in conflict with any extant law. Approval of Resolution Plan is a business decision taken by the Committee of Creditors with requisite majority based on their commercial wisdom and the same is non-justiciable. While dealing with approval of Resolution Plan, the Hon'ble Apex Court in '**K. Shashidhar Vs. Indian Overseas Bank and Ors.**' (Civil Appeal No. 10673 of 2018) decided on **5th February, 2019 (2019 SCC Online SC 257)** observed that the commercial wisdom of the Committee of Creditors has been given paramount status without any judicial intervention for ensuring completion of the stated processes within the timelines prescribed by the I&B Code. It was further observed that there is an intrinsic assumption that Financial Creditors are fully informed about the viability of the Corporate Debtor and the feasibility of the proposed resolution plan and they act on the basis of thorough examination of the proposed resolution plan and assessment made

by their team of Experts. In para 44 of the judgment, the Hon'ble Apex Court observed as under:-

“44. At best, the Adjudicating Authority (NCLT) may cause an enquiry into the “approved” resolution plan on limited grounds referred to in Section 30(2) read with Section 31(1) of the I&B Code. It cannot make any other inquiry nor is competent to issue any direction in relation to the exercise of commercial wisdom of the financial creditors be it for approving, rejecting or abstaining, as the case may be. Even the inquiry before the Appellate Authority (NCLAT) is limited to the grounds under Section 61(3) of the I&B Code.”

As noticed hereinabove no irregularity, much less a material irregularity at the hands of Resolution Professional in Corporate Insolvency Resolution Process or infraction of any of the grounds enumerated under Section 61(3) (i) to (v) have been raised in this appeal to dislodge and disturb the commercial wisdom of Committee of Creditors in approving the Resolution Plan of Respondent No. 2 nor has the Appellant been able to establish any lapse on the part of Adjudicating Authority in examining and determining that the approved Resolution Plan did in any manner not conform to conditions under Section 30(2) of the I&B Code and that the

same was in conflict with any extant law. We would thus have no hesitation in holding that the appeal is not maintainable

9. As regards quorum, suffice it to say that a Special Bench of Judicial Member had been reconstituted by the Hon'ble President, NCLT during outbreak of COVID 19 for hearing of the matter through virtual mode and the matter has been heard by the Special Bench culminating in passing of the impugned order. Objection raised to the constitution of the Bench as also same not being an urgent matter has to be repelled, regard being had to the timelines prescribed under I&B Code and justice being accessible.

10. As regards valuation it is apt to notice that the fair value being ascertained at Rs.157.12 Crore and the liquidation value being ascertained at Rs.125.92 Crore, respectively, Respondent No. 2 offered Rs.143.50 Crore which in the opinion of Committee of Creditors was the best plan providing for satisfaction of claims of all the stakeholders and being viable and feasible, all aspects of the matter having been taken into consideration by the Committee of Creditors based on their commercial wisdom, which is not justiciable either before the Adjudicating Authority or before this Appellate Tribunal. The Code does not provide that the value given by the Resolution Applicant should match the fair value or the liquidation value. The law in this regard has been settled in **'Maharashtra Seamless Limited' (Supra)**. This is apart from the fact being pointed out by the Respondents that even in 2016 in SARFAESI Proceedings not a single buyer offered bid even at the

reserve price of Rs.110 Crores. On this aspect of the matter, it would be profitable to refer to the observations of Hon'ble Apex Court in **'Maharashtra Seamless Limited' (Supra)**.

"26. No provision in the Code or Regulations has been brought to our notice under which the bid of any Resolution Applicant has to match liquidation value arrived at in the manner provided in Clause 35 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. This point has been dealt with in the case of Essar Steel (supra). We have quoted above the relevant passages from this judgment.

27. It appears to us that the object behind prescribing such valuation process is to assist the CoC to take decision on a resolution plan properly. Once, a resolution plan is approved by the CoC, the statutory mandate on the Adjudicating Authority under Section 31(1) of the Code is to ascertain that a resolution plan meets the requirement of sub-sections (2) and (4) of Section 30 thereof. We, per se, do not find any breach of the said provisions in the order of the Adjudicating Authority in approving the resolution plan.

28. *The Appellate Authority has, in our opinion, proceeded on equitable perception rather than commercial wisdom. On the face of it, release of assets at a value 20% below its liquidation value arrived at by the valuers seems inequitable. Here, we feel the Court ought to cede ground to the commercial wisdom of the creditors rather than assess the resolution plan on the basis of quantitative analysis. Such is the scheme of the Code. Section 31(1) of the Code lays down in clear terms that for final approval of a resolution plan, the Adjudicating Authority has to be satisfied that the requirement of sub-section (2) of Section 30 of the Code has been complied with. The proviso to Section 31(1) of the Code stipulates the other point on which an Adjudicating Authority has to be satisfied. That factor is that the resolution plan has provisions for its implementation. The scope of interference by the Adjudicating Authority in limited judicial review has been laid down in the case of Essar Steel (supra), the relevant passage (para 54) of which we have reproduced in earlier part of this judgment. The case of MSL in their appeal is that they want to run the company and infuse more funds. In such circumstances, we do not think the Appellate Authority ought to have interfered with the order 35 of the*

*Adjudicating Authority in directing the successful
Resolution Applicant to enhance their fund inflow upfront.”*

11. On consideration of the matter in entirety, we find that the appeal is not maintainable and the Appellants have no case on merit. In our considered opinion, the appeal deserves to be dismissed at the very threshold stage and proceedings snipped at the very outset. The appeal is accordingly dismissed.

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

**[Justice Jarat Kumar Jain]
Member (Judicial)**

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

NEW DELHI

14th September, 2020

AM