

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 1351 of 2019

[Arising out of Final Order dated 20th November 2019 passed by the Hon'ble Adjudicating Authority, National Company Law Tribunal, Kolkata Bench, Kolkata in C.A. (IB) No. 1131 of 2019, C.P (IB) No.596 of 2017 filed under Section 9 of the Insolvency and Bankruptcy Code, 2016]

IN THE MATTER OF:

QVC Exports Pvt. Ltd.

Having its Registered Office at:

6, Dr. Meghnad Saha Sarani

2nd Floor, Kolkata – 700 026

...Appellant

Versus

1. United Tradeco FZC

Having its office at:

P.O. Box No.52258, E-100F-35

Hamriyah Free Zone Sharjah

United Arab Emirates

In India through Constituted Attorney

Sanjay Agarwal

Residing at 251/1, Nagendra Nath Road

Kolkata – 700 028

2. Anish N. Nanavaty, Resolution Professional

Deloitte Touche Tohmatsu India LLP

27th Floor, Tower 3,

India Bulls Finance Centre

Elphinstine West, Mumbai - 400013

...Respondents

Present:

For Appellants: Shri Abhijeet Sinha, Shri Aditya Shukla and Shri Nitin Kumar Chahar, Advocates

For Respondents: Shri Piyush Singh, Advocate

J U D G M E N T

[Per; V. P. Singh, Member (T)]

This appeal emanates from the Order dated 20th November 2019 passed by the Hon'ble Adjudicating Authority, National Company Law Tribunal,

Kolkata Bench, Kolkata in C.A. (IB) No. 1131 of 2019, C.P (IB) No.596 of 2017 by which the Adjudicating Authority has allowed the Application for rectification of the Resolution Plan already approved and implemented.

Appellant submits that the Company Cosmic Ferro Alloys Limited was admitted under the Corporate Insolvency Resolution Process (in short 'CIRP') on 16th January 2017. The Appellant and the Respondent No.1 had jointly submitted the Resolution Plan for taking over the Company. The same was approved unanimously by the Committee of Creditors (in short 'CoC), and after that, the Resolution Plan was further approved by the Adjudicating Authority vide its order dated 11th October 2018.

Given the approved Resolution Plan, Appellant QVC Exports Private Limited was to hold 34% of the paid-up equity shares, of and in the Company, the Cosmic Ferro Alloys Limited and the Respondent No.1 was to hold 51% paid-up equity shares and 15% of the paid-up equity shares were to be allotted to a Trust namely Cosmic Ferro Alloys ESOP Trust. The approved Resolution Plan got executed, and the shares were allotted as per the terms of the approved Plan. All money in respect of 34% shares were paid by the Appellant and is the rightful owner of 34% paid-up equity shares of and in the Company.

The Board Resolution passed by the Respondent No.1 Company admittedly states that the Respondent No.1 has purchased 51,00,000 equity shares of and in the company, Cosmic Ferro Alloys Limited, by investing Rs.31,60,00,000/-, whereby the Respondent No.1 has purchased such shares on premium @ Rs.51.96 per share, over and above the face-value.

Appellant further contends that the Company Application was filed before the Adjudicating Authority to make rectification in the approved Resolution Plan, after 13 months of the completion and conclusion of the CIRP. The Adjudicating Authority allowed the Company Application by the impugned order, resultantly reducing the shareholding of the Appellant to 10% from 34%. This Appeal is preferred on grounds stated as under:-

- (a) The impugned order is perverse, erroneous and without cogent reasons and is liable to be set aside.
- (b) The Adjudicating Authority had no jurisdiction to entertain an application after a lapse of 13 months, after the completion of CIRP, even after the approval and implementation of the Resolution Plan.
- (c) The Adjudicating Authority had no jurisdiction to alter a Joint Resolution Plan submitted by the Appellant and the Respondent No.1, as co-applicants in the Resolution Process, without there being any consent on the part of the Appellant.

The Respondent No.1, after having agreed to 34,00,000 shares allotted to the Appellant, and after such shares were issued, cannot now turn around and contend otherwise. The respondent No.1 is estopped from contending that the Appellant and its nominees do not have 34,00,000 shares. The following issue arises for our consideration:

- (i) Whether the Hon'ble Adjudicating Authority had jurisdiction to entertain an application for rectification of Resolution Plan and making substantial changes in the Plan, after a lapse of 13 months of the completion of CIRP, even after the approval and implementation of the Resolution Plan?
- (ii) Whether the Hon'ble Adjudicating Authority had the jurisdiction to alter a Resolution Plan submitted by the appellant and the Respondent No.1 as co-applicants in the Resolution Process, without there being any consent on the part of the Appellant?
- (iii) Whether substantial rectification of the Resolution Plan resulting in a change in shareholding of the shareholders could be brought under the purview of the typographical/arithmetic/clerical error?

We have heard the arguments of the Learned Counsel for the parties and perused the record.

Admittedly, that the 'Corporate Debtor' namely Cosmic Ferro Alloys Limited was put under CIRP and the Adjudicating Authority vide its order dated 11th October 2018 approved the Resolution Plan with regards to the allotment and transfer of shares by the approved plan. The relevant part of the Resolution Plan is as under:

“Transfer of Shares from Existing Equity Shareholders – As the value payable to shareholders of the corporate debtor is “NIL”, the Equity Shares will be extinguished, and new Shares will be issued to the New Promoters as under:

It is the intention of the Resolution Application to own atleast 85% of the shareholding in the Corporate Debtor. The balance shareholding will be held by Cosmic Ferro Alloys Limited Employee Stock Option Trust by way of 15% of Equity to be issued to New Directors, KMPs, employees of the company based on their performance or as joining bonus @ Rs.0.50 per share within next 4 years and vetted within 1 year of allotment on approval of this Resolution Plan as stated under-

On approval of the Resolution Plan and Payment of Upfront amount of Rs.99.74 Crores, the Shareholding of the Entire Shareholders, i.e. 1,04,08,529 shares of Rs.10 each will be extinguished, and 1,00,00,000 shares with Face Value of Rs.10 each shall be issued as stated under-

<i>Name of the Shareholder</i>	<i>Quantity (Nos)</i>	<i>Paid-up Value (lacs)</i>	<i>Premium Paid (lacs)</i>	<i>Issued at Discount</i>	<i>Total Value Paid (In lacs)</i>	<i>% of Share Holding</i>	<i>Remarks</i>
<i>United Tradeco FZC</i>	<i>5100000</i>	<i>510.00</i>	<i>2,650.00</i>		<i>3,160.00</i>		
<i>QVC Exports Pvt. Ltd.</i>	<i>3400000</i>	<i>340.00</i>			<i>340.00</i>		
<i>Cosmic Ferro Alloys Limited ESOP Trust</i>	<i>1500000</i>	<i>150.00</i>		<i>(135.00)</i>	<i>15.00</i>		<i>Stock Options to Employees</i>
	<i>10,00,0000</i>	<i>1000,00</i>	<i>2,650.00</i>	<i>(135.00)</i>	<i>3,515.00</i>	<i>100%</i>	

Stock Options will be issued and subscribed @ Rs.0.50 per Share within four years of NCLT Approval of this Resolution Plan.

Note:- Regulation 37(1)(i) of the CIRP Regulations 2016 provides for inclusion in any Resolution Plan as follows “Issuance of Securities of the Corporate Debtor, for cash, Property, Securities or in exchange of Claims interest.”

The combined shareholding of the Resolution applicants as per the approved Resolution Plan was 85%, for which consideration has been paid

by both the Resolution applicants accordingly. M/s United Tradeco FZC has paid Rs.3160 lacs, whereas QVC Exports Private Limited has paid 340 lacs.

The Adjudicating Authority has mentioned in the order that **“the percentage of holding of both parties stands at 75% and 10% which is not at all disputed”**.

Thus, the number of shares according to these percentage ,which needs to be issued and allotted to M/s United Tradeco FZC and QVC Exports Private Limited respectively.

The Adjudicating Authority had further stated that:

“4. Considering the submission made by both the sides and in the background of undisputed fact of percentage of share holding of both the parties individually there appears to have occurred a mistake in quantity of shares to be allotted to these parties. It is further to be noted that in the Share Transfer Agreement dated 31st July, 2019 executed between the parties to this application it has been specifically mentioned that there have been certain clerical and/or arithmetical and/or numerical mistakes arising from the accidental slip or omission at the middle person of page 41 of such resolution due to which various disputes and/or difference arose between the parties which have been resolved and settled upon conciliation in the manner as mentioned hereafter. Copy of this agreement is placed at page 20 to 33 of the reply affidavit and relevant pages 22. Thus, the resolution plan stands corrected in the following manner and the revised chart is reproduced as under:

Name of the Shareholder	Quantity (Nos)	Paid-up Value	Premium Paid	Issued at Discount	Total Value Paid	% of Share Holding	Remarks
United Tradeco FZC	7500000	750	2,410		3160	75%	

<i>QVC Exports Pvt. Ltd.</i>	1000000	400	240		340	10%	
<i>Cosmic Ferro Alloys Limited ESOP Trust</i>	1500000	150		(135)	15	15%	<i>Stock Options to Employees</i>
	100,00,000	1000	2,650	(135)	3,515	100%	

On perusal of the alleged rectification allowed by the Adjudicating Authority, it appears that the shareholding of M/s United Tradeco FZC has been substantially increased, i.e. from 51,00,000 shares to 75,00,000, and contrary to this the shareholding the Appellant, QVC Exports Private Limited, reduced to 10,00,000 shares from 34,00,000 shares. The portion of equity allotted to Employees of the Cosmic Ferro Alloys Limited remains the same. The Adjudicating Authority has observed that joint shareholding of both the Resolution Plan, was 85% for which the consideration has been paid for by both the parties accordingly. Respondent No 1, M/s United Tradeco FZC has paid Rs.3,160 lacs, and the appellant, QVC Exports Private Limited has paid Rs 340 lacs. Considering the investment of the Resolution Plan, the Adjudicating Authority has stated in the order that mistake occurred in the resolution plan which was approved by this adjudicating authority vide order Dt 11.10.2018. The resolution plan stands corrected.

Accordingly, the equity shares which needs to be issued and allotted to the Respondent No 1, M/s United Tradeco FZC and appellant, QVC Exports Private Limited, respectively work out to 75,00,000 and 10,00,000.

The above presumption is without any basis, as the Adjudicating Authority was having no role in interfering in terms of the approved

Resolution Plan, which was executed 13 months back. The Adjudicating Authority has failed to consider that Resolution Plan was submitted jointly by Applicant and Respondent No.1 and the Rectification Application, for amendment in approved Resolution Plan has been filed by only one of the Resolution Applicant, i.e. Respondent No.1. When approved Resolution Plan was submitted by Applicant and Respondent No.1 jointly, then one party had no right to move the rectification of the said Resolution Plan, without the consent of another party. But the Adjudicating Authority has allowed this Application without any cogent reasons.

It is pertinent to mention that the joint Resolution Plan was approved unanimously by the CoC and after that, the same was approved by the Adjudicating Authority vide its order dated 11.10.2018. After that, the approved Resolution Plan was implemented, and shares were allotted as per the terms of the approved Resolution Plan. Resultantly, M/s United Tradeco FZC (Respondent No.1) was allotted 51,00,000 equity shares. After that on 25th October 2018 in the Board meeting of Respondent No.1, It was resolved that in term of the provisions of the approved Resolution Plan, the Company needs to infuse a sum of Rs.316 million towards the acquisition of 51,00,000 equity shares of Rs.10 each at a premium of Rs.51.96. The copy of the Board Resolution is annexed with the Annexure A1 of the Appeal. It shows that the Board of Respondent No. 1 company had also acknowledged and approved the allotment of 51,00,000 shares in terms of approved Resolution Plan @ 51.96 per shares.

After the Board Resolution dated 25th October 2018 of the Respondent No.1 had no right to say that there was a typographical/clerical error in the Resolution Plan. After the acknowledgement by the Board of the respondent No1 company, there was no justification to allege that due to typographical error, 51,00,000 shares is erroneously typed, instead of 75,00,000 shares in the approved Resolution Plan, in the account of Respondent No 1.

It is also important to point out that the 4th Monitory Committee Meeting, held when the Appellant was allotted 34,00,00 equity shares of and in the Company Cosmic Ferro Alloys Limited. Copy of the minutes of the Monitory Committee Meeting is annexed with the Appeal which shows that the Monitory Committee in its meeting dated 21st June 2019 resolved that all disputes among parties were deliberated and resolved that the Appellant was to sell its 34% share, of and in the company Cosmic Ferro Alloys for Rs.6.5 crores plus one crore subject to the valuation. It is also on record that on 31st July 2019 Share Transfer Agreement was executed, but the same was never given effect to, as there were a few preconditions. After the execution of the Share Transfer Agreement, the Respondent No.1 changed the course of action and filed company application for rectification of the resolution plan before the Adjudicating Authority. The implication of the order of the Adjudicating Authority has caused a substantial reduction of the shareholding of the Appellant from 34% to 10% in the company Cosmic Ferro Alloys.

It is important to mention that Hon'ble Supreme Court has not permitted the change in resolution plan after attaining the finality. In

case of *Rahul Jain v. Rave Scans (P) Ltd.*, (2019) 10 SCC 548: 2019 SCC OnLine SC 1447 at page 553 Hon'ble Supreme Court held that:

16. In the present case, it is noticeable that no doubt, Hero was provided with 32.34% of its admitted claim as it has dissented with the plan. On the other hand, Tata Capital Financial Services Ltd. was provided with 75.63% of its admitted claim; other financial creditors (Indian Overseas Bank, Bank of Baroda and Punjab National Bank) were provided with 45% of their admitted claims. **Given that the resolution process began well before the amended regulation came into force (in fact, January 2017) and the resolution plan was prepared and approved before that event, the wide observations of NCLAT, requiring the appellant to match the pay-out (offered to other financial creditors) to Hero, were not justified.** The Court notices that the liquidation value of the corporate debtor was ascertained at Rs 36 crores. Against the said amount, the appellant offered Rs 54 crores. **The plan was approved and, except the objections of the dissenting creditor (i.e. Hero), the plan has attained finality.** Having regard to these factors and circumstances, it is held that NCLAT's order [*Hero Fincorp Ltd. v. Rave Scans (P) Ltd.*, 2019 SCC OnLine NCLAT 584] and directions were not justified. They are hereby set aside; the order of NCLT is hereby restored.

It is important to point out that this Tribunal in Company Appeal No.509 of 2018 in case of R G G Vyapar Pvt Ltd v Arun Kumar Gupta this

Tribunal has held that has held that the Adjudicating Authority has no jurisdiction to reopen resolution process under section 31 of the Code.

But in the instant case, the Adjudicating Authority after approval and execution of the Resolution Plan, and after a lapse of 13 months allowed the rectification in the Resolution Plan. The Adjudicating Authority failed to consider that the approved Resolution Plan is a joint Resolution Plan by the Appellant and Respondent No.1 whereas the Application for rectification of the Resolution Plan is moved only by Respondent No.1. However, the Adjudicating Authority had no jurisdiction under Section 31 to allow the rectification in the approved Resolution Plan. It is pertinent to mention that Rule 11 National Company Law Tribunal Rules gives inherent power, but powers under this section cannot be used to dehor the statutory provision of law.

Hon'ble Supreme Court in case of *Sooraj Devi v. Pyare Lal*, (1981) 1 SCC 500: 1981 SCC (Cri) 188 at page 502 has held that:

“5.The appellant points out that he invoked the inherent power of the High Court saved by Section 482 of the Code and that notwithstanding the prohibition imposed by Section 362 the High Court had power to grant relief. Now it is well settled that the inherent power of the court cannot be exercised for doing that which is specifically prohibited by the Code (*Sankatha Singh v. State of U.P.* [AIR 1962 SC 1208: 1962 Supp 2 SCR 817: (1962) 2 Cri LJ 288]). **It is true that the prohibition in Section 362 against the court altering or reviewing its judgment is subject to what is “otherwise provided by this Court or by any other**

law for the time being in force”. Those words, however, refer to those provisions only where the court has been expressly authorised by the Code or other law to alter or review its judgment. The inherent power of the court is not contemplated by the saving provision contained in Section 362 and, therefore, the attempt to invoke that power can be of no avail.”

Given the law laid down by Hon’ble Supreme Court it is clear that under inherent powers of the Court can act the Adjudicating Authority could only interfere in the field here I & B Code 2016 has authorized to do so. After approval of the Resolution Plan by the Adjudicating Authority can exercise his powers U/S 60 of the I&B Code 2016 Code provides that:

60. Adjudicating Authority for Corporate persons. - (1) The Adjudicating Authority, in relation to insolvency resolution and liquidation for corporate persons including corporate debtors and personal guarantors thereof shall be the National Company Law Tribunal having territorial jurisdiction over the place where the registered office of the corporate person is located.

(2) Without prejudice to sub-section (1) and notwithstanding anything to the contrary contained in this Code, where a corporate insolvency resolution process or liquidation proceeding of a corporate debtor is pending before a National Company Law Tribunal, an application relating to the insolvency resolution or ¹[liquidation or bankruptcy of a corporate guarantor or personal guarantor, as the case may be, of such corporate debtor] shall be filed before such National Company Law Tribunal.

(3) An insolvency resolution process or ²[liquidation or bankruptcy proceeding of a corporate guarantor or personal guarantor, as the case may be, of the corporate debtor] pending in any court or tribunal shall

stand transferred to the Adjudicating Authority dealing with insolvency resolution process or liquidation proceeding of such corporate debtor.

(4) The National Company Law Tribunal shall be vested with all the powers of the Debts Recovery Tribunal as contemplated under Part III of this Code for the purpose of sub-section (2).

(5) Notwithstanding anything to the contrary contained in any other law for the time being in force, the National Company Law Tribunal shall have jurisdiction to entertain or dispose of—

(a) any application or proceeding by or against the corporate debtor or corporate person;

(b) any claim made by or against the corporate debtor or corporate person, including claims by or against any of its subsidiaries situated in India; and

(c) any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under this Code.

(6) Notwithstanding anything contained in the Limitation Act, 1963 (36 of 1963) or in any other law for the time being in force, in computing the period of limitation specified for any suit or application by or against a corporate debtor for which an order of moratorium has been made under this Part, the period during which such moratorium is in place shall be excluded.

Since rectification of the resolution Plan does not involve the question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under this Code, therefore it is not Code, therefore it is not permitted to modify the Resolution Plan under the guise of inherent powers of the Tribunal.

Hon'ble Supreme Court in *Bijay Kumar Saraogi v. State of Jharkhand*, (2005) 7 SCC 748 at page 748 has held that:

“3. We find no reason to interfere with the order of the High Court because a mere perusal of Section 152 makes it clear that Section 152 CPC can be invoked for the limited purpose of correcting clerical errors or arithmetical mistakes in the judgment. **The section cannot be invoked for claiming a substantive relief which was not granted under the decree, or as a pretext to get the order which has attained finality reviewed. If any authority is required for this proposition, one may refer to the decision of this Court in *State of Punjab v. Darshan Singh* [(2004) 1 SCC 328].**”

Thus it is clear that the order which has attained finality cannot be reviewed under the inherent powers of the Court. This power can only be exercised to correct clerical errors or arithmetical mistakes in the judgment. By the impugned order the Adjudicating Authority has changed terms of Resolution Plan based on the application of one of the Resolution Applicant without even consent of the Appellant, even though he was the joint applicant in the Resolution Plan.

Thus we are of the considered opinion that the Adjudicating Authority had no jurisdiction to entertain an application for rectification of Resolution Plan and making substantial changes in the Plan, after a lapse of 13 months of the completion of CIRP, even after the approval and implementation of the Resolution Plan on the pretext of rectification of clerical or typographical error in the order.

Since the Appellant and Respondent, No 1 was the joint Resolution Applicant. Therefore, any application for rectification of the Resolution Plan

could have been moved by both the Resolution Applicants. Thus the Adjudicating Authority had no jurisdiction to allow amendment in the Resolution Plan, submitted by the appellant and the Respondent No.1 as co-applicants in the Resolution Process, without there being any consent on the part of the Appellant.

In the circumstances, we are of the considered opinion that Appeal deserved to be allowed, and the impugned order is not sustainable in law. The appeal is thus allowed and the impugned order passed by the Adjudicating Authority dated 20th November 2019 is set aside. No order as to cost.

[Justice Venugopal M.]
Member (Judicial)

[Kanthi Narahari]
Member (Technical)

[V. P. Singh]
Member (Technical)

NEW DELHI
JANUARY 28, 2020

pks/md