

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) (Ins) No.728 of 2019

[Arising out of Order dated 22.05.2019 passed by National Company Law Tribunal, Mumbai Bench in MA 1090/2019 in CP No. 1562/I&BC/MB/MAH/2017]

IN THE MATTER OF:

Before NCLT

Before NCLAT

**Pacific World Shipping
PTE Ltd. Raffles House,
#22-01 Chelvron House,
Singapore**

....

Appellant

Versus

**Dadi Impex Pvt. Ltd.
Through
Mr. Anandprakash
Choudhari
And Mrs. Manju
Choudhari
614, Laxami
Industrial Estate,
Off Link Road,
Andheri (W),
Mumbai- 400053**

**Respondent/
Corporate Debtor**

Respondent No. 1

AND

**State Bank of India
Through, Branch Manager
1st Floor Lekhraj Bhavan,
Sakivihar Road, Andheri East,
Mumbai- 400072**

...

Respondent No. 2

AND

**Mr. Dhiren S Shah
Resolution Professional
of Respondent No.1
B-102, Bhagirathi Niwas,
Near Natraj Studio,
Sri M V Road Andheri- East,
Mumbai- 400069**

...

Respondent No. 3

For Appellant: **Mr. Ankur Kashyap, Mr. Rudreshwar Singh, Mr. Kaushik Poddar and Mr. Rohit, Advocates**

For Respondents: **Mr. Raghav Shankar, Ms. Arshiya Sharda and Ms. Ekta Bhasin, Advocates for Respondent No. 1. Mr. Aakarshan Sahay, Mr. Nakul Sachdeva and Mr. Damandeep, Advocates for Respondent No. 2. Mr. Nitesh Jain, Advocate for Respondent No. 3/RP**

J U D G E M E N T

(28th February, 2020)

A.I.S. Cheema, J. :

1. One Percula Shipping and Trading INC – Original Operational Creditor filed application under Section 9 of Insolvency and Bankruptcy Code 2016 (IBC in short) before the Adjudicating Authority (NCLT Mumbai) which was admitted in CP No. 1562/I&BC/MB/MAH/2017. The Corporate Insolvency Resolution Process (CIRP in short) was initiated against Respondent No. 1 - Corporate Debtor -DADI Impex Pvt. Ltd. The said process culminated into Resolution Plan being submitted and accepted by the COC. The Resolution Plan was jointly submitted by Anand Prakash Choudhari and Mrs. Manju Choudhari - Successful Resolution Applicants (SRA in short) who were also the Promoters of the Corporate Debtor. They filed the plan as the Corporate Debtor is said to be MSME.

2. The Appellant is one of the Operational Creditors who had filed Form B on 05.06.2018 to the then RP Martin Golla (RP No. 1). Subsequently it appears that Insolvency & Bankruptcy Board of India (IBBI) cancelled the registration of said RP and after orders were passed by

Adjudicating Authority on 15.11.2018, the RP was got substituted by Dhiren S Shah (R-3) (hereafter referred as RP).

3. The present appeal has been filed as the Resolution Plan approved by COC with requisite majority was submitted by the RP to Adjudicating Authority and it came to be accepted by the Adjudicating Authority vide Impugned Order dated 22.05.2019. The order was passed in MA No. 1090/2019 filed by the RP in the Company Petition. The Resolution Plan has been accepted by the Adjudicating Authority with some modifications. This Appeal is against the said Resolution Plan.

The main grievance of the Appellant is that the Operational Creditors have been given only token 2% of their claims admitted while the Financial Creditors are given 100% of their claims.

4. The Appellant claims and it is argued that the Appellant is a Ship Operating Company engaged in business of providing Freight Services to Global Clients. The vessels of the Appellant were hired by the Corporate Debtor thrice in 2017 and dispute arose regarding unpaid demurrage and freight to the tune of Rs. 9,22,53,131.72/- paise. When the application under Section 9 was admitted, Appellant filed claim in Form B on 05.06.2018. Appellant claims that the RP No. 1 did not give notice of Committee of Creditors' (COC) meeting to the Appellant of the 1st and 2nd meeting but allowed the Appellant to attend in third COC meeting. The Appellant was not allowed to attend 4th and 5th COC meetings and Appellant had protested and subsequently, the Appellant was allowed to participate in meetings.

5. It is stated that the Resolution Plan was proposed by existing Promoters in the 14th COC meeting proposing only 2% to be given to the Operational Creditors irrespective of the quantum of their claims. According to the Appellant, the representative of Appellant with other Operational Creditors objected to the 2% token sum being given to Operational Creditors in the 15th and 16th COC meetings. In spite of the objections of the Operational Creditors, COC approved the Resolution Plan in the 17th COC meeting dated 11.03.2019.

6. It is the argument of the learned Counsel for the Appellant that although in view of Judgment in the matter of of **“Committee of Creditors of Essar Steel India Limited Vs. Satish Kumar Gupta & Ors.”** [Civil Appeal No. 8766-67 of 2019] in the Judgement dated 15th November, 2019, passed by the Hon’ble Supreme Court of India this Tribunal has limited judicial review available, it is permissible to consider if in the Resolution Plan interest of all stakeholders including the Operational Creditors has been taken care of, or not. According to the learned Counsel if the Resolution Plan is seen it is designed to only write down the debts of Operational Creditors in a discriminatory fashion. There is no basis of the justification for almost writing off the debts of Operational Creditors. The Corporate Debtor claims to be top salt exporter across the globe and the Operational debts of the shipping companies are being arbitrarily reduced. It is stated that the Resolution Plan is more restructuring of the loans than a Resolution Plan. The Financial Creditors are purported to be paid 100% of their dues by restructuring of their loans and giving them additional

securities. The SRA – Promoters are not infusing funds to pay the Financial Creditors. Although claims were received from only two Financial Creditors State Bank of India and Capital First Limited the plan proposed to pay the other Financial Creditor also. The claim of the Appellant of Rs. 9.23/- Crores and another Operational Creditor - Percula Shipping and Trading INC Rs. 7/- Crores and Clipper Bilk A/S Rs. 9.21/- Crores are much higher than the claim of Financial Creditor Capital First Limited. In spite of this the dues of Operational Creditors have been arbitrarily written down to 2%. The reduction was opposed, however, COC approved the Resolution Plan. Appellant claims that Rs. 66/- Lakhs being paid to the Operational Creditors is the only fund being infused by the SRA. According to the Appellant the plan is contrary to the distribution scheme under Section 53 of IBC and there are no reasons for the uneven distribution. The Appellant is also suspecting the liquidation value.

7. At the time of arguments, the learned Counsel for the Appellant relied on Judgment in the matter of **“Vijay Kumar Jain Vs. Standard Chartered Banks and Ors.” 2019 SCC Online SC 103** and referred to Para 11 of the Judgment to submit that the Hon’ble Supreme Court has held that interalia even the Operational Creditor attending the COC meeting is entitle to copy of the Resolution Plan being discussed. It is claimed that copy of Resolution Plan was not provided to the Operational Creditor and thus the RP violated the requirements under the IBC and its regulations.

8. The learned Counsel for the Respondent No. 1 through the SRA has filed Affidavit in Reply to the Appeal (Diary No. 14289) and learned Counsel for the Respondent No. 1 has countered the argument of learned Counsel for the Appellant pointing out copies of the various Minutes of Meeting filed with the Affidavit to demonstrate that the representative of the Appellant was attending meetings. Reference is specifically made to 14th meeting dated 26.02.2019, 15th meeting dated 01.03.2019, 16th meeting dated 05.03.2019 and 17th meeting dated 11.03.2019 (Pages 11 to 20 of Diary No. 14289) and it is argued that in all these meetings when the Resolution Plan was taken up, the record shows that copies of the Resolution Plan were provided to the representative of the Appellant. The learned Counsel argued that the notings of these meetings show that over long hours the discussions took place and the COC got certain modifications done in the plan. In these meetings the representative of the Operational Creditors had raised objections that the amount being paid to the Operational Creditor of 2% was not acceptable to them. The learned Counsel submitted that the COC looked into various aspects including the fact that the Corporate Debtor is MSME and accepted the Resolution Plan. According to him it is a business decision of the COC and no interference is called for.

9. The Respondent No. 2 - State Bank of India has filed Affidavit in Reply (Diary No. 14588). It is lead Bank of the COC. The learned Counsel for the Respondent No. 2 has submitted that the Resolution Plan approved is compliant with the provisions of IBC 2016. It is argued that the

Resolution Plan was approved and order of Adjudicating Authority dated 22.05.2019 was passed before the Amendments in Section 30 (2) (b) and Section 30 (4) were notified on 16.08.2019. Alternatively, it is argued that even if the said Amendment was to be considered, it would not make difference as according to the State Bank:-

*“A plain reading of amended S. 30(2)(b) would demonstrate that the amount to be paid to the Operational Creditors has to be higher of either the amount to be paid to such Operational Creditors under Section 53 of the Code in the event of liquidation of the Corporate Debtor [**“Situation 1”**] or the amount under the Resolution plan when distributed in accordance with the order of priority in sub-section (1) of Section 53 [**“Situation 2”**]. In the instant case under Situation 1, the amount payable to the Operational Creditors is NIL and in Situation 2, the amount payable to the Operational Creditors is also NIL. Nonetheless, as far as the debt owed to the Operational Creditors are concerned, the Resolution Plan as approved, proposes a payment of 2% of their claim and the remaining amounts in addition to 2% of their claim to be paid from the existing business of the Corporate Debtor.”*

The learned Counsel for the Bank has then relied on Regulation 37 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution

Process for Corporate Process) Regulations 2016 (“Regulations” in short) to submit that for achieving maximization of values of assets, a Resolution Plan can provide reduction in the amount payable to the Creditors. It is claimed that there is no bar to reduce dues payable to Operational Creditors. Referring to the two Judgments in the matter of **“K. Shashidhar & Indian Overseas Bank & Ors.”** [Civil Appeal No. 10673 of 2018] and Judgment in the matter of “Essar Steel” (supra), passed by the Hon’ble Supreme Court of India it is argued that this Tribunal cannot enter into commercial wisdom of the COC and disturb the business decision taken by COC.

10. On being directed the Resolution Professional has by way of Written Submissions (Diary No. 19070) filed particulars of the valuers and the valuation they gave regarding the liquidation value of the Corporate Debtor and it is stated that the average liquidation value of the Corporate Debtor was Rs. 41.35/- Crores. The RP has stated that claims received from the Financial Creditors were of Rs. 48,85,18,812/- and claim admitted were of Rs. 48,48,87,117/-. It is stated that CIRP cost was Rs. 9.36/- Crores and as the liquidation value of the Corporate Debtor Rs. 41.35/- Crores is less than the claims of the Financial Creditors and the CIRP cost, and liquidation value for Operational Creditors is NIL. It is the argument of the Respondents that in spite of this, the Resolution Plan provided for 2% payment of the operational dues and thus it does not call for interference.

11. Having heard the parties, we have carefully gone through the Resolution Plan and the discussion of the same in the Impugned Order. The argument of the learned Counsel for the Appellant that copies of Resolution Plan were not provided is not supported by Minutes of the Meetings referred by SRA which show that copies of the Resolution Plan were provided to the Operational Creditor. It does not appear that the Appellant raised any such dispute with the RP when CIRP was pending, or before the Adjudicating Authority.

12. Coming to the Resolution Plan approved, the first thing which is required to be kept in view is that the Corporate Debtor is MSME. What appears is that these Promoters – Anand Prakash Choudhari and Ms. Manju Choudhari, SRA are the Directors and it appears to be a closely held company by the family. Impugned Order referred to the Financial Creditors who had filed claims (Page 7 & 8 of the Impugned Order). The chart relating to Operational Creditors is at Page 9 of the Impugned Order. The key propositions of the Resolution Plan (Page 15 of Impugned Order) were noticed and what appears is that the Resolution Applicants proposed to reduce the present total limit of Rs. 42.5/- Crores to Rs. 38/- Crores by requesting the State Bank of India to liquidate the FDRs. Other proposals are there to pay particular amounts in given months and there are other proposal as to how the Corporate Debtor would clear the dues of State Bank of India. The proposals also show how the other Financial Creditor would be paid. With regard to payment of Operational Creditors, it is stated (Page 18 of I.O.):-

“The claimed Operational Creditors will be paid 2% of the claim admitted as per information provided by the Resolution Professional and the same will be infused by the Resolution Applicant. Any amount in addition to 2% of amount admitted for Operational Creditors, will be paid from the existing business of the Corporate Debtor.”

After reproducing portion as above of Resolution Plan Page 20 of the Impugned Order shows reference to the Resolution Plan where utilization of funds are referred which discloses that the plan value was Rs. 42.64/- Crores. The term of Resolution Plan is stated to be seven years and three months and the Resolution Plan went on the assumed calculation of Rs. 30/- Crores as the liquidation value and stated that the liquidation value is low and does not cover entire dues of secured Creditors and workman and hence liquidation would not be advisable (Page 24 of the Impugned Order). Now RP has disclosed the Liquidation Value to be Rs. 42.64/- Crores which is still less than admitted claims of Financial Creditors & CIRP costs.

13. The Adjudicating Authority after referring in details to the Resolution Plan in Para 7 discussed the fact that liquidation value is less compared to the proposals made in the Resolution Plan. After recording its satisfaction with the Resolution Plan, Adjudicating Authority directed:

“a. The approval of the Resolution Plan is subject to certain qualifications to be read along with the plan and to be followed in implementation of the plan. The

first qualification is about the rent of Rs. 80,000/- in respect of property lent out by Mrs. Manju Choudhari to the Corporate Debtor used by the Corporate Debtor for its Corporate Office proposed to be paid to Mrs. Choudhari; hereby restricted and not to be paid during the implementation period of the Resolution Plan. In lieu, a sum of Rs. 25,000/- as a monthly salary to Mrs. Choudhari for rendering whole time services for looking after the business of the Company, is hereby approved so that she can devotedly work for the welfare of the Company.

b. The next qualification is about Corporate Insolvency Resolution Process Cost proposed to be paid at Rs. 9.36 Crores, which appears to be exorbitant and unfair. The governing body IBBI New Delhi has in one of its disciplinary order has made a similar observation that a Resolution Professional is expected to be reasonable in demanding professional charges. Considering the nature of the professional services rendered, it shall be appropriate and reasonable to approve Rs. 2.00/- Crores as Corporate Insolvency Resolution Process Cost. The balance surplus shall be appropriated against the liabilities of Operational Creditors to be distributed pari-passu. The

Resolution Applicant had made a provision to settle the debts Operational Creditors at a unfair rate of 2% which shall be increased proportionately.

c. The third qualification to be executed while implementing the Resolution Plan is in respect of payment of salary/remuneration to the directors. The proposal is to pay a sum of Rs. 3,00,000/- to Mr. A.P. Choudhari monthly and nothing to Mrs. Manju Choudhari. During the period of implementation of this Resolution Plan of 7 years 3 months, this Bench is of the view that Mr. Choudhari be paid Rs. 1,50,000/- and to Mrs. Choudhari Rs. 50,000/- This saving shall help in day to day running of business as well as comfortable liquidation of liability.”

The Adjudicating Authority referred to Judgment in the matter of **“K. Shashidhar & Overseas Bank & Ors.”** [Civil Appeal No. 10673/2018] and accepted the Resolution Plan with modifications as above.

14. It can be seen that the Adjudicating Authority diverted Rs. 7.36/- Crores for the Operational Creditors as it found that the CIRP cost calculated by the RP was exorbitant and unfair. The Minutes of the Meetings of the 15th meeting dated 01.03.2019 shows that when the Resolution Plan was being discussed the Operational Creditors had objected to the 2% allocation for Operational Creditors and in the discussion were expecting allocation of 33% of their claim amount and the

minutes show that the Resolution Applicants had expressed that it will not be possible for them to pay such a high amount. Thus, the issue was discussed in the COC meetings and it appears that the lead Bank, State Bank of India got modifications made in the Resolution Plan and ultimately approved the same. It is noticed that the MSME has proposed paying of 100% debts of the Financial Creditors not as upfront. The COC has accepted some restructuring keeping in view the outstanding debts and the liquidation value just to keep the Corporate Debtor a going concern. When the lead Bank has shown concern to accept adjustments to keep the MSME a going concern, it does not appear appropriate to us to push the same to liquidation. It would benefit nobody. Reading the Resolution Plan as a whole and considering the Minutes of the Meetings and the Impugned Order shows that in facts of the matter, the Resolution Plan as accepted by COC & approved by Adjudicating Authority should not be disturbed and it would not be appropriate to interfere in the commercial decision of COC which discussed the objections of the Appellant and still did not accept the same and Adjudicating Authority has also approved the same.

We are not interfering with the Impugned Order approving the Resolution Plan, except using following words for enforcing modification 'b' referred in paragraph 13 (Supra). We direct that Monitoring Committee will enforce the modifications made by the Adjudicating Authority & add the part of money diverted from the head of CIRP costs to the dues payable to Operational Creditors so as to proportionately increase the 2% payable to each Operational Creditor against their respective claims admitted & pay

on priority in terms of Regulation 38 (1) of the Regulation (Note 5 – Page 46 of Resolution Plan r/w Section 8 at Page 53 – Diary No. 17213.)

For the above reason we do not find any substance in the Appeal. The Appeal is disposed with directions as above. No orders as to costs.

[Justice A.I.S. Cheema]
Member Judicial

[Kanthi Narahari]
Member (Technical)

HA/MD