NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) (Ins) No.943 of 2019

[Arising out of Order dated 1st August, 2019 passed by National Company Law Tribunal, Mumbai Bench in CP No.1368/IBC/MB/MEH/2017]

IN THE MATTER OF:	**Before NCLT**	**Before NCLAT**
Shri Swwapnil Bhingardevay 52/788, Lokmanya Nagar, Near Jogging Park, Pune, Maharashtra -411030	....	Appellant
Vs.		
1. M/s. Khandoba Prasanna Sakharkar Khana Limited Through Resolution Professional 52/788, Lokmanya Nagar, Near Jogging Park, Pune, Maharashtra -411030	Corporate Debtor/ RP	Respondent No.1
2. M/s Sai Agro (India) Chemicals Through partners Ghat No.892, Near Ingavale Mala Alate, Hatkanangale, Kolhapur, Maharashtra -416109	SRA	Respondent No.2
3. Ms/ Sarvadnya Industries Pvt. Ltd. 65, Balupatlachi Wadi, Taluka Khandala, Satara - 415521	....	Respondent No.3

4. M/s XL Energy Limited (Formerly XL Telecom and Energy Ltd.) H.No. 19-161111 D-4, Laxmipuram Colony Near ECIL, Hyderabad .... Respondent No.4

5. Mr. Jitendra Palande (RP) 38, 5-3 D, New Ajanta Avenue, Paud Road, Kotharud, Pune – 411038 Resolution Professional Respondent No.5

For Appellant: **Shri Krishnendu Dutta, Sr. Advocate with Shri Murari Kumar, Shri Achint Kumar and Shri Rahul Gupta, Advocates**

For Respondents: **Shri Swapan Pradhan, Advocate with CS Ritesh Mahajan (R-2)**
Shri Ajay K. Jain, Shri Yash Karan Jain and Shri Atanu Mukherjee, Advocates (R-3)
Shri Shikhil Suri, Ms. Nikita Thapar, Shri Prashant S. Kenjale, Ms. Shilpa Saini and Shri Jitendra Palande, Advocates (R-5)

J U D G E M E N T

(2nd June, 2020)

A.I.S. Cheema, J. :

1. This Appeal has been filed by promoter and Director of the Corporate Debtor who claims that the Corporate Debtor is MSME and the Appeal has been filed against Impugned Order dated 1st August, 2019 passed by the National Company Law Tribunal, Mumbai Bench (NCLT – Adjudicating Authority). By the said Order, the Adjudicating Authority has approved Resolution Plan of M/s. Sai Agro (India) Chemicals (Respondent No.2 – SRA [Successful Resolution Applicant]). This Appeal

on 12.09.2019 was admitted to limited extent of examining viability and feasibility of the "Plan".

2. The Application - CP No.1368/IBC/MB/MEH/2017 under Section 7 of Insolvency and Bankruptcy Code, 2016 (IBC – in short) was filed initially by Financial Creditor – The Karad Urban Co-operative Bank Ltd. against the Respondent No.1 (Corporate Debtor – Company). The Application came to be admitted and the Company went through the Corporate Insolvency Resolution Process (CIRP) which has culminated into the Resolution Plan of Respondent No.2 being accepted.

3. The Corporate Debtor has authorized capital of Rs.14 Crores and paid up capital of Rs.9.82 Crores. It had taken licence for production of ethanol from rectified spirit. The loan taken from the Financial Creditors became NPA and the Application under Section 7 came to be filed.

4. Appellant claims that in the second meeting of COC (Committee of Creditors) dated 27th March, 2018, two Valuers came to be appointed to work out fair value and liquidation value. The Resolution Professional on 30th March, 2018 instead of publishing invitation for Resolution Plan, issued Public Notice for outright sale of Corporate Debtor as a going concern. The Appellant had also tried to submit his Resolution Plan in the course of CIRP. The Ethanol Plant installed in the premises of Corporate Debtor is owned by Respondent No.3 – M/s. Sarvadnya Industries Pvt. Ltd. COC was aware of this as on 12th October, 2018 in 4th meeting, Appellant was not allowed to restart the ethanol plant on the

pretext that it is owned by third party who is searching buyer for the plant. On 12th January, 2019, COC shortlisted prospective Resolution Plans. The Resolution Plan of Respondent No.2 – SRA was received on 9th February, 2019 and that the Resolution Professional without examining the same, had taken up with COC which was approved on the same date of 9th February, 2019 in the 8th COC meeting and the Plan suffers from feasibility and viability. The Respondent No.5 (RP) committed various irregularities which are material irregularities and hence the Plan should not have been accepted.

5. The Appellant claims that there was no publication inviting Expression of Interest (EOI – in short). The Resolution Plan was not examined by the RP as required under Section 30(2) of IBC and the COC hurriedly accepted the Resolution Plan which was the only Resolution Plan received. The non application of mind is apparent from the admitted fact that the Resolution Plan has not noticed that the ethanol plant and machinery does not belong to the Corporate Debtor. The Resolution Plan has made business proposals and proceeds on the assumption that the plant is of the Corporate Debtor. The Corporate Debtor cannot function without the ethanol plant machinery which the Respondent No.3 wants to take back and already has an Order of this Tribunal in its favour passed in Company Appeal (AT) (Ins) No.897 of 2019 passed on 16th December, 2019. Thus, the Appellant claims that the Plan as has been approved is not feasible and viable and the CIRP also suffered from

material irregularities. It is argued that the liquidation value of the Corporate Debtor was already known to the Respondent No.2 – SRA and under Section 36(2), it is material irregularity. For such reasons, the Appellant wants the Resolution Plan approved to be set aside.

6. The Respondent No.2 – SRA has argued that the Resolution Plan was prepared on the basis of Information Memorandum provided by Resolution Professional to the Resolution Applicant and that the Information Memorandum nowhere mentioned about the ethanol plant and machinery. It is stated that the Janata Sahakari Bank Limited has taken possession of the Plant and is in the process of conducting sale of the plant by way of auction. The SRA claims that the RP had sent an email on 7th February, 2019 to SRA about inclusion of liquidation value in the Resolution Plan and SRA had claimed that it was on the basis of independent valuation.

7. The Respondent No.3 has submitted that the Resolution Plan is based upon takeover of the Corporate Debtor and it continuing as going concern in its normal course of business. The entire business plan attached is based upon operation of the ethanol plant. Respondent No.3 refers to the Order of this Tribunal in Appeal No.897 of 2019 that the Respondent No.3 can take over the possession of the ethanol plant machinery. This Respondent claims that it has settled with its Banker – Janata Sahakari Bank Limited and is taking over the ethanol plant and machinery. Respondent No.3 claims that in the absence of the ethanol

plant, the Plan approved by the Adjudicating Authority becomes unworkable/non-executable. It is argued that it is necessary for Adjudicating Authority to be satisfied that the plan has provision for effective implementation. It is added by this Respondent that the SRA has not complied with terms of payment as envisaged in the approved Plan and already MA 3943 of 2019 has been filed by the workers/employees for non-payment of their dues under the Plan and Section 33(4) of IBC has been attracted. It is argued by Respondent No.3 that on 09.02.2019 within a span of two and half hours, the exercise of examining and acceptance of the Resolution Plan under Section 30(2) and 30(4) of IBC was carried out by RP and COC. Thus, feasibility was not there, was not noticed.

8. The Respondent No.5 – Resolution Professional has argued to defend the CIRP conducted. According to him, the COC has approved the Resolution Plan and there can be no interference in the commercial wisdom of COC as held in the matters of **"Committee of Creditors of Essar Steel India Limited Vs. Satish Kumar Gupta & Ors."** (2019 SCC OnLine SC 1478) and **"K. Sashidhar v. Indian Overseas Bank and Ors."** (2019 SCC Online SC 257). The RP claims that there was compliance of Section 30(2) of IBC. There is nothing in the Code specifying as to how much time RP should take to examine the Resolution Plan and how much time COC should take. It is claimed that there was no format of expression of interest under Regulation 36A of

Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (Regulations – in short). RP claims that Form – G at the relevant time was Form of invitation of Resolution Plans but that the practice was to publish COC approved invitation of expression of interest. RP has photocopied a g-mail in the written submissions (Diary No.19095) (after the oral arguments were over and without supportive Affidavit), and RP has added the photocopy to claim that the SRA had on 7th February, 2019 responded to the RP regarding liquidation value mentioned in Plan that it was based on its own sources. RP claims that the fact that the liquidation value as calculated by RP after taking Report of two Valuers which is Rs.13.53 Crores which has been mentioned by the SRA, is mere coincidence. The RP is thus defending the process.

9. We have heard Counsel for both sides and gone through the record.

10. Under Section 61(3)(ii) of IBC, in Appeal against approval of Resolution Plan, one of the grounds for this Appellate Tribunal to see is, if there has been material irregularity in the exercise of powers by the Resolution Professional during the Corporate Insolvency Resolution period. In this regard, Regulation 36(2) of IBC (which is also part of the law required to be followed) provides as to the information which should be there in the Information Memorandum. Initially Regulation 30(2)(j) required the RP to mention the liquidation value. But this Clause (j) was subsequently omitted with effect from 31st December, 2017. Clearly, such

information could not be mentioned to the prospective Resolution Applicants. Regulation 35(2) attracts requirement of maintaining confidentiality with regard to the "fair value" and the "liquidation value" of the Corporate Debtor and the Regulation 35(2) controls the manner in which such information can be shared. In the present matter, there is no dispute that the Respondent No.2 – SRA exactly mentioned the liquidation value in the Resolution Plan (now approved and in dispute) which has a date of 7th February, 2019 and which Resolution Plan was accepted by COC on 9th February, 2019. According to the record, COC appointed two Valuers on 27th March, 2018 for getting the liquidation value and fair value. As per procedure, when such value is received, the average of both is taken as "fair value" or "liquidation value" (as the case may be). Form 'H' (Page – 394) mentions liquidation value as Rs.13.53 Crores. Resolution Plan – Annexure A-34 (Page 314 @ Page 332) shows SRA calculating Payment Terms with liquidation value exactly as Rs.13.53 Crores. Apparently SRA knew it. We find it difficult to digest the argument of the Resolution Professional that the exact liquidation value stated by the SRA is mere coincidence. We reject the argument of SRA that it got its own valuation done. No material is shown in this regard. As regards the photocopy of email copied in the written submission by RP, it is not supported by Affidavit. Apart from that, we have doubts with regard to the manner in which the Plan was processed and put up. The Resolution Plan (Annexure A-34 on 1st Page, Page 314) has printed date of 7th February, 2019. The self-declaration of the

Resolution Applicants who are the two partners of Respondent No.2 at Page – 342 shows the date as 9th February, 2019. This self-declaration is part of the Resolution Plan itself with running Page No.29. Thus although the Resolution Plan claims to be dated 7th February, 2019 (and e-mail is claimed of 07.02.2019 regarding liquidation value), no material is put up by the Resolution Professional regarding the date on which Plan was received. It appears to us that this Resolution Plan was complete only on 9th February, 2019 which is the date of the 8th meeting of COC. The Appellant and Respondent No.3 are claiming that the Plan was received on 9th February, 2019 itself and directly placed before COC. On earlier date of 30.01.2019, SRA was still only a prospective Applicant (See Annexure A-30 Page 217). The RP has not put up material to show that the RP had examined the Plan as required under Section 30(2) of the IBC. There is substance in the claim of the Appellant and Respondent No.3 that the Plan was received on 9th February, 2019 and the same being the only Plan, was rushed through the COC meeting and in two – three hours, it was approved without duly examining the Resolution Plan by the Resolution Professional and without the COC being satisfied as required under Section 30(4) of IBC that the Plan is feasible and viable.

11. There is no dispute now, that the Resolution Plan does not in any manner consider as to what happens if the ethanol plant machinery, which belongs to Respondent No.3, is taken away by the Respondent No.3 who is the real owner and had given the plant machinery to the

Corporate Debtor on heavy rent. The Plan proceeds on the basis as if the ethanol plant and machinery belongs to the Corporate Debtor. The Appellant is pointing out that business plans are contemplated in the Resolution Plan on the basis that once approved, the SRA will continue the business. We are not interfering with the commercial wisdom of the COC but what appears to us from the record is that the COC did not consider feasibility and viability of the Resolution Plan in case the plant and machinery are taken away by the Respondent No.3. The Respondent No.3 is still insisting on taking away the plant and machinery and there is already judicial Order in view of Respondent No.3 in this regard. It has been referred above. Apparently the Corporate Debtor cannot function without the Ethanol plant machinery.

12. Thus, we find that there was compromise of confidentiality regarding liquidation value which appears to have been known to the Respondent No.2 before submitting the Resolution Plan. Apart from this the plant and machinery were not owned by the Corporate Debtor, and the Resolution Plan submitted on the hypothesis that the plant and machinery would be available for business and explanation is clearly a Plan which is not feasible and viable. The 8th meeting of COC started at 11 A.M. and the Plan had been approved by 2.00 P.M. and there is absence of material of compliance of Section 30(2) of IBC and in the facts of the matter, there is serious doubt of the RP examining it before putting up the same before COC. On the face of record, COC has not considered

the feasibility and viability while accepting Resolution Plan having fundamental defect with regard to the backbone itself of factory – i.e. – the Ethanol Plant Machinery.

13. Apart from the material irregularity of failure of maintaining confidentiality regarding confidentiality of liquidation value, there is another irregularity in the CIRP. This is with regard to non-publication of Notice inviting expression of interest. Regulation 36A as applicable at the concerned time, required issuing an invitation to the prospective Resolution Applicants to submit Resolution Plan. The RP has admitted (Diary No. 19094) that the Form - G at the relevant time was in the form of "Invitation of Resolution Plan" but if the present record is seen, it can be found that in the second meeting of COC (Annexure A-17 Page – 212 at 213), the COC approved draft of newspaper advertisement for inviting expression of interest from prospective bidders aimed at achieving resolution. We do not know if the publication actually done on 30th March, 2018 (Annexure A-18 Page – 215) is the same. The reason is that Annexure A-18 although it has title of "Invitation of Expression of Interest", is actually a Notice which is inviting proposals for "outright sale" of the Company on a going concern basis. Even if COC approved such a draft, that does not mean that the provisions under the Regulations and Form - G under Regulation 36A were complied with. The Notice published in the newspaper is clearly a Notice inviting proposals for outright sale of the Company as a going concern. The RP cannot

escape by saying that there was practice at the relevant time to publish COC approved invitation of EOI claiming that there was no prescribed format. His written submissions further add that Form - G at the relevant time was a Form for "Invitation of Resolution Plans". By issuing the Notice for outright sale, instead of inviting expression of interest for resolution plan of the Corporate Debtor, there was clearly irregularity in the conducing of the CIRP. The irregularity does not get cured only because Adjudicating Authority passed Orders on 09.04.2018 (Annexure A-19 Page – 216) holding that the Public Notice will be limited for the purpose of inviting Resolution Applicants and not for outright sale. The defect cannot be cured as the genuine Resolution Applicants could not apply and must be said to have been diverted and put to disadvantage of themselves and the Corporate Debtor.

14. For the above reasons, we find that the CIRP suffered from material irregularities and the Resolution Plan approved suffers from feasibility and viability. For such reasons, the Resolution Plan as approved deserves to be set aside.

We pass the following Order:-

ORDER

The Appeal is allowed. For the above reasons, we set aside the Impugned Order and remit the matter back to the Adjudicating Authority with a direction to send back the Resolution Plan to the Committee of

Creditors to resubmit the Plan taking into consideration observations made above and after satisfying the parameters as laid down by the Hon'ble Supreme Court in the Judgement in the matter of "Essar Steel" referred (supra) and IBC. The Adjudicating Authority may give specific time period to the Resolution Professional to place matter before Committee of Creditors for resubmitting the Resolution Plan taking into consideration observations made above and after satisfying the parameters laid down by the Hon'ble Supreme Court and IBC. Further incidental Orders may also be passed.

On resubmission of the Resolution Plan, the Adjudicating Authority will deal with the same in accordance with law.

The Appeal is disposed accordingly. No costs.

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

(Justice A.B. Singh)
Member (Judicial)

[Kanthi Narahari]
Member (Technical)

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