

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 11 of 2020

IN THE MATTER OF:

Kundan Care Products Ltd. ...Appellant

Vs.

Mr. Surya Kanta Satapathy & Ors. ...Respondents

Company Appeal (AT) (Insolvency) No. 75 of 2020

IN THE MATTER OF:

Kundan Care Products Ltd. ...Appellant

Vs.

Mr. Surya Kanta Satapathy & Ors. ...Respondents

Present: For Appellant: - Mr. Prithu Garg and Mr. Hari Mohana N., Advocates.

For Respondents:- Mr. Abhijeet Sinha and Mr. Sudeep Vijayan, Advocates for R-1.

Mr. K. Dutta, Mr. Jeevan B. Panda, Mr. Satish Padhi, Ms. Shalini Sati Prasad and Ms. Meher Tandon, Advocates for R-3.

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

In the 'Corporate Insolvency Resolution Process' of 'M/s. Alex Green Energy Pvt. Ltd.'- ('Corporate Debtor'), the Adjudicating Authority (National Company Law Tribunal), Kolkata Bench, Kolkata, by impugned

order dated 25th November, 2019 approved the 'Resolution Plan' submitted by 'Fortis Chemicals Pvt. Ltd.'- (3rd Respondent). The Appellant- 'Kundan Care Products Ltd.', another 'Resolution Applicant' has challenged the same order in both the appeals.

2. The case of the Appellant is as follows:

2.1 The Appellant- 'Kundan Care Products Ltd.' submitted its 'Resolution Plan' on 29th October, 2019 before the 'Committee of Creditors'. On 1st November, 2019, the Appellant received an e-mail from the 'Resolution Professional' stating that it was ranked at Serial No.6 and as per the terms of the 'Request for Resolution Plan', only the top three 'Resolution Applicants' are being invited to present their plans before the 'Committee of Creditors'. Within three days, on 4th November, 2019, the Appellant contacted the 'Resolution Professional' telephonically and through e-mail and sought an opportunity to negotiate and/ or revise/ enhance its bid/offer of the H1 'Resolution Applicant'.

2.2. It is stated that the 'Resolution Professional' by e-mail dated 4th November, 2019 reiterated the denial of the opportunity of discussion and negotiation to the Appellant. On 5th November, 2019, the Appellant once again sends an e-mail seeking to renegotiate his offer, however, the 'Resolution Professional' does not reply to the said e-mail. Thereafter, the Appellant moved before the Adjudicating Authority, Kolkata Bench.

2.3. In the meantime, the 'Committee of Creditors' approved the 'Resolution Plan' of 3rd Respondent on 11th November, 2019.

2.4. When the matter was placed before the Adjudicating Authority, according to the Appellant, on 15th November, 2019, it stated its willingness to enhance its financial proposal to Rs.11.50 Crores which is substantially higher than the resolution amount of Rs.11.07 Crores proposed by the 3rd Respondent. However, the Adjudicating Authority by impugned order dated 25th November, 2019 while approved the 'Resolution Plan' of 3rd Respondent rejected the offer given by the Appellant.

2.5. Learned counsel for the Appellant submitted that the evaluation process was conducted by the 'Resolution Professional' in a closed, non-transparent manner without affording an opportunity of hearing to the Appellant. The 'Resolution Professional' conveniently skipped the third step stipulated in the RFRP which envisaged the presentation of 'Resolution Plans' by the 'Resolution Applicants' to the 'Committee of Creditors' and was in fact not considered properly.

2.6. Learned counsel for the Appellant submitted that no scoring as H1 Applicant is not a disqualification from participating in the resolution process. In case a 'Resolution Applicant' is ready to revise its proposal and such revised proposal is more than the amount offered by H1 Applicant, the 'Committee of Creditors' should accept the same in the interest of stakeholders.

2.7. Reliance has been placed on the decision of this Appellate Tribunal in "***Binani Industries Limited vs. Bank of Baroda & Anr.— Company Appeal (AT) (Insolvency) No. 82 of 2018 etc.***" to suggest that the 'Committee of Creditors' can consider it before completion of 180 days or 270 days.

2.8. According to learned counsel for the Appellant, a revised plan is in continuation of the 'Resolution Plan' already submitted and accepted by the 'Resolution Professional'.

3. Learned counsel appearing on behalf of Mr. Surya Kant Satapathy ('Resolution Professional') submitted that after admission of the application under Section 7 on 18th February, 2019, the 'Committee of Creditors' meeting was held on 30th August, 2019 and a notice was published on 31st August, 2019, apart from few local dailies, in IBBI website. The 'Expression of Interest' for 'Resolution Plan' was invited. The last date for submission of 'Expression of Interest' was 14th September, 2019. The Appellant- 'Kundan Care Products Limited' submitted their 'Expression of Interest', after much delay, on 23rd September, 2019 and forwarded a hard copy of plan by e-mail dated 28th September, 2019.

4. Despite delay in submission of the 'Expression of Interest', looking to their potential and financial capability, 1st Respondent with the approval of the 'Committee of Creditors' considered the 'Expression of Interest' submitted by the Appellant and selected such 'Expression of Interest' for submission of 'Resolution Plan'. Such inclusion/ provisional

confirmation was communicated to the Appellant on 27th September, 2019 and a request for 'Resolution Plan' with all relevant information was accordingly made available to the Appellant on 29th September, 2019.

5. It was submitted that Part II of the 'Request for Resolution Plan' approved by the 'Committee of Creditors' of the 'Corporate Debtor', lays down the process for evaluation of a 'Resolution Plan'. The 'Request for Resolution Plan' clearly sets out that the 'Committee of Creditors' would negotiate only with the top three 'Resolution Applicants'.

6. The 'Resolution Plans' submitted by the Appellant and others were presented before the 'Committee of Creditors' and the Appellant scored 39.40% of voting shares and was ranked 6th as per the evaluation criteria set out in the 'Request for Resolution Plan'.

7. It was submitted that the e-mail dated 4th November, 2019 cannot be considered a revised financial proposal/ resolution plan. The contents of the e-mail are vague, unclear and did not specify a concrete amount the Appellant was offering. The 'Resolution Plan' submitted by the Appellant provided the financial proposal of the Appellant which was Rupees Five Crores. The contents of the e-mail could at best be construed as a willingness to negotiate with the 'Committee of Creditors' but in no manner could be considered a revised proposal for consideration of the 'Committee of Creditors'.

8. The 3rd Respondent- ('Successful Resolution Applicant') has also taken similar plea.

9. It is a settled law that the ‘Resolution Applicant’ has no right for re-negotiation or further negotiation. After submission of the ‘Resolution Plan’, if it is found in order and in accordance with Section 30(2), it is required to be placed before the ‘Committee of Creditors. The process of evaluation is guided by the said criteria as set out in the ‘Request for Resolution Plan’. If the evaluation criteria suggest that only top three ‘Resolution Applicants’ should be negotiated, the Appellant who ranked 6th among the ‘Resolution Applicants’ cannot have any right to participate for re-negotiation over the decision of the ‘Committee of Creditors’.

10. In **“Committee of Creditors of Essar Steel India Limited Through Authorised Signatory v. Satish Kumar Gupta & Ors.— Civil Appeal Nos. 8766-67 of 2019 etc.”**, the Hon’ble Supreme Court held that the commercial aspects of a ‘Resolution Plan’, its viability or otherwise, and, distribution of proceeds amongst stakeholders, were to be looked only by the ‘Committee of Creditors’ who are competent to go through all relevant aspects. Therefore, this Appellate Tribunal cannot deliberate on such issue.

11. The ‘Resolution Plan’ approved by the Adjudicating Authority can be challenged only on the ground as mentioned in Section 61(3), as under:-

“61. Appeals and Appellate Authority.—

.....(3) *An appeal against an order*

approving a resolution plan under section 31 may be filed on the following grounds, namely:—

(i) the approved resolution plan is in contravention of the provisions of any law for the time being in force;

(ii) there has been material irregularity in exercise of the powers by the resolution professional during the corporate insolvency resolution period;

(iii) the debts owed to operational creditors of the corporate debtor have not been provided for in the resolution plan in the manner specified by the Board;

(iv) the insolvency resolution process costs have not been provided for repayment in priority to all other debts; or

(v) the resolution plan does not comply with any other criteria specified by the Board.”

12. In the present case, as no ground has been made out in terms of Section 61(3), we are not inclined to interfere with the ‘Resolution Plan’ of 3rd Respondent duly approved by the Adjudicating Authority.

Both the appeals are dismissed. No costs.

(Justice S.J. Mukhopadhaya)
Chairperson

(Justice Bansi Lal Bhat)
Member(Judicial)

NEW DELHI

30th January, 2020

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