

IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH, (Court-I)
KOLKATA

IA No. 795/(KB)/2024
in
C.P. No. 1377/KB/2020

*An application under Sections 60(5) of the Insolvency & Bankruptcy Code,
2016 read with Rule 11 of the NCLT Rules, 2016;*

In the matter of:

UCO Bank

...FINANCIAL CREDITOR

Versus

Nandini Impex Pvt Ltd.

...CORPORATE DEBTOR

And

In the matter of:

Mideast Pipeline Products through
Its sole Proprietor, Shri Maninder Singh

...APPLICANT

Versus

Mr. Santanu Bhattacharjee & Anr.

...RESPONDENTS

Date of pronouncement of order: 16.07.2024

CORAM:

SMT. BIDISHA BANERJEE, HON'BLE MEMBER (JUDICIAL)

SHRI BALRAJ JOSHI, HON'BLE MEMBER (TECHNICAL)

Appearances (via Video Conferencing/Physical):

Mr. Jishnu Choudhury, Adv.] For the Applicant in I.A. 1083/2023 &

Mr. Ratul Das, Adv.] IA1082/2023

Ms. Rituparna Chatterjee, Adv.]

Mr. Dibyendu Ghosh, Adv.]

Ms. Tanusree Paul, Adv.] For the CoC

Ms. Urmila Chakraborty, Adv.]

Mr. Rishav Banerjee, Adv.] For the RP

Mr. Saurav Jain, Adv.]

Mr. Zeeshan Haque, Adv.] For the SRA
Mr. Rajib Mullick, Adv.]
Mr. Biswaroop Ghosh, Adv.]

Mr. Shaunak Mitra, Adv.] For the Applicant in IA 1412/2023
Mr. Aditya Karodia, Adv.]
Mr. Dripto Majumder, Adv.]
Ms. Suparna Sardar, Adv.]

O R D E R

Per: Bidisha Banerjee, Member (Judicial)

1. The Court congregated through a hybrid mode.
2. Ld. Counsels were heard.

3. Admitted Facts:

- 3.1. The Corporate Debtor (CD in short) Nandini Impex was admitted into Corporate Insolvency Resolution Process ("CIRP") vide order dated 20th September, 2022.
- 3.2. An appeal was preferred before the Hon'ble National Company Law Appellate Tribunal, Delhi, against the admission order dated 20th September, 2022. It was disposed of on 11th January, 2023.
- 3.3. A public announcement was made on 25th January, 2023 and invitation for Expression of Interest was issued on 9th April, 2023 which was widely published.
- 3.4. Five different applicants namely Trenchless Engineering Services Private Limited, Lumino Industries Ltd, Mount Intra Finance Private Limited, Navneet Garg and Mideast Pipeline Products expressed their interest for the CD. However, only one Resolution Plan was received by the Resolution Professional being that of the, Mideast Pipeline Products, the applicant herein.

- 3.5. The Resolution Plan submitted by the Applicant was opened at the 6th meeting of the Committee of Creditors of the Corporate Debtor held on 20th June, 2023. The Committee of Creditors (hereinafter referred to as “CoC”) in its commercial wisdom opined that the resolution plan as submitted by the Applicant did not fulfil the requirements under IBC. The Financial offer given in the resolution plan being not acceptable to the CoC, the CoC requested the Resolution Professional to seek from the Mideast a re-evaluation and resubmission of the resolution plan. The CoC also decided for re-publication of Form-G to get more member of interested resolution applicants.
- 3.6. A second form G was issued on 29th June, 2023 inviting expression of interest for the Corporate Debtor and published in widely circulated newspapers. The last date for receipt of expression of interest as per the said Form G was 14th July, 2023.
- 3.7. The Applicant company issued an email dated July 11, 2023 in the response to the Resolution Professional’s (RP in short) email dated 29th June, 2023 that having already participated in the Resolution Process any further Expression of Interest should not be required from them. Thus the Applicant Mideast chose not to revise its submitted Resolution Plan and indicated that the “earlier Resolution Plan submitted shall stand valid during the process of any further invitations for Resolution Plans.
- 3.8. By an email dated 13th July, 2023, the Resolution Professional duly replied that the 2nd Form G was issued by the CoC in its commercial wisdom and that none of the rights of the Applicant had been deprived. The Applicant Mideast was also requested to participate.

3.9. At the 7th Meeting of CoC, held on 18th July, 2023. Mr. Maninder Singh, the Sole Proprietor of the Applicant Company was present. Two new Expressions of Interest had been received and as such there were three prospective resolution applicants being M/s SPSS Infrastructure Private Limited, M/s Nakshatra Corporate Advisors Limited and M/s Mideast Pipeline Products.

3.10. In the said meeting the viability of the Resolution Plan shared by the Applicant was also discussed in detail. It was informed to the Middle East that “its Business plan submitted was “not at all feasible as no infusion of fund is there for running the unit for the projected years”... “as well as no basis of estimation of turnover in the Business Plan. Apart from that the operational creditors except staff will not get anything as per the plan which should be considered prudently considering the future plan of action or further projections.” “the Financial offer which was given in the Resolution Plan was also not acceptable as it was far below the liquidation value”. The CoC members observed that the plan does not fulfil all the requirements under IBC, “the financial offer given in the plan is not at all acceptable and revised financial plan considering all the aspects is required to be re-submitted”. The Sole Proprietor of the Applicant agreed that “after proper and deep re-assessment he would revise the Business plan and considering all the aspects he would revise the financial offer as would appear from the relevant extract of the 7th Meeting of the CoC annexed as Annexure F.

3.11. However, after several correspondences exchanged between the parties, the sole proprietor of the Applicant by its letter dated 29th August, 2023 informed that they would be retaining their earlier resolution plan and offer. Nevertheless, the Resolution Professional

requested the Applicant to submit its revised resolution plan by August 31, 2023.

3.12. At the 9th Meeting of the CoC held on 5th September, 2023 no other resolution plan except that of the Applicant was available for consideration. The Applicant was invited to discuss its Resolution Plan. The CoC asked the Applicant to reconsider its financial offer in the Resolution Plan. The sole proprietor of the Applicant agreed to reconsider its financial proposal in the Resolution Plan and agreed to submit its revised resolution plan within a week, as would appear from the minutes of the 9th Meeting of CoC.

3.13. By an e-mail dated 11th September, 2023, the sole proprietor provided a letter dated 9th September, 2023, with an offer of additional 15% to his earlier financial proposal as marked with the "Letter G" such letter was placed before the CoC in its 10th Meeting held on 28th September, 2023. On 12th September, the Resolution Professional duly intimated the Applicant that it required to submit a revised resolution plan after incorporating the changes and revised financial offer. The Applicant on 14th September, 2023 requested for time to submit such plan and confirmed that he would submit such plan on or before 25th September, 2023. But it failed to submit any revised resolution plan within the said period.

3.14. The sole proprietor of Applicant Company once again issued another email on 27th September, 2023 that he was not well and unable to attend to work and requested further time till 7th October, 2023. The CoC in the 10th CoC meeting decided to grant final extension till 7th October, 2023 for submission of Resolution Plan by the Applicant, Which forms Annexure "H and I". A copy of the revised Resolution Plan was finally submitted for the Applicant on 4th October, 2023.

- 3.15. At the 11th Meeting of the CoC held on 11th October, 2023, the revised resolution plan of the Applicant was put to vote. The sole proprietor of the Applicant was present during the said meeting. The CoC asked the Applicant to revise its offer but the Sole Proprietor of the Applicant intimated that the offer given by him was the “last offer”. The CoC in its commercial wisdom decided to reject the revised resolution plan of the Applicant by 100% which Forms Annexure J. Vide email dated 20th November, 2023, the said decision of the CoC to reject the Resolution Plan of the CoC by 100% majority was conveyed to the Applicant.
- 3.16. At the 12th Meeting of the CoC held on 4th December, 2023 the CoC in its commercial wisdom having noticed that the CIRP Period was scheduled to end on 20th December, 2023, approved liquidation of the Corporate Debtor with 100% votes. The CoC also authorised the Resolution Professional to file the necessary application for the purpose. An application being IA 2100 of 2023, inter alia, praying for liquidation of the Corporate Debtor pursuant to the Resolution passed by the CoC was filed on 20th December, 2023, which is pending consideration before this Tribunal.
- 3.17. Suddenly, two months thereafter, on 20th February, 2024 an e-mail was sent to the Resolution Professional bearing the subject “Resolution Plan for Nandini Impex Pvt Ltd.” with no attachment to the said e-mail.
- 3.18. The present application has been preferred by the applicant on 18th April, 2024, i.e. five months after its resolution plan was rejected by the CoC, praying inter alia, for the following reliefs:-

“f. Directing the Resolution Professional to forthwith place the revised offer of the applicant before the Committee of Creditors;

g. Directing the Committee of Creditors of the Corporate Debtor (In CIRP) to forthwith consider the Revised Resolution Plan of the applicant in light of the email dated 15th February, 2024;

h. Stay of all further proceedings in C.P.(IB) No. 1377 of 2020 pending disposal of the instant application;”

4. Admittedly, the Applicant in a bid to emerge as the successful bidder and to prevent liquidation of the Corporate Debtor submitted a revised offer vide its email dated 20th February, 2024 clearly stating that although the valuation of the Corporate Debtor has reduced over time, it was willing to improve its original offer of Rs.4.6 Crores by offering an additional amount of Rs.5.5 crores in case the Corporate Guarantees of the Corporate Debtor and the personal guarantees of the promoters of the Corporate Debtor are assigned to the applicant.
5. However, the Resolution Professional would contend that he has neither received any email dated 15th February, 2024 from the Applicant nor any offer from the Applicant on 20th February, 2024. (Annexure L at Page 130 Petition is the email the Resolution Professional had received without any attachment). An undated letter has been annexed at Pages 131 to 132 of the Application in “Annexure L” to the said Application. Which the Resolution Professional has come across for the first time. Thus, it is alleged that Applicant has made a false statement on oath and is liable for perjury.
6. At hearing, Ld. Counsel Ms. Urmila Chakraborty appearing for the Resolution Professional would vociferously contend that a conditional plan cannot be entertained. Quoting **Amit Bhavana Vs. Gyan Ch.**

Narang, CoC' that decision to liquidate is not to be questioned, Ld. Counsel would oppose any reconsideration of Applicants' proposal.

7. Ld. Counsel for the Resolution Professional would vehemently oppose the prayer for a reconsideration, assert that CIRP and Liquidation of the Corporate Debtor is a time-bound process and all stakeholders are expected to act diligently. Ld. Counsel would strenuously urge that the CIRP Period of the Corporate Debtor has already come to an end on 20th December, 2023. The Applicant has been given several opportunities to revise its offer. The Applicant who was present in all the relevant CoC Meeting, was never seriously interested in participating in the resolution process of the Corporate Debtor. It is alleged that its application has been filed merely to hinder the timely resolution of the Corporate Debtor, it is filed in abuse of the process of law and is not maintainable in law or on facts. It is urged that the Applicant in its purported letter at Pages 131 to 132 of the Application has merely conveyed that it was conditionally offering an amount of Rs. 5.5 crores. No revised resolution plan incorporating the said offer has been received from the Applicant till date.
8. Ld. Counsel for the Resolution Professional would allege that the Committee of Creditors in its commercial wisdom has already decided that the Corporate Debtor should be liquidated by 100% votes, as such any extension of time to consider the purported offer of the Applicant would only result in unnecessary incurring of CIRP cost.
9. We have considered the rival contentions and perused records.
10. We would note that the Hon'ble National Company Law Tribunal in its order dated 11.01.2023 has recorded the following:

"This appeal has been filed against the Order of the Adjudicating Authority dated 20th September, 2022 by which order the Application under Section 7 filed by the Appellant Financial Creditor has been admitted. The Financial Creditor has filed the Application under Section 7 claiming default to the extent of Rs.4,52,08,22,525.31/- including interest as on 31st October, 2020. The Adjudicating Authority after hearing the parties came to the Conclusion that the Corporate Debtor is a loss making company and is unable to service its debt. It was further held that the debt and default is proved and OTS which was granted was not honoured by the Corporate Debtor and further request for OTS is not obligatory to be accepted. The Corporate Debtor has also place reliance on the Judgement of the Hon'ble Supreme Court in the matter of "Vidharbha Industries Power Limited Vs. Axis Financial Creditor Limited". Adjudicating Authority after considering the submissions of the parties came to the conclusion that debt and default is proved and there is no such circumstances on which discretion be exercised for not initiating Section 7 proceeding. Mr. Sanjeev Sen, Sr. Counsel appearing for the Appellant challenging the Order of the Adjudicating Authority contends that the findings recorded by the Adjudicating Authority that it is a loss making company is not correct. He submits that the Company has made payments to its creditors to the extent of Rs. 148.25 Crores in last three financial years and in view of the Judgement of the Hon'ble Supreme Court in "Vidharbha Industries Power Limited Vs. Axis Financial Creditor Limited" the Adjudicating Authority ought to have exercised its discretion in not admitting the Application under Section 7 of the Code. It is further submitted that the Corporate Debtor was NPC Contractor and has its goodwill. There are no much tangible assets from which any amount can be recovered.

XXX

XXX

XXX

XXX

When this Appeal was taken by this Tribunal, Learned Counsel for the Appellant again made a request that Appellant will approach the Bank. On 02.11.2022, this Court adjourned the Appeal accepting the aforesaid request. The Appellant has now filed an affidavit dated 25th November, 2022 where Appellant has brought on record again an OTS proposal where Appellant has offered to make the payment which payment could not be made as per the earlier OTS which was approved on 20th October, 2018.

xxx

xxx

xxx

xxx

From the materials on record, it is clearly established that there is debt and default on the part of the Corporate Debtor. OTS which was given on 20th October, 2018 could not be honoured and the OTS which has now been submitted on 25th November, 2022 is not a fresh OTS Proposal but only proposal to make the balance payment as per 2018 OTS Proposal. In so far as the submission of Learned Counsel for the Appellant that Company is not loss making company, when debt and default is proved, on the arguments that company is not a loss making company debt and default cannot be ignored.

xxx

xxx

xxx

xxx

In so far as last submission of the Appellant that Appellant has submitted an OTS proposal to the Financial Creditors, in event, OTS is accepted, it is always open for the Appellant to file an Application before the Adjudicating Authority for accepting the proposal under Section 12-A of the Code on which the Adjudicating Authority may take appropriate decision in accordance with law.

11. It is evident that the Hon'ble Appellate Forum had found that "there are not much tangible assets from which any amount can be recovered", was inclined towards consideration of revised OTS proposal of the Appellant Middle East

12. In the present case evidently the Applicant has shown interest to revive the Corporate Debtor. It is also ready to revise its offer. The liquidation of Corporate Debtor is yet to be approved by this Tribunal, and it is almost trite that liquidation should be the last resort. Ld. Hon'ble Appellate Forum and that may be the reason why Annexure L at Page 130 Petition is the email the Resolution Professional had received without any attachment.
13. Further, it is almost trite and settled law that conditional plan cannot be approved.

In Ebix Singapore Private Limited vs. Committee of Creditors of Educomp Solutions Limited & Anr., Reported in (2022) 2 SCC 401 Hon'ble Apex Court has observed as follows:

"154. If the Appellants claim were to succeed, a Clause enabling a Resolution Applicants to withdraw/seek modification for reasons such as a 'Material Adverse Event' could also be set up by a Resolution Applicant when it is being prosecuted Under Section 74(3). It was contended before us that Form H, which is a compliance certificate that is to be submitted by the RP to the Adjudicating Authority along with the Resolution Plan, mentions that the RP can enter details as to whether the Resolution Plan is subject to any conditionalities under Clause 12. Thus, the argument goes that this permits the Resolution Applicant to stipulate in the Resolution Plan certain contingencies under which it can withdraw the Plan, for instance if there is an occurrence of a 'Material Adverse Event'. A form is subservient to the statute The conditionalities contemplated in Form H could be those which do not strike at the root of the IBC. They can include commercial conditions and business arrangements with the CoC However, conditions for

withdrawal or re-negotiation of the Resolution Plan cannot pass the test of 'viability' and 'implement ability as they would make the resolution process indeterminate and unpredictable. A two judge Bench of this Court in K Sashidhar (supra), while discussing the jurisdiction of the Adjudicating Authority Under Section 31 to evaluate a Resolution Plan has observed that the Resolution Plan should "be an overall credible plan, capable of achieving timelines specified in the Code generally, assuring successful revival of the corporate debtor and disavowing endless speculation"⁸⁵. Section 30(2)(d) of the IBC and Regulation 38 of the CIRP Regulations also provide that the Resolution Plan should be implementable. In the absence of specific statutory language allowing for withdrawals or even modifications by the successful Resolution Applicant, it would be difficult to imply the existence of such an option based on the terms of the Resolution Plan, irrespective of, and especially when they do not form a part of Clause 12 in Form H, as is the case in all the three Resolution Plans that are in dispute in this present appeal.

155. The aim to tighten timelines for receiving regulatory approvals through the provision of in-principal approvals, prior to the approval of the Adjudicating Authority, indicates that the statutory framework under the IBC has consistently attempted to avoid situations which may introduce unpredictability in the insolvency resolution process and has sought to make the process as linear as it can be. Further, the recommendations made in the Insolvency Law Committee Report of February 2020⁸⁸ discussed above indicate that the aim is to ensure that the Resolution Plan placed before the Adjudicating Authority should reach a certain finality, even in the contest of governmental approvals. A conditionality which allows for further negotiations, modification or withdrawal, once the

Resolution Plan is approved by the CoC would only derail the time bound process envisaged under the IBC.

Furthermore in NCLT, Ahmedabad Bench, in M2K Developers Pvt Ltd Ramchand Choudhary RP of Anil Mega Food Park Pvt Ltd, reported in IA/843 (AHM) 2021 observed as follows: “12. In our considered opinion, such Resolution Plan, if at all approved, cannot be effectively implemented by anyone. The proviso to section 31(1) does not permit us to approve such conditional Resolution Plan”.

14. We would also note that the admittedly and irrefutably the Corporate Debtor does not have much tangible assets that would fetch handsome recovery of loss for the creditors and, therefore, liquidation of the Corporate Debtor may defeat the very object of the code which is value maximisation of assets.
15. The Hon’ble Supreme Court in **‘Kridhan Infrastructure Pvt. Ltd.(Now Appellant(s) Known as Krish Steel & Trading Pvt. Ltd.’ Vs.‘Venkatesan Sankaranarayan & Ors.’**, has observed as hereunder:“9. Liquidation of the Corporate Debtor should be a matter of last resort. The IBC recognizes a wider public interest in resolving corporate insolvencies and its object is not the mere recovery of monies due and outstanding.”.

(Emphasis added)

16. At this juncture, it would only be wise and prudent if the CoC is directed to renegotiate with the Applicant, on its revised offer and withdrawals of conditions attached thereto, within 15 days and report to this Tribunal through the Resolution Professional on the next date of hearing.

17. Directed accordingly, this I.A. No. 795/KB/2024, thus stands **disposed of.**
18. **C.P. (IB) No. 1377/KB/2020** for further consideration on **07.08.2024.**
19. The Registry is directed to send e-mail copies of the order forthwith to all the parties and their Ld. Counsel for information and for taking necessary steps.
20. Certified Copy of this order may be issued, if applied for, upon compliance of all requisite formalities.



LEGALERA
BY THE PEOPLE. FOR THE PEOPLE. OF THE PEOPLE

Balraj Joshi
Member (Technical)

Bidisha Banerjee
Member (Judicial)

Signed on this, the 16th July, 2024

S.Ghose, (Steno).