

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 653 of 2020

[Arising out of Order dated 03rd July, 2020 passed by the National Company Law Tribunal, New Delhi, Special Bench, Court-II in I.A. No.1679/2019 in C.P. No.(IB)-940(ND)/2018]

IN THE MATTER OF:

Kundan Care Products Ltd.
3, Scindia House, 2nd Floor
Janpath, Connaught Place
New Delhi – 110001
(Through Its Director)

...Appellant

Versus

1. Mr. Amit Gupta
Resolution Professional
309, The Crescent Business Park
Sakinaka Telephone Exchange Lane
Sakinaka, Andheri East, Mumbai – 400072
2. Export Import Bank of India
Centre One Building, Floor 21
World Trade Centre Complex
Cuffe Parade, Mumbai-400005
3. Power Finance Corporation Ltd.
'Urjanidhi', 1, Barakhamba Lane,
Connaught Place, New Delhi-110001
4. Astonfield Renewables Pvt. Ltd.
716, 7th Floor, Dalamal Tower
Nariman Point, Mumbai-400021

...Respondents

Present:

**For Appellant: Mr. Prithu Garg and Mr. Siddharth Mehta,
Advocates**

For Respondents: Mr. Amit Gupta, Resolution Professional
**Ms. Pooja Mahajan and Ms. Mahima Singh,
Advocates for R-1.**
Mr. Ashish Rana, Advocate for R-2 (CoC).

J U D G M E N T

BANSI LAL BHAT, J.

Vide order dated 3rd July, 2020 the Adjudicating Authority, National Company Law Tribunal, New Delhi, Special Bench Court-II rejected IA 1679/2019 filed in IB-940(ND)/2018, *inter alia*, on the ground that it would not be appropriate for the Adjudicating Authority to deal with an issue which is already sub-judice before the Hon'ble Apex Court. Through the medium of this Appeal the Appellant-Kundan Care Products Ltd., who has emerged as the Successful Resolution Applicant in Insolvency Resolution Process of M/s Astonfield Solar (Gujarat) Pvt. Ltd. ('Corporate Debtor') assails the impugned order rejecting its Application for withdrawal of its Resolution Plan and cancellation/ revocation/ return/ refund of the Performance Bank Guarantee, on the ground that there is no legal basis or justification for holding that an application for withdrawal of a Resolution Plan post approval is not maintainable and that the matter pending consideration before Hon'ble Apex Court viz IA No.9682/2020 in Civil Appeal No.9241/2019 was filed by the Appellant invoking Article 142 of the Constitution of India seeking specific relief in alternate to the relief of withdrawal of the Plan and same had no bearing on IA No.1679/2019 pending before the Adjudicating Authority.

2. It is submitted on behalf of Appellant that there is no basis or justification for the finding that the Adjudicating Authority under the Insolvency and Bankruptcy Code, 2016 has no power or jurisdiction to allow withdrawal of a Resolution Plan post approval from the Committee of Creditors (for short 'CoC'). It is submitted that the view adopted by the

Adjudicating Authority runs parallel to the view taken by NCLT, Mumbai Bench in Deccan Value Investors LP case, which has been upheld by this Appellate Tribunal in Company Appeal (AT) No.1276/2019 decided on 27th September, 2019. It is further submitted that I&B Code does not contain any provisions to compel specific performance of a Resolution Plan by an unwilling Resolution Applicant and a plea for withdrawal of a plan will have to be accepted, if the plan is found to be unviable, unfit for implementation or is either lacking provisions for its successful implementation or is based on incorrect assumptions. It is further submitted that the Adjudicating Authority has to be satisfied about the feasibility and viability of the Resolution Plan and in the event of these relevant factors found lacking the Adjudicating Authority may reject the Resolution Plan approved by CoC or remit the case to CoC for reconsideration. It is lastly submitted that in the instant case the approved Resolution Plan has been rendered commercially unviable on account of delay in conclusion of CIRP and the Appellant could not be prevented from withdrawing the same.

3. Per contra it is argued on behalf of Respondent No.1 ('Resolution Professional') that the Appeal is not maintainable in view of the same being squarely covered by the judgment of this Appellate Tribunal rendered in ***“Committee of Creditors of Educomp Solutions Ltd. vs. Ebix Singapore Pte. Ltd. & Anr.”*** wherein it was held that after approval of the Resolution Plan by the Committee of Creditors the Adjudicating Authority has no jurisdiction to entertain or permit the withdrawal application filed by the Resolution Applicant and that Adjudicating Authority cannot enter into the arena of the majority decision of the Committee of Creditors. It is

further submitted that there is no provision in the Code which allows withdrawal of an approved Resolution Plan and provisions in the Regulations for submission of Performance Bank Guarantee by a Resolution Applicant while submitting its Resolution Plan is a provision to discourage the Resolution Applicant from withdrawing its Resolution Plan. The business decision of the CoC, based on their commercial wisdom is not open to judicial review before the Adjudicating Authority or even before this Appellate Tribunal. It is lastly submitted that the Resolution Plan of Appellant was approved in preference to two other Resolution Applicants for maximizing the value of Corporate Debtor and the Appellant cannot be permitted now to scuttle the Corporate Insolvency Resolution Process of the Corporate Debtor by walking away from its Resolution Plan which will have the effect of pushing the Corporate Debtor into liquidation.

4. On behalf of Respondent No.2 (Committee of Creditors) it is submitted that the I&B Code does not prescribe any provision for withdrawal of Resolution Plan by the Resolution Applicant and the Adjudicating Authority is not bestowed with any power to allow withdrawal of the Resolution Plan. Allowing such prayer would be without jurisdiction. It is further submitted that once the Resolution Plan has been approved, it becomes a binding contract between the parties and the Successful Resolution Applicant cannot be permitted to withdraw the same which will have the effect of sending the Corporate Debtor into liquidation.

5. Heard learned counsel for the parties and considered their verbal and written submissions in the backdrop of facts of the case and the circumstances in which the impugned order came to be passed. It appears

that in terms of the impugned order the Adjudicating Authority has rejected the prayer emanating from the Resolution Applicant seeking withdrawal of the Resolution Plan, which had been approved by the Committee of Creditors and in respect whereof application under Section 31 of the I&B Code filed by the Resolution Applicant was pending consideration before the Adjudicating Authority. The Adjudicating Authority was of the view that it had no jurisdiction to permit withdrawal of a Resolution Plan, which had been duly approved by the Committee of Creditors. It has also been influenced by the fact that an issue of similar nature was sub-judice before the Hon'ble Apex Court. It is brought to our notice by learned Counsel for Respondent No.1 that the recent decision of this Appellate Tribunal in "***Committee of Creditors of Educomp Solutions Ltd. Vs. EBIX Singapore Pte Ltd. - Company Appeal (AT) (Insolvency) No.203 of 2020***" squarely covers the present case where an Appeal filed against order of Adjudicating Authority permitting withdrawal of Resolution Plan by the Resolution Applicant, which had been approved by the Committee of Creditors on the ground of the Resolution Plan having been rendered commercially unviable on account of lapse of substantial time and inordinate delay in Corporate Insolvency Resolution Process was rejected by this Appellate Tribunal holding that the Adjudicating Authority cannot enter into the arena of the majority decision of the Committee of Creditors and once the Resolution Applicant has accepted the conditions of Resolution Plan, it was not open to it to make a U-turn and wriggle out of the liabilities imposed upon it under the Resolution Plan approved by the Committee of Creditors. Para 95 of the aforesaid judgment rendered on

29th July, 2020 relevant for purposes of disposal of this Appeal may be extracted as under: -

“95. In the instant case, notwithstanding the fact only upon the approval of the ‘Adjudicating Authority’ the ‘Resolution Plan’ of the ‘Resolution Applicant’ would be binding on all the parties and further that the application for withdrawal was filed by the 1st Respondent/‘Resolution Applicant’ was filed earlier to the stage of ‘Approval’ by the ‘Adjudicating Authority’ yet this Court comes to an cocksure conclusion that the ‘Adjudicating Authority’, in law cannot enter into the arena of the majority decision of the ‘Committee of Creditors’ other than the grounds mentioned in Section 32 (a to e) of the ‘I&B’ Code. Moreover, after due deliberations, when the 1st Respondent/‘Resolution Applicant’ had accepted the conditions of the ‘Resolution Plan’ especially keeping in mind the ingredients of Section 25(2)(h) of the ‘Code’ to the effect that ‘no change or supplementary information to the ‘Resolution Plan’ shall be accepted after the submission date of ‘Resolution Plan’ then it is not open to the 1st Respondent/‘Resolution Applicant’ to take a ‘topsy turvy’ stance and is not to be allowed to withdraw the approved ‘Resolution Plan’.”

6. Before approval of a Resolution Plan by the Committee of Creditors the Corporate Insolvency Resolution Process passes through various stages. After admission of the Application under Section 7, 9 or 10 of the I&B Code, IRP is appointed, moratorium is slapped prohibiting activities enumerated in Section 14, public announcement is made, claims are invited, received and collated by the Interim Resolution Professional, Committee of Creditors is constituted and after appointment of Resolution Professional Expression of Interest is floated inviting Resolution Plans whereafter the Resolution Professional places all Resolution Plans before the Committee of Creditors. After preparation of Information Memorandum and examination of each Resolution Plan conforming the conditions laid down in Section 30(2) of the I&B Code, the Resolution Professional is required to present such compliant Resolution Plans to the Committee of Creditors for its approval. The Committee of Creditors may approve a Resolution Plan by a vote of not less than 66% of voting share of the Financial Creditors after considering its feasibility and viability, the manner of distribution proposed and other requirements as specified by IBBI. This process is to be concluded within 180 days and in the event of extension granted by the Adjudicating Authority for sufficient reasons, the CIRP period may extend to 270 days with maximum outer limit of 330 days including the period which may have been consumed by the judicial intervention during the CIRP process. It is manifestly clear that I&B Code provides for insolvency resolution in a time bound manner, the object sought to be achieved, *iner alia*, being maximization of value of assets of corporate persons and balancing the interests of all stake holders. Primacy

is given to the Committee of Creditors, who are empowered to take a business decision in regard to feasibility and viability of a Resolution Plan based on their commercial wisdom, which is not justiciable as by now well settled by a catena of rulings handed down by the Hon'ble Apex Court. Intervention by the Adjudicating Authority is limited to compliance of the Resolution Plan approved by the Committee of Creditors to requirements of Section 30(2) and by this Appellate Tribunal in Appeal to grounds embodied in Section 61(3) of the I&B Code. Reference in this regard may be made to law laid down by the ***Hon'ble Apex Court in K Shashidhar vs. Indian Overseas Bank and Ors. reported in (2019) SccOnline SC 257.***

7. Be it seen that the CIRP process undertaken involves filing of Expression of Interest by the prospective Resolution Applicants which may ultimately manifest in the form of prospective Resolution Plan after negotiations as regards improvement or revision in terms of the proposed Resolution Plan. This process is in the nature of a bidding process where, based on consideration of the provisions of a Resolution Plan with regard to financial matrix, capacity of the Resolution Applicant to generate funds, infusion of funds, upfront payment, the distribution mechanism and the period over which the claims of various stake holders are to be satisfied besides the feasibility and viability of the Resolution Plan, a Resolution Applicant emerges as the highest bidder (H1) eliminating the Resolution Plans of Resolution Applicants, which are ranked H2 and H3. The approval of a Resolution Plan by the Committee of Creditors with requisite majority has the effect of eliminating H2 and H3 from the arena. Though,

such approved Resolution Plan would be binding on the Corporate Debtor and all stake holders only after the Adjudicating Authority passes an order under Section 31 of the I&B Code approving the Resolution Plan submitted by Resolution Professional with the approval of Committee of Creditors in terms of provisions of Section 30(6) of the I&B Code, it does not follow that the Successful Resolution Applicant would be at liberty to withdraw the Resolution Plan duly approved by the Committee of Creditors and laid before the Adjudicating Authority for approval thereby sabotaging the entire Corporate Insolvency Resolution Process, which is designed to achieve an object. A Resolution Applicant whose Resolution Plan stands approved by Committee of Creditors cannot be permitted to alter his position to the detriment of various stake holders after pushing out all potential rivals during the bidding process. This is fraught with disastrous consequences for the Corporate Debtor which may be pushed into liquidation as the CIRP period may by then be over thereby setting at naught all possibilities of insolvency resolution and protection of a Corporate Debtor, moreso when it is a going concern. That apart, there is no express provision in the I&B Code allowing a Successful Resolution Applicant to stage a U-turn and frustrate the entire exercise of Corporate Insolvency Resolution Process. The argument advanced on behalf of the Appellant that there is no provision in the I&B Code compelling specific performance of Resolution Plan by the Successful Resolution Applicant has to be repelled on four major grounds: -

- (i) There is no provision in the I&B Code entitling the Successful Resolution Applicant to seek withdrawal after its Resolution Plan stands approved by the Committee of Creditors with requisite majority;
- (ii) The successful Resolution Plan incorporates contractual terms binding the Resolution Applicant but it is not a contract of personal service which may be legally unenforceable;
- (iii) The Resolution Applicant in such case is estopped from wriggling out of the liabilities incurred under the approved Resolution Plan and the principle of estoppel by conduct would apply to it;
- (iv) The value of the assets of the Corporate Debtor is bound to have depleted because of passage of time consumed in Corporate Insolvency Resolution Process and in the event of Successful Resolution Applicant being permitted to walk out with impunity, the Corporate Debtor's depleting value would leave all stake holders in a state of devastation.

8. We are of the considered opinion that the sanctity of resolution process has to be maintained and the Resolution Applicant whose Resolution Plan has been approved by Committee of Creditors cannot be permitted to withdraw its Resolution Plan. Provision for submission of a Performance Bank Guarantee by a Resolution Applicant while submitting

its Resolution Plan, as required under the amended provisions of IBBI (Insolvency Resolution Process of Corporate Persons) Regulations, 2016 is a step in this direction but may not be deterrent enough to prevent a Successful Resolution Applicant from taking a U-turn. Reliance placed by the Appellant on judgment rendered by this Appellate Tribunal in **“Committee of Creditors of Metalyst Forging Ltd. Vs. Deccan Value Investors LP & Ors. – Company Appeal (AT) (Insolvency) 1276 of 2019 decided on 7th February, 2020”** is of no consequence as in that case the Resolution Plan approved by the Committee of Creditors was found to be violative of Section 30(2)(e) of the I&B Code. It is in the context of such infirmity that this Appellate Tribunal had observed that the Adjudicating Authority could not compel specific performance of a plan by an unwilling Resolution Applicant. Such observations cannot be treated as a ratio to be followed as a precedent. The facts were entirely different and contravention of Section 30(2)(e) was found to have been established in that case. Same has no resemblance or comparison with the facts of the instant case where the Resolution Plan approved by the Committee of Creditors is still awaiting approval of the Adjudicating Authority. Therefore, no reliance can be placed on the observations made in the aforesaid ruling. We may also add that the approved Resolution Plan admittedly does not have a provision which could be treated as a contract of personal service rendering the same unenforceable or of a nature in respect of which specific performance cannot be an appropriate remedy. This feature of the plan also distinguishes it from the one which was the subject matter in the aforestated Appeal decided by this Appellate Tribunal.

9. Having regard to the forgoing discussion, we find no merit in this Appeal. The Appellant has failed to demonstrate that the impugned order suffers from any legal infirmity. The Appeal being devoid of merit is dismissed. No order as to costs.

**[Justice Bansi Lal Bhat]
Acting Chairperson**

**[Justice Anant Bijay Singh]
Member (Judicial)**

**[Dr. Ashok Kumar Mishra]
Member (Technical)**

New Delhi

30th September, 2020.

Ash.