

Daiichi Sankyo Company Limited vs Malvinder Mohan Singh And Ors on 28 October, 2021

Author: Sanjeev Narula

Bench: Sanjeev Narula

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* IN THE HIGH COURT OF DELHI AT NEW DELHI
+ O.M.P.(EFA)(COMM.) 6/2016 & EX.APPLs. (OS) 1096-98/2021.

DAIICHI SANKYO COMPANY LIMITED Decree Holder
Through: Mr. S. N. Mookherjee and
Mr. Arun Kathpalia Senior
Advocates, Mr. Amit K.
Mishra, Mr. Mohit Singh, Ms.
Kanika Singhal, Mr. Varad
Choudhary and Mr. Kunal
Chatterjee, Advocates for
Decree Holder.

versus

MALVINDER MOHAN SINGH AND ORS. Judgement Debtors
Through: Mr. Ramji Srinivasan, Senior
Advocate with Ms. Aditi
Mittal, Mr. Aditya Narayan
Mahajan, Mr. Siddhant
Tripathi, Mr. Jatin Kumar and
Ms. Rajshree Chaudhary,
Advocates for erstwhile COC
of Sharan Hospitality Pvt. Ltd.
(Applicant in EX.APPL. (OS)
898/2021).
Mr. Krishnendu Datta, Senior
Advocate with Mr. Kinshuk
Chatterjee, Ms. Srishti Gupta
and Mr. Shubham S. Saxena,
Advocates for Consortium of
DMI Alternative Investment
Fund-Special Opportunities
Scheme, Fact Software Pvt Ltd
and Mr. Yash Chopra

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(Applicant in EX.APPL. (OS))

649/2021).

Ms. Archana Lakhotia, Mr.

Basit Zaidi and Ms. Rashi

Maheshwari, Advocates for

Garnishee No. 27 & 28.

Mr. Ritin Rai, Senior

Advocate, Mr. Ajay Bhargava,

Ms. Trishala Trivedi and Mr.

Shivank Diddi, Advocates for

R-25.

Mr. Sandeep Das and Ms.

Aishwarya Singh, Advocates

for Religare Finvest Ltd.

Mr. Sumit Goel, Ms. Sonal

Gupta, Mr. Manu Bajaj and

Ms. Nitika Pandey, Advocates

for ICICI Bank.

Ms. Prachi Johri, Advocate for

Successful Resolution

Applicant of Sharan Hospitality

Pvt. Ltd. in EX.APPL. (OS)

898/2021).

Ms. Devina Sehgal and Mohd

Ashaab, Advocates for JD- 16

& 17.

Mr. Rajeev Agarwal and Mr.

Shashank Sharma, Advocates

for R-37 (Lakshmi Vilas Bank

Ltd.) in EA 819/2020.

Mr. Ashwani Kumar, Advocate

for R-27 & 35 in EA No.

819/2020.

CORAM:

HON'BLE MR. JUSTICE SANJEEV NARULA

ORDER

% 28.10.2021

[VIA HYBRID MODE]

EX.APPL.(OS) 898/2021 [on behalf of Respondent No. 25 (Sharan Hospitality Private Limited) under Section 151 of the Code of Civil Procedure, 1908, seeking modification/vacation of the Order of this Court dated 13th November 2018 in I.A. No. 14554 of 2018, and of the Order of this Court dated 27th September 2019 in I.A. No. 14553 of 2018] and EX.APPL.(OS) 649/2021 [on behalf of Successful Resolution Applicant of Pawan Impex Pvt. Ltd. (Consortium of DMI Alternative Investment Fund-Special Opportunities Scheme, Fact Software Pvt Ltd and Mr. Yash Chopra), under Order XXI Rule 46A (3) and Rule 46F r/w Order 1 Rule 10(2) of the CPC seeking discharge

and deletion of Garnishee No. 23 from the array of parties impleaded vide order dated 28 th May 2019 in I.A. No. 14553/2019 filed by the Decree Holder]

1. As both these applications seek nearly identical reliefs and arise from similar factual backgrounds, it is considered appropriate to dispose them by a common order.

2. The applicant in E.A. No. 898/2021 seeks the following relief:

"Allow the present Application and pass an order modifying/vacating the Order dated 13.11.2018 passed in I.A No. 14554/2018 and Order dated 27.09.2019 passed in I.A No. 14553/2018 to the extent that they restrain the Applicant from transferring its assets and thereby discontinue further proceedings against the Applicant in the present petition."

3. Likewise, E.A. No. 649/2021 makes the following prayers:

"A. Pass an order allowing the present application and discharge Pawan Impex Private Limited, Garnishee No. 23 upon payment of INR 11,60,250.00 to RS Infrastructure Private Limited by the Successful Resolution Applicant in accordance with the Resolution Plan approved by the Hon'ble National Company Law Tribunal, Principal Bench, New Delhi vide order dated 31.05.2021 in Company Petition CP No. (IB)- 1396/PB/2019;

B. Pass an order deleting the name of Pawan Impex Private Limited as Garnishee No. 23 from the array of parties of I.A. 14553/2020 filed by the Decree Holder on payment of INR 11,60,250.00 to RS Infrastructure Private Limited;"

BRIEF FACTS:

4. For the sake of convenience, common facts of E.A. 898/2021 are noted, and thereafter, additional facts pertaining to each corporate debtor as provided in each E.A., are noted separately:

4.1. This Court vide judgment dated 31st January 2018 in OMP (EFA) (COMM) 6/2016 affirmed the Award dated 29 th April 2016 in favour of Decree Holder (Daiichi Sankyo co. Ltd.), [thereby dismissed the objections against the enforcement of Award by Judgment Debtors].

The said judgment was affirmed by the Supreme Court vide order dated 16th February 2018 wherein it dismissed the Special Leave to Appeal filed by the Judgment Debtors. The Award thus attained finality in India and is now being executed as a decree in the present proceedings.

4.2. Pursuant to dismissal of the aforesaid SLPs, Decree Holder filed I.A. No. 14554/2018 before this Court, seeking directions against Garnishees who owe monies to the Judgment Debtors. Based on this request, this Court vide order dated 13 th November 2018, inter alia restrained Sharan

Hospitality Private Limited [hereinafter referred to as 'Sharan Hospitality'] from, inter alia, transferring or creating third party interest in immovable properties owned by it and/or its agents. 4.3. In the meanwhile, Cushman & Wakefield India Pvt. Ltd. filed an application bearing C.P. No. 4071/I&BP/NCLT/MAH/2019 under Section 9 of the Insolvency and Bankruptcy Code, 2016 [hereinafter referred to as the 'Code'] for initiation of the Corporate Insolvency Resolution Process [hereinafter referred to as the 'CIRP'] in respect of Sharan Hospitality (the Corporate Debtor therein) before Mumbai Bench of the National Company Law Tribunal. Vide NCLT's order dated 8th May 2019, the said application was admitted, a moratorium in terms of Section 14 of the Code was declared, and CIRP initiated against Sharan Hospitality.

4.4. Parallely, in the aforementioned I.A. No. 14553/2018, this Court vide order dated 28 th May 2019 impleaded 56 entities as Garnishees to the present petition (including Sharan Hospitality as Respondent No. 25 and Pawan Impex as Garnishee No. 23). Thereafter, vide order dated 27th September 2019, the Court restrained the Garnishees from inter alia disposing off, alienating, or encumbering their assets. 4.5. Sharan Hospitality, through its Resolution Professional, also filed an EA NO. 861/2019 in OMP (EFA)(COMM) 6/2016 seeking modification/variation of: (i) Order dated 13th November 2018, passed in I.A. No. 14554/2018, and (ii) Order dated 27 th September 2019 passed in I.A. No. 14553/2018, to the extent such orders restrained it from transferring its assets, on the ground that execution proceedings be discontinued in view of the moratorium imposed by NCLT. In that regard, this court passed its order dated 15 th January 2020, relevant portion whereof is extracted below:

"7. The present execution proceedings cannot be continued against these five applicants during the period of moratorium. Section 14 does not require a separate stay order to be passed by this Court to discontinue the proceedings as the continuation of these proceedings stands prohibited from the date of moratorium. Once the moratorium prohibiting the continuation of these proceedings has come into force, there is no provision in the I & B Code for modification/variation of the earlier orders of this Court. The judgments cited by the judgment debtors and Committee of creditors do not support them.

8. In that view of the matter, no further orders are warranted in these applications except noting that the present proceedings are not continuing against the applicants till the continuation of the moratorium by operation of law.

9. The applications are disposed of in the above terms."

4.6. In the insolvency proceedings of Sharan Hospitality, the resolution plan of one Resolution Applicant - M/s. Majestic Auto Ltd., a public company - was approved by the Committee of Creditors on 30th January 2020, and later approved by the NCLT on 15th April 2021; in terms whereof, the Resolution Professional is now acting in the capacity of a Monitoring Agent of Sharan Hospitality. 4.7. Thus, the CIRP of Sharan Hospitality is complete and the Resolution Plan has to be implemented.

Regarding Pawan Impex - from EX.APPL. (OS) 649/2021 4.8. Pawan Impex was admitted to insolvency, and a moratorium was imposed by the Principal Bench of NCLT, New Delhi in C.P. No. (IB)-1396/PB/2019 on 25th July 2019.

4.9. This Court, vide Order dated 27 th September 2019 in I.A. No. 14553 of 2018, restrained Pawan Impex - as one of the garnishees - from inter alia disposing of, alienating, or encumbering its assets.

4.10. However, after taking note of the operation of moratorium operating qua it, this order was modified on 15 th January 2020 pursuant to an application [bearing E.A. 858-862/2020] and clarified that the present proceedings are not continuing against Pawan Impex till continuation of moratorium by operation of law.

4.11. On 19th September 2020, The Resolution Plan submitted by the Resolution Applicant in the CIRP of Pawan Impex, was approved by the Committee of Creditors.

4.12. The Decree Holder filed two applications before the NCLT whilst the application for approval of Resolution Plan submitted by the Resolution Applicant was pending. By way of one application, the Decree Holder sought stay of the CIRP and through the other, the Decree Holder prayed for impleadment in the CIRP of Pawan Impex. However, the NCLT rejected both reliefs on 31st May 2021, and instead, approved the Resolution Plan.

4.13. Thus, the CIRP of Pawan Impex is also complete and the Resolution Plan has to be implemented.

5. Mr. Ramji Srinivasan, Senior Counsel for the Applicant in EX.APPL. (OS) 898/2021, submits that for the successful implementation of the Resolution Plan, it is pertinent that the embargo created by the stay orders of this Court inter alia restraining the transfer/disposal of assets of Sharan Hospitality, be removed by way of a suitable modification/vacation of such orders, so that the Resolution Applicant can take over Sharan Hospitality on a fresh slate basis. In fact, the order of the NCLT approving the Resolution Plan, does takes note of this position in para 14, which is extracted below:

"14. In view of the above, the Resolution Plan would be implemented once the stay orders are vacated or modified to allow such implementation. It is also understood that in case the implementation of the Resolution Plan does not commence within 18 (eighteen) months from the date of its approval by this Tribunal, the Resolution Applicant would discuss the further course of action with the Applicant and CoC. Any proposal/agreement not to extend the term of the implementation of Resolution Plan at that stage shall not be treated as non-implementation of the Plan."

6. It is further submitted that in the event the implementation of the Plan does not start within 18 months from date of approval by NCLT, the Resolution Applicant will have to mutually discuss with the RP and secure financial creditors of Sharan Hospitality regarding further action. Accordingly, it is imperative that the stay orders passed by this Court be modified.

7. Additionally, Mr. Srinivasan submits that neither does Sharan Hospitality owe any money to the Decree Holder, nor is it a garnishee of the Decree Holder. As a matter of fact, the Decree Holder has not even filed a claim in the CIRP of Sharan Hospitality for the same reason. Para 1(c) and

(d) of Part B - Financial Proposal of the Resolution Plan, as approved by the order of the NCLT, provides the following with respect to the financial proposal of the Resolution Applicant under the Resolution Plan:

"c. No other liability prior to the Effective Date (whether or not standing in the books of accounts of the Corporate Debtor and whether or not acknowledged as due by the Corporate Debtor) shall be borne by the Resolution Applicant. All liabilities standing to the account of the Corporate Debtor shall stand extinguished and be reduced to nil.

d. All claims not admitted as on date of approval of the Resolution Plan by the COC (whether or not standing in the books of accounts of the Corporate Debtor and whether or not acknowledged as due by the Corporate Debtor) shall stand extinguished and barred and shall become Nil. No payments are offered against such claims."

8. In light of the above, except for the Financial Proposal under the Resolution Plan, the Resolution Applicant has no liability whatsoever for the period prior to the Effective Date. Moreover, all claims other than those admitted as on date of approval of the Resolution Plan shall stand extinguished and barred and shall become Nil.

9. Mr. Srinivasan further argues that, assuming but not conceding that the Decree Holder has a rightful claim and could have filed a claim in the CIRP process of Sharan Hospitality, even then would it have been classified, at best, as an unsecured creditor; such claims do not rank superior to the claims of secured and financial creditors under the waterfall payment mechanism envisaged under the Code, and accordingly, Decree Holder would not have received any money from Sharan Hospitality over and above its secured financial creditors.

10. Reliance is placed on Section 31 of the Code to submit that once the Resolution Plan has been approved, it becomes binding on the corporate debtor and all its stakeholders. Further reliance is also placed upon the judgments of the Supreme Court in *Essar Steel India Limited v. Satish Kumar Gupta and Ors.*,¹ and *Ghanshyam Mishra and Sons Pvt. Ltd. v. Edelweiss Asset Reconstruction Company Limited*.²

11. Mr. Krishnendu Datta, Senior Counsel for the Applicant in EX.APPL. (OS) 649/2021, submits that order of the NCLT dated 31 st May 2021, accepting resolution plan qua Pawan Impex and dismissing its applications, has not been challenged by the Decree Holder till date. This order was never impugned by the Decree Holder and the Resolution Plan was implemented in accordance with its terms and conditions. The Resolution Plan stands partly implemented. Thus, the Decree Holder has no right to challenge the same now. In fact, the next step is payment to related party Unsecured
1 (2020) 8 SCC 5316 at paras 107.

2 2021 SCC OnLine SC 313 at para 61-64, 86, 95 and 130.

Financial Creditors. R.S. Infrastructure Private Limited is one such party, which is also a garnishee to the present proceedings, and as per the Resolution Plan, the Applicant is required to pay INR 11,60,250/- as full and final settlement of its liability qua Pawan Impex.

12. Countering the submissions advanced by the applicants, Mr. Mookerjee, Senior Counsel for the Non-Applicant/Decree Holder, argues that the proposition advanced by Mr. Srinivasan - on the legal effect of approval of resolution plan- is not in dispute. However, it is argued that the court should defer the present proceedings to await the decision of the Supreme Court in SLP No. 20417/2017 titled M/s. Daiichi Sankyo Company Limited vs. Oscar Investments Limited & Ors., wherein the apex Court while considering several applications has reserved orders on 12 th May 2021. Mr. Mookerjee claims that the said proceedings would have a bearing on the present applications inasmuch as the Supreme Court has also heard arguments in an I.A. bearing No. 131208/2020, which has been filed on behalf of Judgment Debtor No. 1 - Mr. Malvinder Mohan Singh - seeking stay of proceedings in petitions mentioned in the said application, which includes insolvency proceedings titled: (i) Cushman & Wakefield India Private Limited v. Sharan Hospitality Private Limited, in C.P. (I.B.)-No.4071/I&BP/NCLT/MAH/2019, and, (ii) Axis Bank Limited v. Pawan Impex Private Limited, C.P.(I.B.)- No.1396(PB)/2019. It is argued that since the effect of resolution proceedings in question is being considered by the Supreme Court, this Court should await the outcome of the said proceedings.

13. Besides, Mr. Kathpalia, Senior Counsel for the Respondent, opposing a similar request made by Mr. Datta of Pawan Impex, joins Mr. Mookerjee in making the same prayer and submits that in fact an application seeking forensic investigation has also been considered by the Supreme Court, and has been reserved for orders on the same date.

ANALYSIS:

14. The Court has considered the submissions of the parties.

15. In its considered opinion, the position in law, as urged by Mr. Srinivasan by relying upon the judgments of the Supreme Court noted above, can certainly not be disputed. In fact, Mr. Mookerjee very fairly submits that the same is indeed the correct legal position.

16. Therefore, the only question that arises for consideration is whether, in view of the pending decisions in SLP No. 20417/2017, this Court should defer the present proceedings.

17. In the opinion of the Court the answer is in the negative. Admittedly, there is no stay of the Resolution Plan or the process, as approved. In respect of Sharan Hospitality, the Decree Holder never approached the CIRP, whilst the insolvency proceedings were pending. In the case of Pawan Impex, although a request was made, however, the same was declined, and as Mr. Datta points out, the Decree Holder did not take any steps to challenge the order declining its request and approving the resolution plan; thus, by acquiescence the Decree Holder is bound by it. In absence of any

restraint on the Resolution Plan or the process, the requests made by the Applicants are just and fair. The implementation of the Resolution Plan, as approved, cannot be deferred, as it entails several consequences/compliances which are required to be complied with, without delay. The dominant purpose of making the resolution plan binding on all stake-holders, as observed by the Supreme Court in Ghanshyam Mishra and Sons Pvt. Ltd. (supra) is that there should not be any surprise claim flung on successful Resolution Applicant and he should start with a fresh slate on the basis of approved Resolution Plan (see para 61 of the judgment). The commercial wisdom of the CoC has to be given due effect for ensuring the completion of CIRP within the timelines prescribed. The Decree Holder, as a stake-holder, is bound by the consequence of the approval of the resolution plan under Section 31(1) of IBC. Thus, following the 'clean-slate' doctrine laid down by the Supreme Court in Essar Steel India Limited (supra) and Ghanshyam Mishra and Sons Pvt. Ltd. (supra), the Court does not find any merit in the request made by the Non-Applicant/ Decree Holder to defer the proceedings. If the Decree Holder had any objection qua the CIRP or the Resolution Plan, it ought to have raised the same before the appropriate forum provided under the IBC. The same cannot be examined by this Court.

18. As noted above, in respect of resolution plan qua Sharan Hospitality, there were no objections raised by the Decree Holder and, qua Pawan Impex, the Decree Holder has already exhausted its legal remedy by approaching the adjudicating authority after the CoC's approval of the Resolution Plan. With the Plan being approved, this Court, while executing a decree, would not be in a position to disturb the decision arrived at by the CoC and the adjudicating authority. The objection of the Decree Holder to the prayer made in the applications, therefore cannot be a basis to stall the time bound process under the IBC. The provisions under the IBC and the Rules and Regulations framed thereunder, stipulate strict timelines to be adhered to by all the parties. Therefore, deferring the decision on these applications would unnecessarily defeat the aim of the IBC which is to attain maximisation of assets of the corporate debtor while keeping it afloat as an ongoing concern. The Decree Holder had complete knowledge of the CIRP against Sharan Hospitality and did not take any action. The insolvency proceedings are required to be dealt in a timely, effective and efficient manner which do not warrant deferment of the decision of the present applications.

19. Therefore, it is apposite to clarify/ modify the restraint on transfer of assets qua the Applicants in orders of this Court dated 13th November 2018 in I.A. No. 14554 of 2018, and 27 th September 2019 in I.A No. 14553 of 2018. The same stands modified to the extent that such restraint would not apply to the implementation of the Resolution Plan as approved by the NCLT vide its orders dated 15th April, 2021 [with respect to Sharan Hospitality] and 31st May, 2021 [with respect to Pawan Impex].

20. With the above direction/modification, the present applications stand disposed of.

21. Accordingly, both the applicants stand deleted from the array of parties.

22. Under the Resolution Plan, Pawan Impex is required to pay an amount of Rs. INR 11,60,250.00 to RS Infrastructure Private Ltd. Accordingly, it is directed that the said amount be deposited with the Registry of this Court by Successful Resolution Applicant of Pawan Impex Private Limited (i.e.,

Consortium of DMI Alternative Investment Fund-Special Opportunities Scheme, Fact Software Pvt Ltd and Mr. Yash Chopra) within two weeks from today.

23. List the matter for further proceedings on 23 rd November 2021 before the Joint Registrar.

24. List before the Court on 07th December, 2021.

SANJEEV NARULA, J OCTOBER 28, 2021 hd