

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 1689 of 2023

[Arising out of Order dated 09th November, 2023 passed by the Adjudicating Authority (National Company Law Tribunal, Kolkata Bench, Court No. II) in I.A.(IB) No. 1470/KB/2023]

IN THE MATTER OF:

Kanoria Energy & Infrastructure Limited

...Appellant

(Erstwhile A Infrastructure Limited) Hamir Garh
Bhilwara RJ 311025 In

Versus

1. **Mr. Avishek Gupta,**
Resolution Professional Sarga Hotel Private Limited,
[Under Cirp] Ck-104, Sector 2 Salt Lake Kolkata
West Bengal – 700091

2. **J.C. Flower Asset Reconstruction,**
Acting as Trustee of JCF Yes Trust 2022 – 23/8,
12th Floor, Crompton Greaves House, Annie
Basant Road, Worli, Mumbai – 400030;

...Respondents

For Appellant: Mr. Krishnamohan Menon, Mr. Parul Sachdeva,
Ms. Mehak Joshi, Advocates.

For Respondents: Mr. Ramji Srinivasan, Sr. Advocate with Ms. Mahima Singh, Ms. Shruti Pandey, Ms. Namrata Sarogi, Mr. Kartik Pandey, Advocates for R1

Mr. Abhijeet Sinha, Sr. Advocate with Mr. Sidhartha Sharma, Mr. Arjun Asthana, Ms. Shalini Basu, Advpcates for SRA

Mr. Gopal Jain, Sr. Advocate with Mr. Raunak Dhillon, Ms. Madhuri Khanna, Mr. Nihaad Dewan, Advocates for R2

J U D G M E N T

ASHOK BHUSHAN, J.

1. This Appeal has been filed by the Appellant challenging the Order dated 09th November, 2023 passed by the National Company Law Tribunal, Kolkata Bench, Court II (hereinafter referred to as “**The Adjudicating Authority**”) in I.A. (IB) No. 1470/KB/2023 by which Application, Appellant sought direction to the Resolution Professional to consider the Resolution Plan of the Appellant/Applicant dated 11th April, 2023 as revised on 23rd May, 2023 and place the same before the Committee of Creditors for evaluation. By the Impugned Order, the Adjudicating Authority rejected the Application.

2. Brief facts of the case necessary to be noticed for deciding this Appeal are:-

- Corporate Insolvency Resolution Process (**CIRP** in short) of the Corporate Debtor-Sarga Hotel Pvt. Ltd. commenced vide Order dated 11.02.2020. Form-G was issued by Resolution Professional in response to which Appellant submitted his ‘expression of interest’.
- On 30th September, 2022, Appellant submitted a Resolution Plan. Appellant on 11th April, 2023 submitted a revised signed resolution plan, three other resolution applicants also submitted their revised signed resolution plans on 11th April, 2023.
- On 12th CoC meeting held on 12th April, 2023, signed revised resolution plans were opened. On 3rd May, 2023, all resolution applicants including the Appellant were asked to submit a revised

signed resolution plans after incorporating the legal comments without changing the commercial offer as submitted on 11th April, 2023 by 05th May, 2023. On 04th May, 2023, Appellant sought extension of time for resubmission of Resolution Plan till 11th May, 2023. Appellant again sent an email requesting for extension of time for submissions of resolution plan till 07th May, 2023. Time for receipt of revised resolution plans were extended upto 08th May, 2023. On 08th May, 2023, Resolution Professional requested the Appellant to submit a Resolution Plan within the stipulated timeline however Appellant did not submit its revised signed resolution plan. Resolution Professional received revised signed resolution plan from three other Resolution Applicants.

- On 19th May, 2023, the 13th CoC meeting was held in which CoC was apprised of receipt of revised final signed plan from three Resolution Applicants whereas final signed resolution plan was not received from the Appellant by 08th May, 2023. The signed resolution plan submitted by Appellant on 11th April, 2023 was considered for evaluation. It was decided that four resolution plan including the signed resolution plan of appellant dated 11th April, 2023 shall be put for voting in the next CoC Meeting scheduled for 24th May, 2023. One day before the CoC meeting i.e. on 23rd May, 2023, RP received an email by 10:52 PM by which Appellant unilaterally proposed to revise its commercial offer. On 24th May, 2023, 14th CoC Meeting was held during which the CoC was informed about the email dated 23rd May, 2023 received from

Appellant. CoC duly considered the email dated 23rd May, 2023 of the Appellant and decided to consider appellant's resolution plan as submitted on 11th April, 2023. All plans were put to e-voting on the basis of result of e-voting the Resolution Plan submitted by Shriram Multicom Pvt. Ltd. was approved with 100% vote share.

- On 2nd June, 2023, RP filed an application I.A. No. 1054/KB/2023 for approval of the Resolution Plan. On 26th June, 2023, RP by email informed the applicants other than successful resolution applicant that earnest money and bank guarantee will be returned after the approval of resolution plan. Shriram Multicom Pvt. Ltd. was also informed. On 21st August, 2023, the Appellant filed an I.A. No. 1470 of 2023 seeking a direction to consider its resolution plan by RP and to place it before the CoC. I.A. No. 1470 of 2023 was heard by the Adjudicating Authority and by the Impugned Order dated 09th November, 2023, Application was rejected. Aggrieved by the said order, this Appeal has been filed.

3. We have heard Shree Krishnamohan Menon, Learned Counsel for the Appellant, Shree Ramji Srinivasan, Learned Sr. Counsel appearing for Resolution Professional and Mr. Joy Saha and Mr. Abhijeet Sinha, Learned Sr. Counsels for the Successful Resolution Applicant and Mr. Gopal Jain for Respondent No. 2-J.C. Flower Asset Reconstruction.

4. Learned Counsel for the Appellant challenging the Impugned Order submits that the email dated 23rd May, 2023 had to be treated as a plan modification and negotiation was required to be done by the Committee of Creditors. It is submitted that in the email, the revised offer submitted by

the Appellant was much higher than the plan of Shriram Multicom Pvt. Ltd. which was approved in hasty manner by the CoC. It is submitted that CoC failed to give due and proper consideration to the revised bid of the Appellant. It is submitted that the Adjudicating Authority has incorrectly relied on Regulation 39(1B) of the CIRP Regulations, 2016. It is submitted that the Resolution Plan submitted by the Appellant was in compliance of Regulation 39(1A). It is submitted that the CoC did not conduct a substantial review on the merits and viability of the appellant's resolution plan and NCLT failed to consider the fact that CoC refusal to acknowledge the final offer of Rs. 310 Crores presented in the revised plan by the Appellant was in fact a means to achieve objective of the IBC i.e. maximization of the value of the corporate debtor. It is submitted that the constitution of CoC is in question since I.A. No. 822 of 2022 had already been filed by the RARE Asset Reconstruction Company questioning the ouster of the RARE Asset Reconstruction Company from the CoC which application was rejected by the Adjudicating Authority against which C.A.(AT) Ins. No.1304 of 2023 has been filed and is pending.

5. Learned Counsel appearing for the Resolution Professional submits that in spite of time being granted to the Appellant to submit revised resolution plan till 08th May, 2023, revised resolution plan was not submitted by the Appellant and email dated 23rd May, 2023 was sent in the night when the CoC was to consider all the resolution plans. Email dated 23rd May, 2023 was placed before the CoC and the CoC considered the email dated 23rd May, 2023 and decided to consider the signed

resolution plan submitted on 11th April, 2023. The email dated 23rd May, 2023 was unsolicited offer to resolution plan after stipulated deadline and has rightly been not considered by the CoC. It is submitted that commercial wisdom of CoC is not subject to judicial review. It is submitted that CoC considered all the four plans including the plan of Appellant and decided to approve the Resolution Plan of the Successful Resolution Applicant with 100% vote share. It is further submitted that Resolution Plan approved by the CoC has now been approved by the Adjudicating Authority by its order dated 04.01.2024.

6. Committee of Creditors represented by J.C. Flower Asset Reconstruction having vote share of 94.09% in the CoC has also opposed the appeal. It is submitted that belated email by the Appellant expressing its intention to enhance its final proposal was correctly not considered by the CoC. It is submitted that Appellant sought extension of time for submission of the plan till 07th May, 2023 and Appellant was communicated by the RP that time is extended till 08th May, 2023 to submit signed revised resolution plan but Appellant did not submit any signed revised resolution plan till 08th May, 2023. In the Resolution Plan dated 11th April, 2023, final offer of the Appellant was Rs. 284 Crores which was sought to be proposed to be enhanced by email to Rs. 310 Crores, Appellant neither complied the timeline stipulated by Resolution Professional but also failed to submit a revised resolution plan despite grant of extension of time hence there was no occasion to consider the email dated 23rd May, 2023. The email dated 23rd May, 2023 does not amount to submit a resolution plan. Regulation 39(1B) of CIRP

Regulations, 2016 cast an obligation on the CoC not to consider any resolution plan received after timeline prescribed by the RP. CoC in its commercial wisdom decided not to entertain the email dated 23rd May, 2023 and after consideration of all the four resolution plans voted with 100% vote share of the Resolution Plan of the SRA which decision needs no interference by the Adjudicating Authority.

7. Learned Counsel for the SRA submits that resolution plan submitted by SRA having been approved on 04th January, 2024, the present Appeal deserves to be dismissed. Resolution Applicant does not have any vested right that its plan should be approved.

8. We have considered the submissions of the parties and have perused the record.

9. From the facts which has been noticed above it is clear that appellant had submitted a resolution plan dated 11th April, 2023, after submission of the resolution plan on 11th April, 2023, appellant requested the RP for extension of time to submit a revised resolution plan. The request for extension of time was placed before the CoC and CoC extended time till 08th May, 2023 to submit a revised resolution plan. The Adjudicating Authority in the impugned order has noticed the sequence of the events in paragraph 4.2 to 4.4 which are as follows:

“4.2. The Applicant submitted its expression of interest on 28th May, 2022 and a draft Resolution Plan on 30th September, 2022, and a signed Resolution Plan on 11th April, 2023. The applicant thereafter sent an email on 23rd May, 2023 to the Resolution Professional of the

Corporate Debtor stating that in furtherance to the Resolution Plan submitted, the Applicant is now in a position to offer more favourable Financial Plan and, accordingly, conveyed his intention in enhancing the originally submitted plan on April 11th 2023, from Rs. 284 crores to rupees Rs. 310 crores.

4.3. The Applicant herein was corresponding with the Resolution Professional of Corporate Debtor and has sought final extension of time till 7th May, 2023 in the email dated 5th May, 2023 (which is in page number 24 of Reply to the Application) for submitting the revised Plan. The Applicant did not submit the revised plan on 7th May, 2023 as assured but instead sought time up to 11th May, 2023.

4.4. On 7th May, 2023 again the Applicant sent an email seeking time up to 14th May, 2023 instead of earlier request for 11th May, 2023. This request was placed before CoC and CoC granted one more day as last chance i.e., till 8th May, 2023 to submit the revised plan and this was communicated by the Respondent vide email dated in the morning hours of 8th May, 2023 which is in page 23 of the Reply.”

10. Appellant did not submit signed revised resolution plan till 08th May, 2023 which was time extended by the CoC and sent an email dated 23rd May, 2023 which is as follows:

“Dear Avishek

This is on furtherance to the resolution plan submitted by us, A Infrastructure Limited on 11 April 2023 in the corporate insolvency resolution

process of Sarga Hotel Private Limited ("Corporate Debtor").

We are committed to the insolvency resolution of the Corporate Debtor. As you are aware we had made multiple requests for extension of submission of resolution plan on account of the non-availability of our and our strategic partner's management.

Subsequent to further deliberation of our management we understand that we are in a position to offer a more favorable financial offer in comparison to that provided in the resolution plan submitted by us on 11 April 2023.

Accordingly, we offer upfront (i.e. 45th day from resolution plan approval order) amount of INR 200 Crores and INR 110 Crores within 1 year from resolution plan approval order to the financial creditors (secured Assenting Financial Creditors, Financial Creditors (related party) and Unsecured Financial Creditors.

In view of the aforesaid the amount offer to the financial creditors increased from INR 284 Crores to INR 310 Crores.

Save and except the above financial offer, the resolution plan submitted by us on 11 April 2023 may be considered.

We are looking forward to discussing the same with the committee of creditors.

Regards

A Infrastructure Limited”

11. It is relevant to notice that meeting of COC was scheduled for 24th May, 2023 and in the previous night, an email was sent by the Appellant

as extracted above, the email dated 23rd May, 2023 was placed by the RP before the CoC in the meeting held on 24th May, 2023 and the CoC considered the email and decided to consider the resolution plan submitted by the Appellant on 11th April, 2023. The minutes of the 14th CoC meeting has been extracted by the Adjudicating Authority in paragraph 7.10 of the Order, it is useful to extract the same:

“7.10. In the 14th COC meeting held on 24th May, 2023, the Resolution Professional appraised the members of COC about the receipt of e-mail from the Applicant dated 23rd May, 2023 and only after detailed deliberation and discussions, the members accepted the resolution plans submitted already and put them for voting. Therefore, by respectfully following the several Judgements of Honorable NCLAT cited by the Ld. counsel for the respondent, we hold that decision of CoC in approving the plan of the successful resolution applicant need not be interfered. The relevant portion of the minutes of 14th CoC meeting reproduced herein as:

“The RP team informed the CoC members that vide email dated 23 May 2023 received at 10:52 PM, A Infrastructure Limited (“AIL”) had proposed to revise their financial offer to the financial creditors from INR 284 Cr to INR 310 Cr. In their email, AIL has offered to pay an upfront (within 45 days from NCLT approval date) amount of INR 200 Cr and the balance payment of INR 110 Cr within a year from the NCLT approval date. It was brought to the notice of the CoC members that the resolution

applicants were categorically asked to submit a final legally compliant plan on 8th May 2023, keeping the commercials same as on 11th April 2023. AIL was also informed by the RP team that if no revised final signed resolution plan was received by the stipulated timeline, their signed resolution plan as on 11th April 2023 will be considered final. AIL did not submit its revised final signed resolution plan by 8th May 2023. However, now, when the resolution plans are being put for voting, AIL has sent an unsolicited email proposing that it can increase its commercial offer. AIL email was then presented before the CoC for their consideration and views. The representative of JCE stated that the RAs were given sufficient time to submit a revised plan within a specific timeline. Further, AIL did not submit a signed plan within the prescribed timeline and, through the email dated 23 May 2023, it has just shown an intent to change their commercial offer after a substantial delay post 8th May 2023 and that too when CoC was considering the resolution plans for voting. It was also observed that the timing of the email received from AIL indicates that AIL knew about the proposed voting on the resolution plans by the CoC even though the agenda for the CoC meeting was confidential and shared only with the CoC members and the suspended board (as participants in the CoC meeting). Further, there appeared to be striking similarities

between the revised proposal submitted by ALL and the financial proposal contained in the resolution plan of the one of the RAs. Hence, it appears that confidential information is being leaked to AIL as well. The CoC also requested the RP and CoC legal counsels to share their views. Both the legal counsels stated that CIRP is a time bound process, and the R RAS were clearly informed to submit their final plans by 8th May 2023. However, the final decision rests with the CoC members, After deliberation, it was decided by both the CoC members that the revised proposal from ALL cannot be considered on account of it being unsolicited, beyond the prescribed timelines and that too, only a mere proposal/ intent sent on an email on the eve of the CoC meeting convened to vote on the resolution plans.”

12. Committee of Creditors thus duly considered the resolution plan submitted by the Appellant on 11th April, 2023 which was also put to vote along with other three plans. COC has noted that all resolution applicants were informed to submit their final plans by 08th May, 2023. The minutes of the 14th CoC Meeting as noted above clearly indicate that the email received from the Appellant was duly placed before the CoC and it was considered. CoC has noticed email dated 23rd May, 2023 that Appellant has just shown an intent to change their commercial offer when the CoC was considering the plan and was going to vote on the plan. The CoC also noticed that in the email sent by the Appellant there is similarity between the revised resolution plan submitted by the resolution applicant

and final proposal contained in resolution plan of one of the Resolution Applicant, hence CoC was of the view that confidential information was being leaked to appellant as well.

13. Commercial wisdom of the CoC has paramount important and CoC did consider the resolution plan submitted by the Appellant dated 11th April, 2023 and all the resolution plans were voted. It is well settled that no resolution applicant has any vested right to have its plan approved. Hon'ble Supreme Court in **Arcelor Mittal India Pvt. Ltd. Vs. Satish Kumar Gupta**, (2019) 2 SCC 1, in paragraph 79 laid down following:

“79. Given the timeline referred to above, and given the fact that a resolution applicant has no vested right that his resolution plan be considered, it is clear that no challenge can be preferred to the adjudicating authority at this stage. A writ petition under Article 226 filed before a High Court would also be turned down on the ground that no right, much less a fundamental right, is affected at this stage. This is also made clear by the first proviso to Section 30(4), whereby a Resolution Professional may only invite fresh resolution plans if no other resolution plan has passed muster.”

14. We may also notice the Judgment of Hon'ble Supreme Court in **Ngaitlang Dhar Vs. Panna Pragati Infrastructure Private Limited & Ors.**, (2022) 6 SCC 172, where Hon'ble Supreme Court held that commercial wisdom of CoC has paramount status, in paragraph 32 and 39 of the Judgment, following has been held:

“32. *It is trite law that “commercial wisdom” of the CoC has been given paramount status without any judicial intervention, for ensuring completion of the processes within the timelines prescribed by IBC. It has been consistently held that it is not open to the adjudicating authority (NCLT) or the appellate authority (Nclat) to take into consideration any other factor other than the one specified in Section 30(2) or Section 61(3) IBC. It has been held that the opinion expressed by the CoC after due deliberations in the meetings through voting, as per voting shares, is the collective business decision and that the decision of the CoC's “commercial wisdom” is non-justiciable, except on limited grounds as are available for challenge under Section 30(2) or Section 61(3) IBC. This position of law has been consistently reiterated in a catena of judgments of this Court, including:*

(i) K. Sashidhar v. Indian Overseas Bank [K. Sashidhar v. Indian Overseas Bank, (2019) 12 SCC 150 : (2019) 4 SCC (Civ) 222] ,

(ii) Essar Steel India Ltd. (CoC) v. Satish Kumar Gupta [Essar Steel India Ltd. (CoC) v. Satish Kumar Gupta, (2020) 8 SCC 531 : (2021) 2 SCC (Civ) 443] ,

(iii) Maharashtra Seamless Ltd. v. Padmanabhan Venkatesh [Maharashtra Seamless Ltd. v. Padmanabhan Venkatesh, (2020) 11 SCC 467 : (2021) 1 SCC (Civ) 799] ,

(iv) Kalpraj Dharamshi v. Kotak Investment Advisors Ltd. [Kalpraj Dharamshi v. Kotak

Investment Advisors Ltd., (2021) 10 SCC 401 : (2022) 1 SCC (Civ) 233]

(v) Ghanashyam Mishra & Sons (P) Ltd. v. Edelweiss Asset Reconstruction Co. Ltd. [Ghanashyam Mishra & Sons (P) Ltd. v. Edelweiss Asset Reconstruction Co. Ltd., (2021) 9 SCC 657 : (2021) 4 SCC (Civ) 638]”

39. *We are, therefore, of the considered view that Nclat has grossly erred in interfering with the decision of the CoC, which was duly approved by NCLT. The appeals are, therefore, allowed. The impugned judgment and order passed by Nclat, dated 19-10-2020 [Panna Pragati Infrastructure (P) Ltd. v. Amit Pareek, 2020 SCC OnLine NCLAT 727] is quashed and set aside. There shall be no order as to costs. All pending applications shall stand disposed of.”*

15. It is further relevant to notice that in the CIRP of the Corporate Debtor, extension was granted to appellant and resolution applicants to submit revised resolution plan by 08th May, 2023 but no revised plan having been submitted by the Appellant by 08th May, 2023, CoC rightly proceeded to consider the resolution plan submitted by the Appellant on 11th April, 2023 along with plans of other resolution applicants in which no infirmity can be found.

16. In so far as the submission of the Appellant that constitution of CoC was not valid which was under challenge by an application filed by the RARE Asset Reconstruction Limited, it is relevant to notice that application filed by the RARE Asset Reconstruction Limited was also rejected by the Adjudicating Authority hence no infirmity is found in the

approval of the resolution plan by the CoC. The Adjudicating Authority by the impugned order after noticing that resolution plan of the Appellant along with email dated 23rd May, 2023 was duly considered by the CoC, has rightly rejected I.A. No. 1470 of 2023 filed by the Appellant. We do not find any merit in the Appeal, the Appeal is dismissed.

**[Justice Ashok Bhushan]
Chairperson**

**[Barun Mitra]
Member (Technical)**

**[Arun Baroka]
Member (Technical)**

**NEW DELHI
29th February, 2024**

Basant

Company Appeal (AT) (Insolvency) No. 1689 of 2023