

NATIONAL COMPANY LAW APPELLATE TRIBUNAL. PRINCIPAL BENCH,**NEW DELHI****Comp. App. (AT) (Ins) No. 637 of 2019 & I.A. No. 1927, 3057 of 2019 & 583 of 2020****IN THE MATTER OF:****Liberty House Group Pte Ltd.****...Appellant****Versus****Dinkar T. Venkatasubramanian****...Respondent****Present:****For Appellant : Sr. Adv. Mr. Virender Ganda, Mr. Arvind Kumar Gupta, Ms. Henna George, Ms. Ashmeet Arora, Ms. Tanya Hasija, Mr. Ayandeb Mitra, Advocates****For Respondent : Mr. Sumant Batra, Mr. Ruchi Goyal, Adv. for R1 Mr. Sandeep Bajaj, Mr. Vipul Jai, Mr. Mayank, Adv. for R1 and 2.****J U D G M E N T****Per: Justice Rakesh Kumar Jain:**

This appeal is filed by Liberty House Group Pte Ltd. (in short 'LHG') against the order dated 15.03.2019, passed by the Adjudicating Authority (National Company Law Tribunal, Chandigarh Bench, Chandigarh) by which an application filed by State Bank of India, one of the Financial Creditors, bearing CA Nos. 592 of 2018 has been allowed and as a consequence thereof, application filed by the Resolution Professional (in short 'RP') bearing CA No. 364 of 2018 for approval of the resolution plan of LHG has been withdrawn.

2. As a matter of fact, the Appellant is not aggrieved against the withdrawal of the resolution plan submitted by it rather it is aggrieved against certain observations made by the Adjudicating Authority in the course of decision taken on the application bearing CA No. 592 of 2018 which are taken as adverse to its interest.

3. The brief facts of this case are that State Bank of India filed an application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (in short 'Code') bearing CP(IB) No. 116/Chd/Hry/2017 against Castex Technologies Limited (Corporate Debtor) (in short 'CTL') which was admitted on 20.12.2017 declaring moratorium. IRP was appointed on 22.12.2017. The CoC in the meeting held on 01.02.2018, approved the process note containing terms and conditions for consideration and selection of the resolution plans and the same was shared with potential resolution applicants subject to their furnishing the non-disclosure undertakings and eligibility declaration in terms of Section 29A of the Code. The RP invited Expression of Interest (in short 'EOI'). 17 potential resolution applicants including 5 strategic and 12 financial investors furnished their EOI, however, 5 EOI were received after the last date of the submission of EOI. Amongst others, LHG submitted its EOI on 27.01.2018. SBI Capital Markets Ltd. was appointed as process advisors to assist the resolution professional in evaluating the resolution plans and in the same meeting, the criteria for evaluation of the resolution plans was also approved by the CoC. The RP also created a virtual data room (VDR) and provided access to the resolution applicants with effect from 20.02.2018 onwards but out of 17 potential resolution applicants, only seven submitted non-disclosure undertaking in agreeable form and they were all provided with the access to the VDR. The process memorandum was also modified because of the amendment in Regulation 35 and inserted in Section 36A of the Regulations w.e.f. 06.02.2018, hence, the process memorandum prepared earlier was modified to include the evaluation matrix.

4. The RP issued process memorandum dated 30.03.2018 detailing each step of the process to be undertaken during the CIRP for resolution of CTL. The RP received two potential resolution applicants, namely, Deccan Value Investors L.P. (DVI) and Liberty House Group PTE Limited (LHG) and were placed before the CoC in its meeting held on 16.04.2018. In the meeting held on 05.05.2018, the resolution plans submitted by these two resolution applicants were found deficient. However, in terms of Clause 11.1 of the process memorandum, LSG submitted a Bid Bond Guarantee (BBG) for an amount of Rs. 40 Crores dated 10.05.2018 issued by Barclays Bank PLC, Nehru Place, New Delhi being No. BARCBG2018145. In the meeting held on 18.05.2018, the resolution plan submitted by DVI was not found commercially comparable with the higher bid of LHG and no revised offer was provided by it after 03.05.2018. Therefore, CoC classified LHG as the preferred bidder and it was granted time till 25.05.2018 for submission of the resolution plan after addressing the issue raised by the CoC. On the basis of the decision taken by the CoC in its meeting held on 18.05.2018, it was resolved to seek extension of 90 days more in terms of Section 12(2) and (3) of the Code and for that purpose CA No. 221 of 2018 was filed. The said application was allowed on 13.06.2018 and the period for completion of insolvency resolution process was extended by 90 days which expired on 13.09.2018. After negotiation with the member of the CoC, LSG submitted resolution plan dated 21.08.2018 with addendums dated 23.08.2018 and 28.08.2018 in furtherance of its EOI dated 27.01.2018 which was approved by the CoC of CTL with 98.80% of the voting share on 30.08.2018. The RP issued a letter of intent (LOI) to LSG in accordance with the provision of Code and in terms of

process memorandum which was unconditionally and duly accepted and executed by LHG on 03.09.2018. Clause (ii) of the LOI prescribed that “you shall, within a period of 10 (ten) business days from the date of issuance of the letter of intent, submit a performance guarantee as defined and in the manner provided in Clause 14.1 of the process memorandum.” Clause 14.1, 14.2 and 14.3 of the process memorandum is reproduced as under:-

“14.1 With 10 (ten) business days of the date of issuance of a Letter of Intent, the Successful Applicant shall provide a performance guarantee of INR 100,00,00,000/- (Indian Rupees One Hundred Crore only) in favour of State Bank of India A/c Castex Technologies Limited ("Performance Guarantee"). The Performance Guarantee shall be valid for an initial period of 9 (nine) months from the date of signing of the Letter of Intent ("Performance Guarantee Validity Period") and shall be extended /renewed by the Successful Applicant for such period until 100% (one hundred percent) of the Applicant Contribution is made by the Successful Applicant in accordance with the Plan. The Performance Guarantee shall have a claim period of 30 (thirty) days after the Performance Guarantee Validity Period. State Bank of India will hold the Performance Guarantee in trust on behalf of the Committee of Creditors.

14.2 The Committee of Creditors shall have the right to invoke the Performance Guarantee by issuance of a written demand in the prescribed format to invoke Performance Guarantee. The Performance Guarantee can be invoked at any time, if (a) any of the conditions under the Letter of Intent or Resolution Plan are breached; or (b) non-receipt of required approvals within the timelines specified in the Resolution Plan or if the Resolution Plan is not effective due to any approval required by the Successful Applicant to give effect to the Resolution Plan. The Performance Guarantee shall be returned upon infusion of Applicant Contribution by the Successful Applicant.

14.3 Non submission of the Performance Guarantee by the Successful Applicant, as per the provisions of the clause 14.1 will lead to rendering of Resolution Plan by such Successful Applicant as non-responsive, and the Resolution Professional shall have the right to reject the Resolution Plan and invoke the BBG”

5. The LHG was required to provide a performance guarantee of Rs. 100 Crores in favour of State Bank of India for and on behalf of the CoC, within

10 business days of the date of issuance of a LOI. The condition for submission of 100 Crore as performance guarantee was incorporated in the process memorandum to attract genuine and serious resolution applicants, who are capable of performing and resolving the CTL by way of resolution plan and to keep away non-serious and vexatious resolution applicants. Since, the time is the essence of the Code, this stipulation was for the genuine and serious resolution applicants so that CTL is not dragged into liquidation. Moreover, the process memorandum was a document formulated and approved by the CoC in terms of 25(2)(h) of the Code, which lay down the criteria and provide for the method for preparation and submission of resolution plan and other conditions required to be followed by the resolution applicants for submission of resolution plan.

6. Be that as it may, the RP filed CA No. 364 of 2018 under Section 30(6) r/w Section 31 and 60(5) of the Code r/w Regulation 39(4) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (in short 'Regulations') to submit the resolution plan of the LSG, approved by the CoC, for its approval by the Adjudicating Authority. However, before resolution plan could have been approved by the Adjudicating Authority, State Bank of India filed CA No. 592 of 2018 on behalf of the CoC in respect of the Corporate Debtor under Section 30 r/w Section 31 and 60(5) of the Code for withdrawal of CA No. 364 of 2018 and to exclude the time period spent, in negotiating with LHG and in litigation w.e.f. 18.05.2018 till passing of the final order on that application. This application was filed in view of the decision taken by the CoC in 18th meeting to reject the resolution plan of the LHG and to invoke BBG submitted by the LHG in terms

of Clause 14.3 of the process memorandum. It is pertinent to mention that even the BBG submitted by LHG was invoked on 21.11.2018 by the SBI acting for itself and on behalf of the CoC. The decision to withdraw CA No. 364 of 2018 was taken in view of the fact that LSG was unable to comply with the basic requirement of furnishing performance guarantee to the tune of Rs. 100 Crores which casted a serious doubt on the ability of LHG to implement the plan, which contemplates total payment of Rs. 2505 Crores. LHG filed a civil suit bearing CS (Comm) No. 1246 of 2018 before the Hon'ble Delhi High court for interim injunction restraining encashment of BBG but vide order dated 22.02.2019, the Hon'ble Single Judge of Delhi High Court held that the High Court being a civil court does not have the jurisdiction over the subject matter of the suit. After discussing the conduct of the Appellant in regard to its non-compliance of the essential terms and conditions of LOI and the process memorandum, the Adjudicating Authority made an observation that the LHG is at default because as per the process memorandum and LOI, duly signed by the LHG, furnishing of performance guarantee was an essential term. While reaching to its conclusion, for passing of an order of withdrawal of the application CA No. 364 of 2018, the Adjudicating Authority made observations in respect of the conduct of the Appellant and passed the following order:-

“57. In view of the above, we allow the application CA No. 592 of 2018 filed by State Bank of India on behalf of the Financial Creditor and consequently CA No. 364 of 2018 filed by the RP for approval of the plan is permitted to be withdrawn. CA No. 364 of 2018 is therefore, disposed of as withdrawn.

58. We further direct as under:-

- i. the period from 18.05.2018 to the date of receipt of the certified copy of this order shall be excluded for counting 270 days permitted for completion of the insolvency resolution process;

- ii. in case the CoC decides to so proceed for calling fresh EOI, the RP/CoC shall issue the specific notice inviting EOI to DVI apart from making publication of the notice in the normal permissible mode for such purpose; and
- iii. we impose the cost of Rs. 10 lacs upon the respondent-LHG for not implementing the resolution plan approved by the CoC to be deposited with the Prime Minister Relief Fund within a period of one month from the date of receipt of the copy of this order and the financial creditors shall be at liberty to file proceedings for claiming damages and / or costs before the appropriate forum.”

7. It is pertinent to mention that it has been brought to our notice that in pursuance of exclusion of time and direction for initiation of fresh process, the resolution plan submitted by DVI dated 06.01.2020 r/w Addendums dated 07.02.2020, 18.02.2020 and 09.03.2020 was approved by the CoC on 16.03.2020 and thereafter, the same has also been approved by the Adjudicating Authority on 15.12.2020 under Section 30(6)r/w Section 31 of the code and the DVI resolution plan has since been fully implemented on 21.01.2022.

8. As we have earlier observed that this appeal by LHG is not on the merit of the decision taken by the Adjudicating Authority allowing the application filed by SBI on behalf of other creditors bearing I.A. No. 592 of 2018 consequent to which CA No. 364 of 2018 filed by the RP for approval of the resolution plan submitted by LHG was withdrawn rather this appeal has been filed by LHG for expunction of certain remarks/observations made by the Adjudicating Authority in the course of passing the impugned order.

9. Counsel for the Appellant has pointed the said observations which are contained in Para 17, 36, 42, 55, 58(iii) of the short synopsis, which are reproduced as under:-

“17. It is stated that the resolution plan submitted by LHG was even accepted in this case of M/s Amtek Auto Limited and others against which the admission order was passed by this Tribunal under Section 7 of the Code in a petition filed by the Corporation Bank bearing (IB) No.42/Chd/Hry/2017. Amtek Auto Limited is stated to be the holding company of the corporate debtor, namely, Castex Technologies Limited, LHG has further defaulted in implementing the resolution plan sanctioned by the Kolkata Bench in the case of Adhunik Metaliks Limited.

36. Having given our thoughtful consideration to the submissions made by learned senior counsel for the CoC, the respondent and also the learned counsel for the Resolution Professional, we are of the view that there is a clear default by the LHG in not complying with the essential terms and conditions of the Lol and the process of memorandum.

42. It is not even the case of the respondent that any time upto the filing of the application, the performance guarantee as required by terms of Lol was ever furnished. We, therefore, conclude that there is a clear default by the LHG in making compliance of the terms and conditions of the Lol duly signed by the respondent LHG.

55. The other question, which we deem important to consider is whether the respondent-LHG should be burdened with costs for the default. We are of the opinion that exemplary costs should be imposed upon the respondent-LHG for making mockery of the entire system of CIR Process, for which the strict timelines are provided by the Code in completion of the whole process, LHG seems to have submitted the resolution plan with the highest bid has committed the default in complying with the essential terms of the plan and Lol and has come up with some excuse or the other to avoid it.

58(iii). we impose the cost of Rs.10 Lacs (Rupees ten lacs only) upon the respondent-LHG for not implementing the resolution plan approved by the CoC to be deposited with the Prime Minister Relief Fund within a period of one month from the date of receipt of the copy of this order and the financial creditors shall be liberty to file proceedings for claiming damages and / or costs before the appropriate forum”

10. Counsel for the Appellant has submitted that the Appellant is a prominent international company which specializes in reviving sick and

insolvent manufacturing companies. It is submitted that it has obtained three companies through CIRP process being Adhunik Metalik Ltd., Zion Steel Ltd. and SBQ Steels Ltd.. It is submitted that the Appellant is only seeking expunction of certain observations in the impugned order and willing to pay Rs. 10 lakhs (Cost) as a goodwill gesture and in this regard submitted that the order may be modified to the extent that instead of treating it be an amount of cost, it may be treated a payment made by the Appellant voluntarily. It is submitted that LOI contained the requirement of Bank Guarantee and not the performance guarantee whereas the RP has sought bank guarantee through its email dated 10.09.2018 and while the dispute between the RP and the Appellant regarding performance bank guarantee and the negotiations were going on, the RP filed CA No. 431 of 2018 seeking appropriate directions to LHG but it was withdrawn on 14.12.2018. It is further submitted that the order of withdrawal of the resolution plan was not opposed by the Appellant, therefore, there was no occasion to pass any strictures as there was no lis before the Adjudicating Authority and there was any dispute regarding withdrawal of the resolution plan. The Appellant has relied upon an order passed by this Tribunal in the case of Liberty House Group Pte. Ltd. Vs. ARGL Ltd. CA (AT) (Ins) No. 8 of 2019 to contend that the same order may be passed in the present appeal as well. It is submitted that in similar circumstances, the resolution plan of ARGL Ltd. was also withdrawn by the RP which was allowed by the Adjudicating Authority on 05.12.2018 and adverse observations contained therein were set aside by this Tribunal vide order dated 08.03.2019 in the case of Liberty House Group Pte. Ltd. (Supra). In respect of the observations made in Para 17 of the impugned

order regarding the failure of the Appellant in implementing the resolution plan sanctioned by the Kolkata Bench in the case of Adhunik Metaliks Ltd., it is submitted that there were certain disputes regarding interpretation and implementation of the resolution plan of the Adhunik Metaliks Ltd. between the Appellant and CoC. This Tribunal, vide order dated 15.03.2019 in CA (AT) (Ins) No. 53 of 2019, permitted the Appellant another 30 days to make the payment in terms of the resolution plan which was made by the Appellant and is recorded in the order dated 07.02.2020 passed by this Tribunal in CA (AT) (Ins) No. 724-725 of 2019. As regards observations made in Para 36, 42, 55 and 58(iii), it is submitted that there has been no default on the part of the Appellant in not complying with the essential terms and conditions of LOI and process memorandum because the CoC did not provide for the performance guarantee and in the process document and there was no specific format for BBG. It is further submitted that there was no requirement for the resolution applicants to submit performance guarantee in the form of bank guarantee which was introduced by the RP after the issuance of LOI and approval of the resolution plan by the CoC. The observation made in Para 58(iii) is pertaining to imposition of cost of Rs. 10 lacs for not implementing the resolution plan approved by the CoC and a direction has been issued to the Appellant to deposit the same in the Prime Minister Relief Fund about which the Appellant has already submitted that the said amount may not be imposed as a cost but the Appellant would voluntarily deposit the same.

11. In reply, Counsel for the Respondent No. 1 has submitted that the observations made in Para 17 in the aforesaid paras, highlighted by the Appellant, has been made after due consideration of the facts and

circumstances on record and on the basis of findings of facts recorded by the Hon'ble Delhi High Court in CS (COMM) 1246 of 2018 filed by LHG seeking permanent injunction restraining SBI from invoking the BBG, Para 42,43,44 & 45 read as under:-

“42. Even otherwise, de hors the legalese, what emerges on going through all the documents is that the plaintiff, after submitting the resolution plans and after the same were approved by the CoC, has had second thought and/or was not in a position to furnish PBG and started making counteroffer, of conversion of BBG into PBG and opening of an Escrow Account for the balance amount of the PBG and which was not acceptable to the RP/CoC who, after giving sufficient latitude to the plaintiff have invoked the BGs.

43. It cannot also be lost sight of that in the whole process, considerable time, out of the time bound schedule in terms of the Code for the resolution process, has been wasted and wastage of which time may ultimately result in the possibility of Castex and ARGL Limited being restructured ceasing to exist and being inevitably required to be liquidated, all at the cost of the creditors thereof and wastage of the stressed assets of the said two companies. The loss caused by such conduct of the plaintiff is thus mammoth, having adverse consequences on all the creditors and shareholders of the said two companies and also on the economy of the country and to remedy which, the code was enacted. The NCLT is best equipped to also deal with apportionment of the amount of the BBGs in proper account.

44. The present case thus also falls in the category of cases envisaged in SAW Pipes Ltd. supra i.e. where loss caused on account of delays in construction of say, a public road, though does not cause loss to any individual or person or company in particular but causes loss to the residents of the country and which is unmeasurable and in which regard a pre-estimate is permitted to be forfeited without proof of any loss. The loss likely to be caused by the conduct of the plaintiff similarly, is to the country as a whole and thus the amount of the BBGs which the plaintiff was required to furnish to ensure that the plaintiff, after furnishing resolution plan does not withdraw, as the plaintiff has done, though not expressly but by conduct, qualifies as a genuine pre-estimate of the loss.

45. On merits also thus, I do not find the plaintiff entitled to a restraint against encashment/payment under the BG.”

12. The Regular First Appeal against this order bearing RFA (OS) (COMM) No. 12 of 2019 filed by LHG, the interim order has been declined but the said RFA is pending in the Hon'ble Delhi High court of Delhi. It is submitted that since the observations have been made in the impugned order, taking into consideration the findings recorded by the Delhi High Court, the said observations may not be set aside in this appeal. It is further submitted that no specific format was provided in respect of PBG is after thought. LHG vide email dated 15.09.2018 requested the RP to complete the obligation under Clause 14 of the process memorandum by converting the BBG of Rs. 40 Crores to performance bank guarantee and by creation an overseas escrow account for the remaining 60 Crores but vide email dated 18.09.2023 the RP informed LHG that this request is in violation of the LOI issued on behalf of the CoC. The RP convened 15th CoC meeting to discuss the issue of violation of clause 14 of the process memorandum by LHG where the representative of LHG took the same stand of converting Rs. 40 Crores of BBG as part of PBG and remaining Rs. 60 Crores to be deposited in overseas escrow account which can be used to pay the upfront portion and assigned the reason for it that the LHG does not want to keep the money locked as margin money for issuance of PBG and will be happy to put in the money after the plan is approved by the Adjudicating Authority. He also stated that due to the uncertainties in the progress of the legal proceedings and predictable timelines, he is unable to submit the PBG in the manner prescribed in the LOI but the CoC made it very clear that no deviation from the terms agreed is possible. It is submitted that LHG vide email dated 24.09.2018 again requested the RP to agree to the proposed arrangement but the member of

CoC after detailed discussion during the 18th meeting held on 19.11.2018 decided to invoke the BBG submitted by LHG and further withdraw the application filed before the Adjudicating Authority by the RP for approval of the resolution plan. It is also argued that at no point of time the LHG raised any concern in regard to the ambiguity in the terms/ format of PBG rather stand taken by the LHG was that due to uncertainties in the progress of the legal proceedings and predictable timelines, the LHG is unable to submit the PBG in the manner prescribed in the LOI and before the Adjudicating Authority the LHG pleaded in regard to the ambiguity in the format of PBG as the reason for non-submission of PBG and therefore, it is all an after thought submission made by the Appellant. It is next argued that the order dated 08.03.2019 passed by this Tribunal is not applicable to the facts of this case because the order passed in the case of ARGL Ltd. was on its own facts and circumstances and no reason has been recorded for passing of the order, therefore, it does not laydown any ratio which is to be followed and whereas the present case is on its own facts in which the observations came to be recorded which is relevant and germane to the controversy because in the absence of these observations that the Appellant had been remis in submitting the performance guarantee, the application for withdrawal of the application for the approval of the resolution plan could not have been allowed.

13. We have heard Counsel for the parties and perused the record with their able assistance.

14. We have given the facts in detail which would itself indicate the process of CIRP at various levels in as much as opportunity granted to the Appellant

to comply with the terms and conditions laid down in LOI and process memorandum but the Appellant failed to comply with the same and could not even give the performance guarantee of Rs. 100 Crores as against the resolution plan of Rs. 2505 Crore. The Hon'ble Delhi High Court came down heavily upon the act and conduct of the Appellant in its order which has been reproduced hereinabove which has been one of the facts prevailed upon the Adjudicating Authority to make the observation about the act and conduct of the Appellant for non-compliance of the terms and conditions of LOI and process memorandum and delayed the whole proceedings which has a certain timelines.

15. In our considered opinion, the observations which are sought to be expunged or deleted are relevant and germane to the process for taking decision for allowing the application filed by SBI for withdrawal of the application filed by the RP for approval of the resolution plan submitted by the LHG/Appellant in which it did not show any interest as it could not even deposit a sum of Rs. 100 Crores as the performance guarantee and requested to treat the BBG of Rs. 40 Crores as part of the performance guarantee of Rs. 100 Crores and asked for rest of the amount of Rs. 60 Crores to deposit in the overseas escrow account which was not the spirit of LOI and process memorandum. The reason for not complying with the terms and conditions of the LOI and process memorandum has also been given by LHG and noticed in the meetings of the CoC, referred to above. In so far as the decision in the case of CA (AT) (Ins) No. 08 of 2019 is concerned, the said order does not give any reason for setting aside the observations as well as cost which was imposed rather the part of the impugned order about which the LHG was

aggrieved against in the said appeal has also not been noticed, therefore, in our humble opinion, the said decision is not a precedent for us to follow.

16. Thus, in view of the aforesaid discussion, we find that this appeal is denuded of any merit which may calls for any interference by this Court much less for the limited purpose for which it has been filed and hence, the same is hereby dismissed though without any order as to costs.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Mr. Naresh Salecha]
Member (Technical)

New Delhi

17th November, 2023.

Sheetal