

Kalinga Allied Industries India Pvt Ltd vs Hindustan Coils Ltd & Ors on 11 January, 2021

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NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 518 of 2020

IN THE MATTER OF:

Kalinga Allied Industries India Pvt. Ltd.

Having Its Registered Office at:
CCC/23, Civil Township,
Rourkela Sundargarh, Orissa-769004

...Appellant

Versus

1. Hindustan Coils Ltd.

Having Its Registered Office at:
Plot No. 19-20, Phase-I, Siltara Industrial Area,
Raipur (Chhattisgarh) - 492001

...Respondent No. 1

2. Bindals Sponnge Industries Ltd. (Under CIRP)

Through Mr. Dinesh Sood (Resolution Professional)
Having Its Office at:
C/o Yogakshem Insolvency Professionals LLP,
UGF, 1/15 Tilak Nagar, New Delhi - 110018

... Respondent No. 2

3. Committee of Creditors

Through Mr. Dinesh Sood (Resolution Professional)
Having Its Office at:
C/o Yogakshem Insolvency Professionals LLP,
UGF, 1/15 Tilak Nagar, New Delhi - 110018

... Respondent No. 3

Present:

For Appellant: Mr. Abhijeet Sinha, Mr. Rakesh Wadhwa and
Mr. Sanwal Tiberwal, Advocates.

For Respondents: Mr. Virender Ganda, Sr. Advocate with Mr. Vipul
Ganda, Mr. Vishal Ganda, Mr. Ayandeb Mitra and
Ms. Shelly Khanna, Advocates.

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Mr. IPS Oberoi, Advocate for R-2 with Mr. Dinesh Sood, RP.

JUDGMENT

Jarat Kumar Jain, J:

The Appellant, Kalinga Allied Industries India Pvt. Ltd. filed this Appeal against the impugned order dated 27.02.2020 passed by Ld. Adjudicating Authority (National Company Law Tribunal) Special Bench, New Delhi. Whereby allowed the Interlocutory Application No. 1513 (PB) of 2020 filed by M/s Hindustan Coils Ltd. (respondent No. 1) and directed that the application along with the proposed plan of respondent No. 1 be placed before committee of creditors (in short, COC) for consideration.

2. Brief facts of this case are that pursuant to the expression of interest issued by RP on 24.08.2018, the Appellant submitted a Resolution Plan in time. After several rounds of deliberations by the COC revised Resolution Plan was submitted by the Appellant on 19.12.2018. The same was approved by the COC by requisite majority in the 13th meeting on 28.12.2018. Thereafter, the RP filed an Application under Section 30(6) of the Insolvency & Bankruptcy Code (In short I&B Code) for approval of Resolution Plan in the month of January, 2019. Thereafter, various objections were filed before the Adjudicating Authority which were heard and disposed of. Sometime in the month of February 2020, the Respondent No. 1 filed an application I.A. No. 1513 (PB) of 2020 seeking direction for Company Appeal (AT) (Insolvency) No. 518 of 2020 consideration of its Resolution Plan which is 12% more than the offer of the successful Resolution Applicant (Appellant herein).

3. Learned Adjudicating Authority after hearing the parties held that the Respondent No.1 offers to pay Rs. 50.01 Crore which is Rs. 4.9 Crore more than offered by the successful resolution applicant (Appellant). It is also held that the object of the I&B code encourages maximization of the value of assets of the corporate debtor, which is also advantageous to all the stakeholders. Therefore, it is directed that the proposed plan of the Respondent No. 1 be placed before the COC for consideration. Being aggrieved with this order, the Appellant has filed this Appeal.

4. Learned Counsel for the Appellant submitted that Ld. Adjudicating Authority has no Jurisdiction to entertain any Application from a person who has not participated in Corporate Insolvency Resolution Process (In short CIRP) for consideration of a purported better plan or a plan with a better value ignoring the statutory time lines under Section 12 of the I&B Code and even assuming jurisdiction, there was no occasion for the Ld. Adjudicating authority to pass a direction to the COC

to consider the plan of Respondent No. 1. The Adjudicating authority cannot suo motu direct the COC to consider new resolution plan and reconsider already approved resolution plan. For this purpose, placed reliance on the Judgment of this Appellate Tribunal in the case of Chhatisgarh Distilleries Ltd. Vs. Dushyant Dave & Ors. C. A. (AT) (Ins) No. 461 of 2019. The Respondent No. 1 never underwent to rigors of compliance before the COC by submitting the Company Appeal (AT) (Insolvency) No. 518 of 2020 expression of interest with other prospective Resolution Applicants. It is further submitted that from the order dated 27.02.2020, it is clear that the Respondent No. 1 was well aware of the Resolution Plan amount offered by the Appellant and accordingly the Respondent No. 1 has enhanced its offer before the Ld. Adjudicating Authority in the guise of maximization of realization. Once the Resolution Plan has been opened and the Fundamentals and Financials of the plan and offer made therein were disclosed to all the participants, including RP. After this, no further fresh bid or offer could have been accepted or considered. For this purpose, placed reliance on the Judgment of this Appellate Tribunal in the Case of Kotak Investment Advisors Ltd. Vs. Mr. Krishna Dharamshi & Ors. C.A. (AT) (Ins) No. 344 -345 of 2020. (See para 23)

5. It is also submitted that the Appellant's plan was approved by the COC and the Application for approval of plan under Section 31 of the I&B Code, was pending before the Adjudicating Authority. Meanwhile, the Respondent No. 1 has filed the Application which is beyond the period of 330 days. Therefore, the Application was not maintainable.

6. Learned Counsel for the Appellant further submitted that once the plan is approved by the COC, the statutory mandate on the Adjudicating Authority under Section 31(1) of the I&B Code is to ascertain that a Resolution Plan meets the requirements of Sub Section (2) of Section 30 thereof. The Adjudicating Authority has a very limited power to judicial scrutiny and statutory provision does not permit the Adjudicating Authority Company Appeal (AT) (Insolvency) No. 518 of 2020 to interfere with the commercial wisdom of the COC. Even for maximization of value of the assets of the Corporate Debtor, the Adjudicating Authority is not entitled to overturn the business decisions of the COC. For this proposition, placed reliance on the decision of this Appellate Tribunal in the case of Sharvan Kr. Agarwal Consortium Vs. Ritu Raj Steel Pvt. Ltd. & Ors. Company Appeal (AT) (Ins) No. 1490 of 2019.

7. Learned Counsel for the Appellant submitted that in the impugned order it is inadvertently mentioned that Learned Counsel for the Resolution Professional raised no specific objection in regard to the Application filed by the Respondent No. 1. For correction of this fact, RP has already filed an Application before the Adjudicating Authority, otherwise also there can be no estoppel against the law and the Appellant can very well maintain this Appeal. The Impugned Order is erroneous and prejudicial to the interest of the Appellant. Therefore, it may be set aside.

8. Per Contra Learned Counsel for the Respondent No. 1 submitted that the Appellant has made mis-representation in the Appeal and tried to mis- guide this Appellate Tribunal. On 22.10.2019 a new Application C.A. No. 1545(PB)/2019 was listed and heard wherein 3rd party stranger Applicant namely Kalinga Enterprise Pvt. Ltd. seeking direction from the Adjudicating Authority to direct the COC to consider the Resolution Plan. Kalinga Enterprises Pvt. Ltd. is a related party of the Appellant as defined under Section 5(24) (d) of the I&B Code and Section 2(76) of the Companies Act, 2013

and this fact has been admitted by the Appellant in his rejoinder. The Company Appeal (AT) (Insolvency) No. 518 of 2020 Appellant and the Kalinga Enterprises Pvt. Ltd. being a common director and part of the consortium.

9. Learned Counsel for the Respondent No. 1 further submitted that the impugned order grants an opportunity for COC to evaluate better Resolution Plan. The Appellant has itself delayed the CIRP of the Corporate Debtor. The Appellant dragged the CIRP by two years by abusing its position as the only Resolution Applicant.

10. It is further submitted that the impugned order was dictated in the open Court in the presence of all the parties, however, none of the parties objected it. The object of the I&B Code is maximization of the value of the assets of the Corporate Debtor. Keeping in view that the offer of the Respondent No. 1 is around 12% more than the offer of the successful Resolution Applicant. Therefore, the order does not call for any interference by this Appellate Tribunal. The Tribunal while passing the order followed the settled principle enumerated in the Judgment of Hon'ble Supreme Court in the case of Binani Industries Ltd. Vs. Bank of Baroda C.A. (AT) (Ins) No. 82 of 2018 and Swiss Ribbon Pvt. Ltd. Vs. Union of India 2019 (4) SCC 17 (paragraph 26 and 27). The Appeal is pre-mature as the COC has not yet deliberated and rejected the Appellant's plan. There will be no prejudice to the Appellant since the Resolution Plan of the Appellant has not yet attained finality. Thus, the Appeal is liable to be dismissed.

11. After hearing Learned Counsels for the parties we have perused the record following issues are crop up for our consideration. Company Appeal (AT) (Insolvency) No. 518 of 2020 i. What are the powers of the Adjudicating Authority under Section 31 of the I&B Code?

ii. Whether the Adjudicating Authority can direct the COC to consider the Resolution Plan of a person who was not part of CIRP?

iii. Whether the conduct of the Appellant during the pendency of the CIRP can be considered in this Appeal?

12. The Hon'ble Supreme Court in the matter of Maharashtra Seamless Limited vs Padmanabhan Venkatesh & Ors. Civil Appeal No. 4242 of 2019 held that once the Resolution Plan is approved by the COC, the statutory mandate on the Adjudicating Authority under Section 31(1) of the I&B Code is just to test the Resolution Plan with reference to provisions of Section 30 (2). This Appellate Tribunal in the Case of Sharvan Kumar Agarwal Consortium (Supra) held that once the Plan is approved by the COC, the statutory mandate on the Adjudicating Authority under Section 31(1) of the I&B Code is to ascertain that the Resolution Plan meets the requirement of sub-Section (2) & (4) of Section 30 thereof. The Adjudicating Authority has a very limited power to judicial scrutiny and statutory provision does not permit the Adjudicating Authority to interfere with the commercial wisdom of the COC. Even for maximization of value of assets of the Corporate Debtor. The Adjudicating Authority is not entitled to overturn business decision of the COC.

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13. With the aforesaid, we are of the considered view that the Adjudicating Authority has a very limited power of judicial scrutiny under Section 31 of the I&B Code and the statutory provision does not permit the Adjudicating Authority to interfere with the commercial wisdom of the COC. Even for maximization of value of assets of the Corporate Debtor. In the impugned order Ld. Adjudicating Authority erroneously assumed that it is the duty of the Adjudicating Authority to satisfy itself that the price offer is reasonable and adequate. For this purpose, considered the liquidation value and fair value of the Corporate Debtor and price offered by successful Resolution Applicant and reached a conclusion that the Respondent No. 1's offer is around 12% more than the offer of successful Resolution Applicant.

14. We are of the considered view that Ld. Adjudicating Authority has exceeded his jurisdiction and indulge in quantitative analysis which is not permissible under Section 31 of the I&B Code.

Issue No. 2.

15. In pursuant to the expression of interest issued by RP on 24.08.2018 the Appellant submitted a Resolution Plan. After several rounds of deliberation by the COC revised Resolution Plan was submitted by the Appellant on 19.12.2018. The same was approved on 28.12.2018 by the COC in the 13th meeting by requisite majority. Thereafter, the RP filed an Application under Section 30 (6) of the I&B Code for approval of Resolution Plan in the month of January, 2019 and sometime in the month of February, 2020 the Respondent No. 1 filed an Application seeking direction for Company Appeal (AT) (Insolvency) No. 518 of 2020 consideration of its Resolution Plan. Admittedly the Respondent No. 1 has not submitted any Resolution Plan pursuant to the expression of interest issued by the RP. Thus, the Respondent No. 1 is not part of CIRP. The Respondent No. 1 has filed Application directly before the Adjudicating Authority. The Adjudicating Authority in the guise of maximization of the value of assets of the Corporate Debtor directed that the Respondent No. 1's Application and Resolution Plan be put up before the COC for consideration. There is no provision in the code or regulation which provides that while exercising the power under Section 31 of the I&B Code the Adjudicating Authority can direct the COC to consider the Resolution Plan of such person who has not been part of CIRP. Otherwise also if such procedure is adopted then the CIRP will be frustrated. Once the Resolution Plan has been opened and fundamentals and financials of the Plan and offer made therein were disclosed to all the participants including RP. Then anyone can enhance its offer before the Adjudicating Authority in the guise of maximization of realisation. Therefore, no further fresh bid or offer could have been accepted or considered as held by this Appellate Tribunal in the case of Kotak Investment Advisors Ltd. (Supra) (See Para 23).

16. This Appellate Tribunal in the case of Chhatisgarh Distilleries Ltd. Vs. Dushyant Dave & Ors. Company Appeal (AT) (Ins) No. 461 of 2019 in the light of the pronouncement of Hon'ble Supreme Court in the case of Committee of Creditors Essar Steel India Ltd. Vs. Satish Gupta & Ors. 2019 SCC Online SC1478 held that:

Company Appeal (AT) (Insolvency) No. 518 of 2020 "In the light of the above pronouncement of Hon'ble Supreme Court, we have examined the issues raised in these Appeals. Admittedly, the A-1 filed its resolution plan before the Adjudicating

Authority on 13.02.2019 whereas, the last date for submission of Resolution Plan before RP was 15.10.2018. Resolution plan of successful Resolution Applicant i.e. Dera Finvest Pvt. Ltd. (R2) was approved by 98.72 % of the Committee of Creditor in e-voting conducted on 01.11.2018 and 02.11.2018. When the Resolution Plan is filed before the Adjudicating Authority then the Authority has to satisfy that the Resolution Plan approved by the Committee of Creditor fulfils the requirements as specified in Sub-Section 2 of Section

30. However, the Adjudicating Authority cannot direct the CoC to consider the second Resolution plan submitted before the Authority although the second Resolution Applicant is ready to invest more amount in comparison to first Resolution Applicant. Learned Adjudicating Authority has rightly held that Adjudicating Authority cannot suomotu direct the CoC to consider new resolution plan and reconsider already approved Resolution plan. The Hon'ble Supreme Court in the above referred judgment held that under Section 30(2) of I&B Code, decision of Committee of Creditor is purely Commercial and cannot be adjudicated by the Adjudicating Authority. Thus, we are of the view that Adjudicating Authority is well within its jurisdiction while rejecting the application of A-1."

17. With the aforesaid, we are of the considered view that Ld. Adjudicating Authority has erroneously entertained the Application and Resolution Plan of the Respondent No. 1 and directed the RP to put up the same before the COC for consideration.

18. Learned Senior Counsel for the Respondent No. 1 has raised the objection that the Appellant mis-represented in the Appeal and mis-guided this Appellate Tribunal. Admittedly, a new Application C.A. No. 1545/PB/2019 was filed by Kalinga Enterprises Ltd. (In short 'KEL') as a Company Appeal (AT) (Insolvency) No. 518 of 2020 third party and seeking direction from the Adjudicating Authority to direct the COC to Consider its Resolution Plan. KEL is a related party to the Appellant. The Adjudicating Authority vide order dated 22.10.2019 directed the RP to place Resolution Plan of the Applicant KEL before the COC. KEL and the Appellant have a common Director and part of same consortium. The Learned Counsel for the Appellant submitted that the objection raised by the Respondent No. 1 has no force on following grounds:

i. The I&B Code defines under Section 5(24) (d) related party with reference to a Corporate Debtor and not with reference to Resolution Applicant.

ii. KEL and the Appellant were a part of consortium, this fact was disclosed in the Application filed by KEL.

19. We have considered the aforesaid objection raised by Learned Counsel for the Respondent No. 1 we are of the view that the order passed by the Adjudicating Authority on 22.10.2019 has no relevance with this Appeal. Therefore, we find no force in the objection raised by Learned Counsel for the Respondent No. 1.

20. With the aforesaid, we are of the view that when the Application for approval of Resolution Plan is pending before the Adjudicating Authority at that time the Adjudicating Authority cannot entertain an Application of a person who has not participated in CIRP even when such person is ready to pay more amount in comparison to the successful Resolution Applicant. If a Resolution Plan is considered beyond the time limit then it will make a Company Appeal (AT) (Insolvency) No. 518 of 2020 never-ending process. Thus, impugned order is not sustainable in law as well as in fact. The impugned order is hereby set aside.

21. The Adjudicating Authority is directed to proceed with the Application filed by the RP for approval of Resolution Plan as per law.

The Appeal is allowed. However, no order as to costs.

[Justice Bansi Lal Bhat] The Acting Chairperson [Justice Jarat Kumar Jain] Member (Judicial) [ShreeshaMerla] Member (Technical) New Delhi, 11th January, 2021 SC.

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