

IN THE NATIONAL COMPANY LAW TRIBUNAL, AHMEDABAD
DIVISION BENCH
COURT - 1

ITEM No. 139

**IA/572(HMM)2022 in
CP(IB) 469 of 2019**

Order under Section 30(6) of IBC, 2016

IN THE MATTER OF:

Shri Sanjay Jitendralal Shah RP for
B & C Energy Infra Ltd.

Vs.

Dakshin Gujrat Vij Company Limited & Ors

.....**Applicant**

.....**Respondent**

Order delivered on 24/01/2023

Coram:

Madan B. Gosavi, Hon'ble Member(J)
Kaushalendra Kumar Singh, Hon'ble Member(T)

PRESENT:

For the Applicant :

For the Respondent :

ORDER

The case is fixed for pronouncement of the order. The order is pronounced in open court vide separate sheet.

-SD-

**KAUSHALENDRA KUMAR SINGH
MEMBER (TECHNICAL)**

-SD-

**DR. MADAN B. GOSAVI
MEMBER (JUDICIAL)**

Rajeev Kr. Sen/Stenographer

**BEFORE THE ADJUDICATING AUTHORITY
NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD BENCH
COURT-I**

IA/572(AHM)2022 in CP(IB) 469 of 2019

[An application under section 30(6) r.w. 31 of the Insolvency and Bankruptcy Code, 2016 Regulation 39(4) of IBBI Regulations, 2016, Rule 11 of NCLT Rules, 2016]

In the matter of:

Shri Sanjay Jitendralal Shah,

Resolution Professional of B&C Energy Infra Limited,

Having its address at:

501, 502-5th Floor, Abhijeet-1,

Mithakhali Six Roads, Navrangpura,

Ahmedabad-380009

**....Applicant/Resolution
Professional**

Versus

1. CFM Asset Reconstruction Private

(Financial Creditor)

Having its address at:

Near YMCA Club, S.G. Highway,

Makarba, Ahmedabad-380051

2. Bank of Baroda, Mehsana Main Branch

(Financial Creditor)

Having its address at:

Mehsana (Main) Branch,

Station Road, Mehsana- 384001

3. Ashvinkumar Jayantilal Patel

(Suspended Director of B&C Energy Infra Limited and

Successful Resolution Applicant)

Having its address at:

H-132, Sardarshan, G.I.D.C.-Dediyasan,
Modhera Road,
Mahesana- 384002

4. Labhuben Ashvinkumar Patel

(Suspended Director of B&C Energy Infra Limited)

Having its address at:

H-132, Sardarshan,G.I.D.C.- Dediyasan,
Modhera Road, Mahesana -384002

5. Manishkumar Rameshchandra Patel

(Suspended Director of B&C Energy Infra Limited)

Having its address at:

8, Pink City, Opp. Man Farma,
Dediyasan-3, Mehsana O- 384002

6. Creative Engineers & Services Private Limited

(Operational Creditor)

Having its address at:

15,16B Sangini Complex,
Near Doctor House, C.G. Road,
Ahmedabad- 380009

7. Dakshin Gujarat Vij Company Limited

(Operational Creditor)

Having its address at:

"Urja Sadan", Nana Varachha Road,
Kapodara Char Rasta, Surat- 395006

....Respondents.

IN THE MATTER OF

CP(IB) No. 469 of 2019

[An application under section 9 of the Insolvency and Bankruptcy Code, 2016]

Creative Engineers and Services Private Limited

.....Operational Creditor

Versus

B&C Energy Infra Limited

..... Corporate Debtor

Order reserved on: 09.01.2023

Order pronounced on: 24.01.2023

Coram: DR. MADAN B. GOSAVI (MEMBER JUDICIAL)

KAUSHALENDRA KUMAR SINGH (MEMBER TECHNICAL)

Appearance:

For the Applicant : Ms. Natasha Dhruvan Shah, Ld. Adv.

For the Respondent : Mr. Pratik Thakkar, Ld. Adv.

ORDER

[PER: DR. MADAN. B. GOSAVI, MEMBER (J)]

1. This application under section 30(6) of the Insolvency and Bankruptcy Code, 2016 (“IBC, 2016”) is filed by Mr. Sanjay J Shah- Resolution Professional (“RP”) of the Corporate Debtor – B&C Energy Infra Limited for approval of the Resolution Plan of the Corporate Debtor submitted by Suspended Director of the Corporate Debtor on the ground that since the Corporate Debtor is MSME, the Suspended Board of Director is not ineligible to submit the resolution plan under section 240A of the IBC, 2016.

2. The following facts are not in dispute:

I. The Corporate Debtor has been admitted in Corporate Insolvency Resolution Process (“CIRP”) by order dated 03.01.2022. The Applicant was appointed as the IRP. On 11.01.2022, the IRP made the public announcement of the CIRP of the Corporate Debtor. He called upon the creditors of the Corporate Debtor to submit their claims supported by requisite proof. He received the claims from two Secured Financial Creditors, two Unsecured Financial Creditors, and some of

Operational Creditors. He constituted the Committee of Creditors (“CoC”) consisting of two Financial Creditors i.e., CFM Asset Reconstruction Private Limited having 86% of voting shares, and Bank of Baroda having 14% of voting shares. He did not include in CoC the other two Financial Creditors, namely, Mr. Ashvinkumar J Patel and Ms. Labhuben Ashvikumar Patel because they being the directors of the Corporate Debtor and related parties.

II. The IRP prepared the Information Memorandum of the assets and liabilities of the Corporate Debtor. His appointment as the RP was confirmed by the CoC. As per the instruction of CoC, he published Form-G on 18.03.2022 calling upon the Prospective Resolution Applicants (“PRAs”) to submit the resolution plan for the Corporate Debtor.

III. In pursuance of the publication of Form-G, Mr. Ashvinkumar J Patel submitted the Resolution Plan. As already noted above, he is one of the Directors of the Corporate Debtor having 54.20% shareholding in the Corporate Debtor. In short, this plan is submitted by the Corporate Debtor itself.

3. Section 240A of the IBC, states that: -

'240A. (1) Notwithstanding anything to the contrary contained in this Code, the provisions of clauses (c) and (h) of section 29A shall not apply to the resolution applicant in respect of corporate insolvency resolution process of any micro, small and medium enterprises.

(2) Subject to sub-section (1), the Central Government may, in the public interest, by notification, direct that any of the provisions of this Code shall—

(a) not apply to micro, small and medium enterprises; or

(b) apply to micro, small and medium enterprises, with such modifications as may be specified in the notification.

(3) A draft of every notification proposed to be issued under sub-section (2), shall be laid before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions.

(4) If both Houses agree in disapproving the issue of notification or both Houses agree in making any modification in the notification, the notification shall not be issued or shall be issued only in such modified form as may be agreed upon by both the Houses, as the case may be.

(5) The period of thirty days referred to in sub-section (3) shall not include any period during which the House referred to in sub-section (4) is prorogued or adjourned for more than four consecutive days. (6) Every notification issued under this section shall be laid, as soon as may be after it is issued, before each House of Parliament.

Explanation.—For the purposes of this section, the expression "micro, small and medium enterprises" means any class or classes of enterprises classified as such under sub-section (1) of section 7 of the Micro, Small and Medium Enterprises Development Act, 2006.'

4. In short, the ineligibility to submit the Resolution Plan by a certain class of persons (including the related party of the Corporate Debtor) is not applicable provided the Corporate Debtor is an MSME unit. It is not in dispute that the Corporate Debtor is MSME.

5. Now, we proceed to examine the Resolution Plan submitted by Ashvinkumar Jayantilal Patel - one of the Directors of the Corporate Debtor in the light of the provisions of sections 30(2)(a) to (f) of the IBC, 2016 along with Regulations 38 and 39 of IBBI (CIRP of the Corporate Persons) Regulations, 2016.

6. Section 30(2)(a) of the IBC, 2016 requires that the Resolution Plan must provide payment of the CIRP costs in priority. In this Resolution Plan, a

sum of Rs. 5 Lakh is earmarked for payment of CIRP cost with the undertaking that it will be paid in priority (Clause 5.3). We hold that provisions of section 32(2)(a) of the IBC, 2016 are complied with.

7. Section 30(2)(b) of the IBC, 2016 requires that debts of the Operational Creditors and dissenting Financial Creditors to be paid in an equitable manner as per section 53 of IBC, 2016 on a priority basis. In this case, there is no dissenting Financial Creditor. There are two Operational Creditors but no provision is made to pay their dues. One of the Operational Creditors M/s. Creative Engineers & Services Private Limited (Respondent No. 6) objected the Resolution Plan on the same ground. It has also objected the Resolution Plan on some other grounds say as personal guarantees of the Directors of the Corporate Debtor are sought to be extinguished, the fixed deposit of the Corporate Debtor with Mahesana Urban Cooperative Bank Limited amounting to Rs. 25,51,167/- is not considered as the assets of the Corporate Debtor in the Information Memorandum, some fixed deposits are encashed during the CIRP etc. We consider his other objections later on. At this stage, we deal with its first objection that no provision is made in the Resolution Plan for payment of debts of Operational Creditors and it is in contravention of section 30(2)(b) of the IBC, 2016.

8. Form H prepared by the RP is at page no. 605 (Annexure-Q). The liquidation value of the assets of the Corporate Debtor is shown as Rs. 40,47,826/-. As against this, the debt amount payable to the Secured Financial Creditor is Rs. 68,88,960/- and to the Unsecured Financial Creditor is Rs. 3,86,88,947/-. As per section 53 of the IBC, 2016, the claim of Secured Financial Creditor and Unsecured Financial Creditor are to be paid in priority, than the debt payable to the Operational Creditor. If we take the debt amount payable to the Financial Creditor (Secured as well as Unsecured), it exceeds the liquidation value of the Corporate Debtor. In this case, if, at all, the Corporate Debtor goes into liquidation, the Operational Creditors will not get any amount toward their dues. In view of this, we hold that the Resolution Plan does not suffer from any illegalities as stated under section 30(2)(b) of the IBC, 2016.

9. Section 30(2)(c) and (d) of the IBC, 2016 mandates that the Resolution Plan must provide for mechanism for the management of the Corporate Debtor after approval of the Resolution Plan and pending its implementation. So also, there must be a mechanism for the effective implementation of the Resolution Plan.

10. Clause 7 and 8 in the Resolution Plan speaks about the establishment of the monitoring committee. The same committee is responsible for the implementation of the Resolution Plan. The committee consists of one nominee appointed by the Resolution Applicant. The RP or one person nominated by the RP and one professional nominated by the Financial Creditors. It is stated that the committee will manage the affairs of the Corporate Debtor pending the implementation of the Resolution Plan. With this arrangement, we hold that the Resolution Plan is in compliant with the provisions of section 30(2)(c) and (d) of the IBC, 2016.

11. We examined the Resolution Plan in view of the provision of section 30(2)(e) and (f) of the IBC, 2016 to see whether it is not in contravention of any provisions of law for the time being in force and whether it confirms the other requirements specified by the Board.

12. Respondent No. 6 i.e., M/s. Creative Engineers & Services Private Limited and Respondent No. 7- Dakshin Gujarat Vij Company Limited filed an objection against the approval of the Resolution Plan. Both are the Operational Creditors. In the Resolution Plan no provision is made for the payment of debts of the Operational Creditors. However, we have already noted that the debt payable to Secured Creditors is much more than the liquidation value of the Corporate Debtor. Hence, in case, Corporate Debtor goes in liquidation still the value of the amount of assets of the Corporate Debtor is not sufficient to pay the debts of Secured Financial Creditors. As per the waterfall mechanism of distribution as stated under section 53 of the IBC, 2016, the Operational Creditor of the Corporate Debtor would get nothing. For this reason, we have held that Resolution Plan cannot be rejected although no provision is made to pay the debts of the Operational Creditors.

13. However, Learned Counsel appearing for the Operational Creditors brought to our notice certain facts to impress upon us that such Resolution Plan cannot be approved by this Adjudicating Authority. Learned Counsel further submitted that in the Resolution Plan, some provision is made for payment of debts of two Secured Financial Creditors only. The other two Financial Creditors are paid nothing because they are related parties of the Corporate Debtor. However, in the Resolution Plan, it is mentioned that their claims will not get extinguished and they are being carried forward. According to Learned Counsels, it is against the provisions of the law.

14. We examined the Resolution Plan at para 5.4 (page 128) the Resolution Applicant has given financial outlay. It is as follows:

5.4. Resolution for Secured Financial Creditors

5.4.1. The amount of claim admitted by the Resolution Professional against the claims submitted by the secured creditors who are members of the CoC ("Secured Financial Creditor") as on the Cut-off Date has been tabled below.

<i>Sr No</i>	<i>Name of Financial Creditor</i>	<i>Verified Amount of claims</i>	<i>Nature of Claim</i>	<i>Amount offered as part of the Resolution Plan</i>	<i>% of Amount offered as part of Resolution Plan</i>
1	<i>CFM Asset Reconstruction Private Limited</i>	<i>59,50,078/-</i>	<i>Secured Loan</i>	<i>59,50,078/-</i>	<i>100%</i>
2	<i>Bank of Baroda, Mehsana Main Branc</i>	<i>9,38,882/-</i>	<i>Secured Loan</i>	<i>9,38,882/-</i>	<i>100%</i>
3	<i>Ashvinbhai J Patel</i>	<i>2,75,22,445/-</i>	<i>Unsecured Loan (Related Party-Director)</i>	<i>As this is a related party debt, no amount shall be offered as part of the Resolution Plan. The existing debt will be taken over as a liability in the new company</i>	

				<i>and only repaid if funds are available in the new company.</i>
4	<i>Labhuben A Patel</i>	<i>1,11,66,502/-</i>	<i>Unsecured Loan (Related Party-Director)</i>	<i>As this is a related party debt, no amount shall be offered as part of the Resolution Plan. The existing debt will be taken over as a liability in the new company and only repaid if funds are available in the new company.</i>
TOTAL		4,55,77,907/-		68,88,960/-

5.4.2. The resolution plan envisages payment of Rs. 68.89 Lakh at 100% of the admitted amount to secured creditors as per below payment plan.

Kind of Payment	Proposed timeline	Amt (INR)
<i>1st Tranche-Upfront</i>	<i>Within 45 days from the effective date</i>	<i>13.8 Lakh</i>
<i>2nd Tranche-Upfront</i>	<i>Within 90 days from the effective date</i>	<i>18.47 Lakh</i>
<i>3rd Tranche</i>	<i>Within 135 days from the effective date</i>	<i>18.47 Lakh</i>
<i>4th Tranche</i>	<i>Within 180 days from the effective date.</i>	<i>18.47 Lakh</i>
Total		Rs. 68.89 Lakh

15. It is seen that there are four Financial Creditors of the Corporate Debtor. (i) CFM Asset Reconstruction Private Limited, and (ii) Bank of Baroda are the Secured Financial Creditors. Both are having 100% of the debt of the total claim. Both are CoC members. The other two Financial Creditors (Unsecured) are (i) Mr. Ashvinbhai J Patel, and (ii) Mrs. Labhuben A Patel. Both of them are the Directors of the Corporate Debtor. They have lent the Corporate Debtor a sum of Rs. 2,75,22,445/- and Rs. 1,11,66,502/-

respectively. Their claims are not considered by the RP being claimed by the related parties. But in the Resolution Plan it is mentioned that *“As this is a related party debt, no amount shall be offered as part of the Resolution Plan. The existing debt will be taken over as a liability in the new company and only repaid if funds are available in the new company”*.

16. The above recital in the Resolution Plan shows that the Corporate Debtor’s liability to pay the debt amount of its Director is allowed to be carried forward. In the case of ***Ghanashyam Mishra and others vs. Edelweiss Asset Reconstruction and others in Civil Appeal No. 8129 of 2019***, this situation has been adequately considered by Hon’ble Supreme Court. The questions for consideration in that proceeding were :-

- (i) *As to whether any creditor including the Central Government, State Government or any local authority is bound by the Resolution Plan once it is approved by an adjudicating authority under sub-section (i) of Section 31 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as ‘I&B Code’)?*
- (ii) *As to whether the amendment to Section 31 by Section 7 of Act 26 of 2019 is clarificatory/declaratory or substantive in nature?*
- (iii) *As to whether after approval of resolution plan by the Adjudicating Authority a creditor including the Central Government, State Government or any local authority is entitled to initiate any proceedings for recovery of any of the dues from the Corporate Debtor, which are not a part of the Resolution Plan approved by the adjudicating authority?*

17. The Hon’ble Apex Court answered them in para 95. It is as follows:

“...95. In the result, we answer the questions framed by us as under:

- (I) *That once a resolution plan is duly approved by the Adjudicating Authority under sub-section (1) of Section 31, the claims as provided in the resolution plan shall stand frozen and will be binding on the Corporate Debtor and its employees, members, creditors, including the Government, any State Government or any local authority, guarantors and other stakeholders. On the date of approval of*

resolution plan by the Adjudicating Authority, all such claims, which are not a part of resolution plan, shall stand extinguished and no person will be entitled to initiate or continue any proceedings in respect to a claim, which is not part of the resolution plan;

- (II) 2019 amendment to Section 31 of the I&B Code is clarificatory and declaratory in nature and therefore will be effective from the date on which I&B Code has come into effect;*
- (III) Consequently all the dues including the statutory dues owed to the Central Government, any State Government or any local authority, if not part of the resolution plan, shall stand extinguished and no proceedings in respect of such dues for the period prior to the date on which the Adjudicating Authority grants its approval under Section 31 could be continued.*

18. It shows that the claims of the creditors which are not part of the Resolution Plan get extinguished upon approval of the Resolution Plan. In this Resolution Plan, the claims of the Directors of the Corporate Debtor are not considered by the RP as they being related parties of the Corporate Debtor. However, at the same time, the CoC in their commercial wisdom allowed the claim of those Directors of the Corporate Debtor to be carried forward against the provisions of law and overlooking the judgment of the Hon'ble Supreme Court as stated above. At the same time, the claims of the Operational Creditors are extinguished completely. In our considered opinion, this Resolution Plan is not only against the provisions of law but also this plan does not give equitable treatment to its creditors.

19. This Resolution Plan is a plan by the Directors of the Corporate Debtor. The Directors did not offer anything to the Operational Creditors. They did not pay dues of the Dakshin Gujarat Vij Company Limited-Government of Gujarat undertakings. But at the same time, they tried to save their claims against the Corporate Debtor and the CoC approved this plan may be only because both CoC members got 100% of their dues in return. In view of the above, we hold that Resolution Plan does not give equitable treatment to all stakeholders and it is against the provisions of the Insolvency

and Bankruptcy Code, 2016. Hence, we hold that it is not in conformity with the provisions of section 30(2)(e) and (f) of the IBC, 2016. We do not wish to approve this Resolution Plan.

20. Accordingly, we proceed to pass the following orders:

ORDER

I. IA/572(AHM)202 filed by the Resolution Professional for approval of the Resolution Plan under section 30(6) of the IBC, 2016 stands rejected and disposed of.

IV. Urgent certified copy of this order, if applied for, to be issued to all concerned parties upon compliance with all requisite formalities.

-SD-

**KAUSHALENDRA KUMAR SINGH
MEMBER (TECHNICAL)**

-SD-

**DR. MADAN B. GOSAVI
MEMBER (JUDICIAL)**

Rajeev Kr. Sen/Stenographer