

IN THE NATIONAL COMPANY LAW TRIBUNAL,
COURT II, MUMBAI BENCH
INTERLOCUTORY APPLICATION NO. 1205 OF 2021

IN
CP(IB) NO. 1842/MB/2018

*Application u/s 60(5)(b) of the Insolvency and
Bankruptcy Code, 2016.*

In the matter of:

Sanjay Dave, erstwhile Promoter/

Director of Oracle Home Textile Ltd

...Applicant

In the matter of

ANDHRA BANK LTD.

...Operational Creditor

v/s.

ORACLE HOME TEXTILE LIMITED

(Through its Resolution Professional Mr. Jitendra
Kumar Yadav)

...Corporate Debtor

Order pronounced on 30.04.2024.

Coram:

Shri. Kuldip Kumar Kareer : **Member Judicial.**

Shri. Anil Raj Chellan : **Member Technical.**

Appearances (in physical mode)

For the Applicant: Counsel Mr. Pulkrit Sharma a/w Umang Mehta.

For the Respondent: Adv. Akshay Doctor a/w Naveli R.

ORDER

Per: Shri. Kuldip Kumar Kareer, Member Judicial.

1. This is an application under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as “the Code”) filed by the Applicant, who is an erstwhile Promoter/Director of the Corporate Debtor praying for the following reliefs: a.) Direct that there cannot be a conditional approval of the Resolution Plan submitted by the present Applicant; b.) Direct the Resolution Professional to re-issue an unconditional Letter of Intent, as per the provisions of IBC, 2016 and the terms of the Applicant’s CoC-approved Resolution Plan; c) Direct that MSME status of the Corporate Debtor cannot be a ground for forfeiture of the EMD and Performance Bank Guarantee; and d) Defer the deposit of Performance Bank Guarantee till the final disposal of the present application.

Case of the Applicant (in brief):

2. The Applicant herein is the Resolution Applicant, whose resolution plan has been approved by the Committee of Creditors of the Corporate Debtor. The Resolution Plan submitted by the Applicant was voted on by the CoC and it came to be approved on 10.05.2021 when the voting period ended. The approval was notified to the Applicant vide email dated 10.05.2021. The

Applicant is also a suspended director of the Corporate Debtor but was permitted to file his resolution plan as the Corporate Debtor is an MSME. Mr. Jitendra Kumar Yadav was appointed as the Interim Resolution Professional ('IRP') and was later confirmed as the Resolution Professional ('RP').

3. However, the CoC through RP has granted a conditional approval and Letter of Intent to the present application. The condition attached to the aforesaid approval is that the approval has been made conditional to an order that may come to be passed by this Hon'ble Tribunal pursuant to the hearing held on 21.01.2021 in applications filed by the belated resolution applicants seeking time to submit their resolution plans. These interlocutory applications are IA Nos. 2311/2021 and IA No. 2195/2021 in CP No. 1842/2018.
4. Being aggrieved by the conditional approval of the Applicant's resolution plan by the CoC and RP, the Applicant is constrained to approach this Hon'ble Tribunal by way of this application. Hence this application.

Submissions of the Applicant

5. It is submitted on behalf of the present Applicant that there is no provisional basis for such conditional approval of the resolution plan, subject to outcome of the application moved by the third-party resolution applicants where the present Applicant is not even a party.

6. From a bare perusal of Section 30(4), it is evident that there is no scope of conditional approval of the resolution plan. Counsel for the Applicant submits that there could have been only two scenarios for the CoC, (i) either the CoC could have approved the Applicant's plan without it being conditional to the outcome of third party applications, where the present Applicant is not even a party, or (ii) the CoC could have expedited the pending order of 21.01.2021 through advocates or through the concerned resolution applicants. Counsel for the Applicant further submits that making the Applicant subject to a conditional approval of his resolution plan would be akin to dangling a sword over the head of the applicant where one has no control since the Applicant herein was never a party to those applications. The Applicant cannot be made subject to the outcome of third party applications, where the Applicant is not even a party. The Applicant cannot be prejudiced because some third parties are non-vigilant in regard to their applications.
7. It is submitted on behalf of the Applicant that no efforts have been taken by the third party resolution applicants in expediting the proceedings craving for leave to allow them to submit their resolution plan. Counsel for the Applicant submits that any financial investor would be most vary of any conditional approval in a scheme where the decision will be based on proceedings in which he is not even

involved or heard. Counsel for the Applicant further submits that no party can be prejudiced in proceedings where such party is not heard or represented.

8. The Letter of Intent indicates that the Applicant is required to furnish the Performance Bank Guarantee (“PBG”). As per the Request for Resolution Plan (‘RfRP’) the Applicant is required to furnish the PBG within a period of 7 days. Though the extension of upto 45 days on account of COVID-19 pandemic was granted, the Applicant apprehends that furnishing of PBG at this stage would be prejudicial to the Applicant’s interest. Hence, the Applicant prays for directions from the Hon’ble Adjudicating Authority to defer the deposit of PBG till the final disposal of the present application.

9. **Reply and Contentions of the Respondent:** The Respondent/RP has filed his Affidavit-in-Reply dated 15th September, 2021. The main contentions of the Respondent are briefly stated hereinbelow:

- i. The Applicant has come to this Hon’ble Tribunal with unclean hands with a motive to mislead the Tribunal and to delay the Corporate Insolvency Resolution Process (‘CIRP’) of the Corporate Debtor. The Suspended Director Mr. Sanjay Dave i.e. the Applicant has filed an Interlocutory Application No. 608/2020 seeking directions to extend CIRP period and to allow him to submit the Resolution Plan. The said Application came to be allowed vide Order dated 18.02.2020. Till 18th

IN THE NATIONAL COMPANY LAW TRIBUNAL, COURT-II,
MUMBAI BENCH

I.A. NO. 1205 OF 2021
IN
CP(IB) NO. 1842/MB/C-II/2018

CoC meeting conducted on 06th March, 2020, the Applicant had not submitted his plan. Thereafter, in and around July 2020, the Applicant filed an Interlocutory Application No. 1070 of 2020 *inter alia* seeking exemption from depositing Earnest Money Deposit ('EMD') along with the resolution plan. The Hon'ble Tribunal did not accede to this request and directed the Applicant vide Order dated 21st August, 2020 to submit his Resolution Plan with EMD within 3 weeks and further directed CoC to take a decision on the same.

- ii. Pursuant to the above order, the Applicant submitted the EMD and his Resolution Plan and the same was discussed and deliberated upon by the CoC at its meetings. After the 27th CoC meeting, the Final Resolution Plan dated 31st December, 2020 along with its Addendum dated 05th May, 2021 submitted by the Applicant was voted upon and approved the same subject to the discussion held in 27th CoC meeting by 99.90% votes on 10th May, 2021.
- iii. In the meantime, on 21st January, 2021 the above Company Petition came up for hearing before the Hon'ble Tribunal at which other interested parties who were keen on participating in the CIRP process and submitting their respective Resolution Plans argued their respective

IN THE NATIONAL COMPANY LAW TRIBUNAL, COURT-II,
MUMBAI BENCH

I.A. NO. 1205 OF 2021
IN
CP(IB) NO. 1842/MB/C-II/2018

application. After hearing the parties, the Hon'ble Tribunal indicated that it would pass a detailed order in respect of the same.

- iv. The 28th CoC Meeting was held on 21st May, 2021. At the said meeting, the Respondent/RP informed all the members present that the voting results approving the plan were subject to the order(s) to be passed subsequent to the hearing held on 21.01.2021. The Applicant requested the CoC to issue him a Letter of Intent ('LoI') on the letterhead of RP. Thereafter, vide email dated 24th May 2021, the RP circulated the draft LoI to the Applicant for his perusal and acceptance. The Applicant replied to the said email vide his Advocate's Letter dated 29th May, 2021, *inter-alia*, raising the preliminary objection to the LoI being conditional subject to the outcome of hearing dated 21.01.2021 and the additional conditions being sought to be imposed in the LoI. The Respondent submits that at that juncture only, the Respondent as RP had reiterated that the condition regarding the outcome of the hearing dated 21.01.2021 was intimated to the Applicant well in advance and was also recorded in the minutes of 28th CoC meeting.
- v. Even in response to the Applicant's Letter dated 29th May, 2021 referred-to-above, the Respondent addressed a Reply dated 31st May, 2021 reiterating that the condition under the LoI had been subsisting since the

IN THE NATIONAL COMPANY LAW TRIBUNAL, COURT-II,
MUMBAI BENCH

I.A. NO. 1205 OF 2021
IN
CP(IB) NO. 1842/MB/C-II/2018

time of 23rd CoC meeting and contention in respect thereof cannot be accepted. In the meantime, the Applicant proceeded to file the above application and informed the Respondent of the same vide his Advocate's email dated 03rd June, 2021.

- vi. At 29th CoC meeting held on 11th June, 2021, the Applicant was requested to provide the duly corrected/modified resolution plan as per the discussions at earlier CoC meetings so that the application could be filed before the Hon'ble Tribunal. At the said meeting, the CoC had enquired with the Applicant if he has any specific objection w.r.t LoI and the Applicant answered in the negative. Thus, the CoC called upon the Applicant to submit a corrected Resolution Plan as per the RfRP document and further requested the RP to issue a fresh LoI. Pursuant to the above, the RP circulated a fresh LoI to the Applicant vide email dated 23.06.2021 and 7 days' time was granted to the Applicant to accept the same. The Applicant replied to the above email on the same day raising issues of LoI not being in conformity with the RfRP document and once again requested the RP to issue a fresh LoI. The RP on the same day replied that the latest LoI has been issued pursuant to the discussions held in 29th CoC meeting.

- vii. Thereafter, at 31st CoC meeting, the Applicant was asked by the CoC to give his final stand on the unconditional acceptance of the LoI as per the RfRP terms and conditions. However, the Applicant maintained his objections to the LoI and the conditions attached thereto and said that he cannot accept the LoI. Expressing its displeasure towards the prolonging of CIRP by the Applicant, the CoC passed the resolution at its 31st meeting that the EMD submitted by the Applicant would stand forfeited. Accordingly, the RP vide his Letter dated 02nd August, 2021 informed the Applicant of the forfeiture of EMD in view of CoC's rejection of his resolution plan and on account of Applicant's failure in accepting the LoI dated 23rd June, 2021 unconditionally.
- viii. The Applicant appears to be in a clear attempt to derail the CIRP process of the Corporate Debtor. Hence, the instant Application needs to be dismissed.

FINDINGS

10. We have heard the Counsel for the parties and have gone through the records.
11. This is an application moved by the Applicant, being an erstwhile Promoter and a Suspended Director of the Corporate Debtor, who is aggrieved by the conditions attached to the Letter of Intent issued by the Respondent in

accordance with the directions of the CoC of the Corporate Debtor. The three conditions with which the Applicant is aggrieved are as follows:

- a. The Resolution Applicant agrees that in case there is any amount realized from ECGC (Export Credit & Guarantee Corporation) of the Corporate Debtor, then the Corporate Debtor shall, on and from the Effective Date (i.e. date of receiving the Order), be entitled to keep and have benefits of the amount, title, or interest notwithstanding that it was not reflected in the Information Memorandum, no other entity or persons shall have any right of such realizations;
- b. The CoC members allow the Resolution Applicant a period of 45 days for providing the Performance Guarantee instead of 7 days considering the overall pandemic situation in the country and lockdowns in the state;
- c. Letter of Intent dated 23rd May, 2021 is being issued subject to the outcome of the decision of the Adjudicating Authority and/or any other courts or tribunals or regulatory authorities, as the case may be, under the applicable laws and the Applicant shall not hold the Resolution Professional or the CoC liable for such decisions of the Adjudicating Authority and/or any other courts or tribunals or regulatory authorities.

12. Counsel for the Applicant submits that there is no provision in law whereby the CoC can approve a plan subject to the outcome of litigations in which the Applicant is not even a party. Counsel for the Applicant further submits that that making the Applicant subject to a conditional approval of his resolution plan would be akin to dangling a sword over the head of the applicant where one has no control since the Applicant herein was never a party to those applications. The Ld. Counsel for the Applicant states that vide Letter of Intent dated 23.05.2021, received by the Applicant on 24.05.2021, certain overarching provisions were sought to be foisted on the Applicant that were over and above as also beyond what was submitted in the resolution plan and addendum already e-voted upon by the CoC and, therefore, the Ld. Counsel for the Applicant contends that such Letter of Intent beyond the scope of resolution plan could not have been issued by the Resolution Professional. It is the case of the Applicant that since the Respondent has vide Letter dated 31.05.2021 refused to issue an unconditional letter of intent, the Applicant is constrained to approach the Tribunal with the instant application.

13. On the other hand, Counsel for the Respondent submits that the condition under the Letter of Intent ('LoI') has been subsisting since the time of 23rd CoC Meeting held on 10th March, 2021. Counsel for the Respondent further submits that in the 28th CoC meeting, it was informed to the Applicant and all others

present in the meeting that the voting results approving the plan were subject to the orders to be passed by the Hon'ble NCLT subsequent to the hearing held on 21.01.2021. It is only after the 29th CoC meeting that that a fresh LoI was issued which too maintained the condition of approving the plan subject to the outcome of other litigations in relation to the submission of resolution plans by other resolution applicants.

14. We have carefully examined and weighed the aforesaid submissions and we have given our thoughtful consideration to the same.

15. On perusal of records, we find that the Applicant was virtually present in the 27th CoC meeting dated 06th May, 2021 wherein the Addendum dated 05th May, 2021 was received and briefly discussed. Clause 7.10.6 of the Addendum dated 05th May 2021, which was quoted in the minutes of the 27th CoC Meeting, is reproduced as follows: *“7.10.6 The Resolution Applicant further expressly clarifies, that in case there is any amount realized from ECGC (Export Credit & Guarantee Corporation) of the corporate Debtors, then the Corporate Debtor shall, on and from the Effective Date (date of receiving the Order), be entitled to keep and have benefits of the amount, title, or interest notwithstanding that it was not reflected in the Information Memorandum no other entity or persons shall have any right of such realizations.”*

It is not in dispute that the Addendum to the Resolution Plan was submitted by the Applicant on 06.05.2021. No objections were raised by the Applicant during

the 27th CoC meeting with respect to the above-quoted condition. The Applicant has also not placed on record the copy of the Addendum to the Resolution plan submitted by him to show that the conditions stated in the Letter of Intent, which are being disputed by the Applicant, were not forming part of the Resolution Plan read with the Addendum thereto submitted by him. It is a matter of record that the Resolution Plan and the Addendum to the Resolution Plan referred-to-above were put for e-voting and the e-voting lines for that purpose were extended upto 13:00 hours of 10th May, 2021. On 10th May 2021, the e-voting was concluded with 99.90% votes in favour of approving the Resolution Plan and the Addendum thereto, and the results of the e-voting were communicated to the Applicant by the Respondent by way of e-mail dated 10th May, 2021 itself and the Applicant was asked to provide 3 sets of the hardcopies of the finally approved resolution plan including the addendum.

16. The Letter of Intent dated 23rd May, 2021 states that the RP had sent a communication on 12th May, 2021 to the Applicant to include the first two conditions, as are referred-to-hereinbefore at Para 11 of this Order, since the same were missing in the files shared by the Applicant. However, the Applicant has plainly refused to include it even though those two conditions were quoted from Clause 7.10.6 and Clause 12.6.1 of the Addendum dated 05.05.2021

submitted by the Applicant. Thus, we are constrained to observe that the Applicant does not appear to be willing to go ahead with the approved resolution plan and that seems to be a reason for his refusal to give unconditional acceptance to the Letter of Intent.

17. The Hon'ble Supreme Court of India in *Ebix Singapore Private Limited v. Committee of Creditors of Educomp Solutions Limited and Another*, reported in (2022) 2 SCC 401, has inter alia held that the resolution applicant cannot withdraw or modify the resolution plan, after the same is approved by the Committee of Creditors. It is immaterial that post approval by the Committee of Creditors, there is consideration under Section 31(1) of the Code by the Adjudicating Authority for final approval. The judgment in *Ebix Singapore Private Limited* (supra) elaborates and sets out several reasons why the resolution applicant cannot be permitted to withdraw or modify the resolution plan after approval by the Committee of Creditors, and before an order under Section 31(1) of the Code is passed. These reasons include delay, consequences of the delay and the uncertainty and complexities that would arise in the Corporate Insolvency Resolution Process, which are unacceptable and not contemplated in law.

18. Thus, it is settled position in law that once the resolution plan submitted by the Resolution Applicant (i.e. the Applicant in the instant case) is approved by the CoC, then the Resolution Applicant cannot withdraw or modify the

IN THE NATIONAL COMPANY LAW TRIBUNAL, COURT-II,
MUMBAI BENCH

I.A. NO. 1205 OF 2021
IN
CP(IB) NO. 1842/MB/C-II/2018

Resolution Plan. Therefore, in our considered view, the Applicant is precluded from raising any objections to the conditions stated in the Letter of Intent inasmuch as they are not alien to the resolution plan (along with the addendum thereto) submitted by the Applicant which was approved by the CoC. If the Applicant's objections to the conditions stated in the Letter of Intent are entertained at this stage, then the same would tantamount to withdrawing or modifying the resolution plan (along with the addendum thereto) by the Applicant/SRA after its approval by the CoC, which is not permissible in law.

19. Further, it is stated in the Letter of Intent dated 23rd May, 2021 that it is being issued subject to the outcome of the decision of the Adjudicating Authority and/or any other courts or tribunals or regulatory authorities, as the case may be, under the applicable laws and the Applicant shall not hold the Resolution Professional or the CoC liable for such decisions of the Adjudicating Authority and/or any other courts or tribunals or regulatory authorities. The Applicant seems to be aggrieved by this condition also. On perusal of records, such as the minutes of the 15th CoC Meeting held on 24.01.2020 annexed at Annexure 'A' to the Application, it is evident that the Applicant herein was present in the 15th CoC meeting wherein the resolution plans received from M/s. Faze Three Ltd and M/s. Munish Kohli & Associates were discussed and deliberated upon in the backdrop of M.A. No. 2005/2019 and M.A. No. 1618/2019 which were

IN THE NATIONAL COMPANY LAW TRIBUNAL, COURT-II,
MUMBAI BENCH

I.A. NO. 1205 OF 2021
IN
CP(IB) NO. 1842/MB/C-II/2018

then pending for hearing before this Tribunal. The Applicant expressed his interest to submit a resolution plan vide Letter dated 11.02.2020 and he submitted his initial resolution plan only after passing of the Order dated 18.02.2020 by this Tribunal in MA No. 608/2020. Thus, it is evident from records that the Applicant was aware of the ongoing litigations with respect to submission of resolution plans by other resolution applicants and, therefore, it goes without saying that the Applicant herein cannot now insist on his plan being considered without subjecting it to the outcome of the decision of the Adjudicating Authority or any other court or tribunal under the laws of the land. Thus, the plea of the Applicant that the Applicant cannot be made subject to outcome of third-party applications where the Applicant is not even a party, is hereby rejected in toto as being irrational, absurd and untenable in law.

20. Since the forfeiture of Earnest Money Deposit is a subject-matter of controversy between the parties herein in another I.A. No. 2029/2021, we are not inclined to entertain the issue of forfeiture of Earnest Money Deposit in the instant I.A. under consideration. The apprehension of the Applicant that after deposit of performance bank guarantee, the MSME status of the Corporate Debtor may be challenged, whereupon the guarantee of the Applicant would be tremendously jeopardized, is not only a speculation but also a lame excuse or a novel method found out by the Applicant to refrain from furnishing the

IN THE NATIONAL COMPANY LAW TRIBUNAL, COURT-II,
MUMBAI BENCH

I.A. NO. 1205 OF 2021
IN
CP(IB) NO. 1842/MB/C-II/2018

performance bank guarantee so as to wriggle out of his obligations under the resolution plan and the addendum approved by the CoC. Thus, the relief as prayed for in prayer clause (iv) at Para 38 of the application does not deserve to be granted. The relief craving for deposit of performance bank guarantee till the final disposal of the present application is of interim nature and the same cannot also be granted at the stage of final disposal.

21. No other issue remains to be addressed in the above-captioned matter.
22. Thus, in view of the above discussions and findings, the present **I.A. No. 1205 of 2021** is being **dismissed** with no orders as to costs.

Sd/-

ANIL RAJ CHELLAN
(MEMBER TECHNICAL)

Sd/-

KULDIP KUMAR KAREER
(MEMBER JUDICIAL)