

IN THE NATIONAL COMPANY LAW TRIBUNAL,
COURT II, MUMBAI BENCH
INTERLOCUTORY APPLICATION NO. 2029 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

v/s.

1. Andhra Bank Ltd.

(Now Union Bank of India)

2. Oracle Home Textile Ltd

(Through its Resolution Professional Mr.
Jitendra Kumar Yadav)

...Respondents

In the matter of

ANDHRA BANK LTD.

...Operational Creditor

v/s.

ORACLE HOME TEXTILE LIMITED

...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. Pulkit Sharma a/w Umang Mehta.

For the Respondents: Adv. Akshay Doctor a/w Naveli R for the RP.

Adv. Smriti Shahani appeared for CoC.

RP also present-in-person.

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, seeking the reliefs which *inter-alia* includes a) directions to RP/CoC to issue unconditional letter of intent; b) refund the earnest money deposit of INR 1,00,00,000/- (Rupee One Crore Only) which was wrongly forfeited by the RP/CoC; c) to accept performance guarantee within 45 days from the issuance of revised issue unconditional letter of intent; d) conclude CIRP by approving the resolution plan which has already been approved by the CoC with 99.90% as more than three years have passed since the commencement of CIRP of the Corporate Debtor; and e) all other applications filed by the prospective resolution

applicants may be heard only after disposal of Applicant's case in I.A. No. 1205/2021.

Facts of the case as per the Applicant:

2. The Resolution Plan dated 31.12.2020 along with the Addendum dated 05th May, 2021 was submitted by the Applicant and was voted by the CoC with 99.90% approval on 10.05.2021. The same was informed to the Applicant vide email dated 10.05.2021. Based on above, the Resolution Professional ('RP') issued a conditional Letter of Intent ('LoI') dated 23.05.2021, which according to the Applicant, was not in conformity with the approved resolution plan. The LoI dated 23.05.2021 declared that the Applicant is the Successful Resolution Applicant ('SRA').
3. While the RP issued a conditional letter of intent, but he had sought an unconditional acceptance of the letter of intent from the Applicant. The Applicant through his lawyers pointed out the deficiency, with a request to issue an unconditional letter of intent. However, this request was not considered by the RP and the CoC. The Applicant, therefore, preferred I.A. No. 1205/2021 seeking unconditional letter of intent.
4. The RP did not rectify the LoI dated 23.05.2021 and instead, issued a revised LoI dated 23.06.2021. However, the same was also not on the lines of the

request of the Applicant regarding unconditional letter of intent. During the course of further meetings and discussions, the RP and CoC finally agreed for rectifying the first and foremost deficiency as far as the worker's clause was concerned and the same was finally accepted as per the approved resolution plan only. The RP and the CoC also rectified the deficiency of unmentioned period of validity of the performance guarantee.

5. Based on the above corrections as decided in the CoC meetings, the RP had issued another revised LoI dated 23.07.2021. However, even the revised LoI dated 23.07.2021 was not in line with the decision of CoC meeting dated 06.05.2021 wherein the CoC had agreed to give 45 days for submission of performance guarantee from the date of issue of LoI. In the aforementioned revised LoI, a clause was inserted which stated that the Applicant is bound by the discussions and decisions during the CoC meetings. This condition is over and above the approved resolution plan and the addendum. Such a condition is also vague in nature because it does not refer to which discussions and what decisions during which CoC meetings, as more than 30 CoC meetings have taken place.
6. In the 31st CoC Meeting, it was decided to reject the resolution plan of the SRA as the Applicant failed to unconditionally accept the LoI thereby breaching the condition subsequent as stipulated in the request for resolution plan. Further, it

was also resolved to forfeit the earnest money deposit of Rs. 1 crore submitted by the Applicant along with the resolution plan, on account of non-acceptance of the LoI dated 23.06.2021.

7. Hence this application.

Submissions of the Applicant

8. Counsel for the Applicant submits that there is no statutory 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. From a bare perusal of Section 30(4), it is evident that there is no scope of conditional approval of the resolution plan. Ld. Counsel for the Applicant further submits that once the CoC has voted in favour of a resolution plan, then it cannot by way of a letter of intent expand the scope of resolution plan.

9. Learned Counsel for the Applicant contends that once the resolution plan is approved by the CoC, then passing a resolution by the CoC for liquidation of the Corporate Debtor would become self-contradictory. Counsel for the Applicant submits that the main objective of the Code is to revive a company rather than sending it into liquidation. Ld. Counsel for the Applicant argues that when the Applicant is willing to implement the approved resolution plan

but for the conditional LoI, in such a scenario, sending the Corporate Debtor into liquidation would be against the entire objective of the Code.

10. Counsel for the Applicant further submits that subjecting the Applicant to the outcome of decision of the Adjudicating Authority in third-party litigations would be akin to dangling a sword over the head of the applicant where one has no control. 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. 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.

11. 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.

12. Counsel for the Applicant has heavily relied upon the Judgment dated 09th February, 2023 of the Hon'ble NCLAT in "Express Resorts v/s. Amit Jain-RP of Neesa Leisure Limited" in Company Appeal (AT)(Ins.) No. 1158/2022, wherein it was held that once the CoC exercise their commercial wisdom, they cannot change their view since its bound by its own decision taken in approving the resolution plan.

13. **Reply and Contentions of the Respondents/RP:** The Respondents/RP have chosen not to file his reply but the Respondents/RP have been orally heard. The Respondents/RP have filed their Written Submissions on record. The contentions of the Respondents are briefly summarized hereinbelow:

- i. I.A. No. 3914/2023 has been filed by the RP before the Hon'ble Adjudicating Authority seeking directions to liquidate the Corporate Debtor u/s 33(1) of the Code. The liquidation application ought to be allowed for the reasons stated hereunder and therefore, the applications filed by the Applicant will not survive.
- ii. The CIRP period of the Corporate Debtor has come to an end on 21st February, 2023 and no resolution plan has been approved by the CoC and

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submitted to this Hon'ble Tribunal for its approval within the period of CIRP. Hence, under such circumstances, it is the mandate of law as enshrined u/s 33(1) of the Code that the Corporate Debtor must necessarily be sent into liquidation. In this regard, it is also relevant to highlight that the CoC in its 33rd Meeting held on 05th June, 2023 has approved the resolution to send the Corporate Debtor into liquidation with an overwhelming majority of 99.61% votes.

- iii. Suspended Director was given multiple opportunities to submit a complete and appropriate resolution plan that could be placed before this Tribunal for approval. However, the Applicant herein failed to do so. In fact, at the CoC meeting held on 11th February, 2020, the CoC had even passed a resolution for liquidation of the Corporate Debtor with a requisite majority of 99.61% of the votes in favour of liquidation. It was this very same meeting that the Applicant raised his voice and desire to submit a resolution plan. The Applicant had filed M.A. No. 608/2020 before this Tribunal seeking directions to allow the Applicant to submit the resolution plan and the same came to be allowed vide Order dated 18.02.2020. In terms of Request for Resolution Plan ('RFRP'), all Prospective Resolution Applicants were required to provide an EMD of Rs. 1 crore. The Applicant refused to give EMD and instead chose to file

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IA No. 1070/2020 before this Tribunal seeking exemption from submitting the EMD and the said IA came to be rejected vide Order dated 21.08.2020. As can be seen from above, even before proceeding to submit the Resolution Plan, the Suspended Director i.e. the Applicant attempted various maneuvers to delay the process on one pretext or another.

- iv. Pursuant to the Order dated 21.08.2020, the Applicant submitted a resolution plan for CoC's consideration. The plan submitted by the Applicant was deliberated upon in the 27th CoC meeting and the CoC required the Applicant to submit a revised plan in line with the discussions and decisions of the CoC meetings. Accordingly, the Applicant submitted a revised resolution plan and thereafter, the addendum. The revised Resolution Plan and the Addendum thereto were voted upon by the members of CoC subject to changes as discussed in the meeting were incorporated as a part of the plan and any order which this Hon'ble Tribunal may pass pursuant to the hearing that was held on 21st January, 2021. However, till date, the Suspended Director/Applicant has not submitted a complete copy of the corrected resolution plan. Also, the voting in respect of the incomplete plan was subject to the prospective orders that would be passed by this Tribunal and therefore, the resolution plan of the Applicant was never voted upon in absolute terms. It is further

imperative to mention that during the 33rd CoC Meeting held on 05th June, 2023, the Suspended Director/Applicant had *inter-alai* agreed that in the event a requisite majority of 66% votes is not achieved towards the approval of purported demands sought by him, the Corporate Debtor shall be sold under Liquidation under the provisions of the Code. This clearly shows that the Applicant himself has agreed to the Liquidation of the Corporate Debtor.

- v. The Applicant has come with unclean hands and with an oblique 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 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

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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.

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

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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.

- ix. 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 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.
- x. 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.

- xi. 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.

- xii. 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

14. We have heard the Counsel for the parties and have gone through the records.
15. The Applicant herein is aggrieved by the forfeiture of his earnest money deposit of Rs. 1 crore with the Respondent No.01 i.e. Andhra Bank. The Applicant is also seeking unconditional letter of intent from the RP as also the time period of 45 days instead of 7 days to furnish the performance guarantee.
16. As per our order of even date in I.A. No. 1205/2021, we have rejected the prayer of the Applicant seeking directions to the RP/CoC to issue unconditional letter of intent. Hence, the same issue which has already been decided in the above-mentioned application, cannot be reagitated here again. Further, as per our order of even date in I.A. No. 1205/2021, we have held that

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the conditions contained in the Letter of Intent dated 23.05.2021 were nothing but a part of the Addendum dated 05th May, 2021 to the approved Resolution Plan that were submitted by the Applicant himself. We further held that the Applicant is bound by the outcome of the decisions of Adjudicating Authority in applications preferred by other resolution applicants and hence, the Applicant cannot insist on deleting such a condition from the letter of intent. In view of our Order of even date passed in I.A. No. 1205/2021, we did not find any infirmity with the Letter of Intent dated 23.05.2021. Even in the Letter of Intent dated 23.06.2021 issued by the RP acting on behalf of CoC, the Applicant was subjected to the outcome of decision of the Adjudicating Authority and the Applicant shall not hold RP or CoC liable for the same. At the cost of repetition, we state that the aforesaid condition of subjecting the Applicant to the outcome of decision of the Adjudicating Authority has been upheld by us and therefore, the basis of our decision even in respect of the Letter of Intent dated 23.06.2021 would not change.

17. In our considered view, the Applicant should have given unconditional acceptance to the Letter of Intent dated 23.05.2021. However, the same was admittedly not done. Thereafter, the revised Letter of Intent dated 23.06.2021 was issued by the RP again reiterating the condition that the letter of intent is

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being issued subject to the outcome of the decision of the Adjudicating Authority and that the Applicant shall not hold the RP or the CoC responsible for the such decisions. However, yet again, the Applicant failed to unconditionally accept the said letter of intent and consequently, the resolution plan along with the addendum thereto submitted by the Applicant, which was approved by the CoC by 99.90% votes in favour of the plan on 10.05.2021, could not be filed before the Adjudicating Authority for its approval u/s 30(6) read with Section 31 of the Code. Thus, we hold that the Applicant failed to comply with the resolution plan process and hence, the forfeiture of earnest money deposit of the Applicant worth Rs. 1 crore is in accordance with Clause 1.9.4, sub-clause (e) of the Request for Resolution Plan.

18. As per Clause 1.10.1 of the Request for Resolution Plan, the Successful Resolution Applicant (i.e. the Applicant in the instant case) was required to provide a Performance Security in the form of performance guarantee. Owing to the Covid-19 pandemic, it was mutually agreed between the Applicant and the CoC to extend the time of 7 days to 45 days for submission of performance guarantee. However, the Applicant failed to furnish the same till date. Therefore, in terms of Clause 1.9.4 (b) and Clause 1.10.1, the CoC was fully justified in passing the resolution in its 31st Meeting (held on 26.07.2021) to

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forfeit the earnest money deposit of the Applicant worth INR 1,00,00,000/- (Rupees One Crore Only). Hence, we hold that the actions of the CoC in forfeiting the earnest money deposit of the Applicant do not suffer from any illegality or legal infirmity so as to warrant interference of this Tribunal u/s 60(5) of the Code.

19. An application for approval of the resolution plan u/s 30(6) read with Section 31 of the Code is supposed to be filed by the RP. The Applicant cannot seek approval of his resolution plan invoking the jurisdiction of this Bench u/s 60(5) of the Code. Hence, the prayer in terms of clause (iv) seeking conclusion of CIRP by approving the resolution plan cannot be granted.

20. The Applicant has prayed that all IAs filed by the prospective resolution applicants may be heard only after disposal of Applicant's I.A. No. 1205/2021 since the Applicant is the successful resolution applicant. Counsel for the Applicant has heavily relied upon the Judgment dated 09th February, 2023 of the Hon'ble NCLAT in "Express Resorts v/s. Amit Jain-RP of Neesa Leisure Limited" in Company Appeal (AT)(Ins.) No. 1158/2022, wherein it was held that once the CoC exercise their commercial wisdom, they cannot change their view since its bound by its own decision taken in approving the resolution plan.

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In the above-quoted ruling, the Hon'ble NCLAT had rightly held that once the CoC has decided to approve a resolution plan, then it is bound by its own decision and cannot in the name of receiving higher offer, subsequently turn around and pray to the Adjudicating Authority to send the plan back for reconsideration. However, the aforesaid ruling does not apply to the facts of the present case, as the CoC has not prayed before the Adjudicating Authority for sending back the resolution plan submitted by the Applicant for reconsideration under the pretext of having received higher offers, but merely laid down a condition that in case the Adjudicating Authority directs the CoC to consider the interest expressed by other resolution applicants, then it will have to consider their plans as per the order of the Adjudicating Authority for which the CoC shall not be held responsible by the Applicant. Even otherwise, this issue is not relevant anymore since the applications of other resolution applicants have been dismissed by this Bench and now there is no question of considering the resolution plans submitted/to be submitted by other resolution applicants who had expressed their interests.

21. By repeatedly insisting for unconditional LoI even when the condition(s) put therein were not alien to the resolution plan read with the addendum thereto submitted by the Applicant, by filing an IA seeking relaxation from depositing

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the earnest money deposit and by not furnishing the performance bank guarantee till date, it seems to us that the Applicant is not interested in going forward with the resolution plan for revival and rehabilitation of the Corporate Debtor of which he was the promoter. The 31st CoC meetings were held on 19th July 2021, 23rd July 2021 and 26th July 2021. On 26th July, 2021 the Applicant was asked by the CoC to give his final stand on the unconditional acceptance of LoI as per the RfRP terms and conditions. However, the Applicant remained adamant on his stand that the LoI purported to impose additional conditions which he was not inclined to accept. Therefore, the CoC in its 31st Meeting held on 26.07.2021 decided to reject the resolution plan submitted by the Applicant, as the Applicant failed to provide unconditional acceptance to the LoI dated 23.06.2021, and also it was decided to forfeit the EMD of the Applicant of INR 100,00,000/- (Rupees One Crore Only). Thus, we observe that ample opportunities were given by the Respondents to the Applicant to submit the copies of the corrected/modified Resolution Plan and accept the LoI. However, despite that, the Applicant failed to accept the LoI and submit the corrected Resolution Plan as was agreed to in the previous CoC meetings. Thus, we are of the considered view that the CoC is fully justified not only in rejecting the Resolution Plan of the Applicant, but also in forfeiting the Applicant's earnest

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money deposit of Rs. 1 crore as per the terms and conditions of RfRP documents and the LoI, and going for liquidation of the Corporate Debtor.

22. Therefore, in the facts and circumstances of the present case, we find that I.A. No. 2029 of 2021 is devoid of any merit for the reasons recorded above and accordingly, **I.A. No. 2029 of 2021 is hereby dismissed** with no orders as to costs.

Sd/-

ANIL RAJ CHELLAN
(MEMBER TECHNICAL)

Sd/-

KULDIP KUMAR KAREER
(MEMBER JUDICIAL)