BEFORE THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH

MA 2738/2019 & MA 354/2019 in
CP No.1832/IBC/NCLT/MB/MAH/2017

Under Section 60(5) of the Insolvency and Bankruptcy Code, 2016

In the Miscellaneous Application No. 2738/2019 of

Indian Oil Corporation Limited
.....Applicant / Operational Creditor

And

In the Miscellaneous Application No. 354/2019 of

Export Import Bank of India
….Applicant

In the matter of

IDBI Bank Ltd.
…Financial Creditor

v.

EPC Constructions India Limited
….Corporate Debtor

Date of hearing: 04.09.2019
Date of Pronouncement: 20.09.2019

Coram :
Hon'ble M.K. Shrawat, Member (J)
Hon'ble Chandra Bhan Singh, Member (T)

For the Applicants :
Prashant Pratap, Zoheb Khatri, Nishant S., Abhilash i/b Meharia & Co., for Indian Oil Corporation Limited.
Advocate Charles D. Souza, Advocate Manaswi Agarwal, Adv. Ms. Sakshi Bhalla & Adv. Yash Badkar for EXIM Bank.

For the Respondents :
Mr. Gaurav Joshi, Senior Counsel, a/w Adv. Mr. Archit Virmani, for Successful Resolution Applicant.
Mr. Pradeep Sancheti, Senior Counsel , Mr. Pulkit Sharma a/w Prateek Mishra a/w Rugved More a/w Swetha Sankaran a/w. Akhil Mahesh i/b Luthra & Luthra Partners, for Resolution Professional.
Advocate Ashish kamat a/w Krishna Baruah i/b Pragnya Legal, for CoC (IDBI Bank).

Per: Chandra Bhan Singh, Member (T)

ORDER

1. The Corporate Insolvency Resolution Process of EPC Constructions India Limited (the Corporate Debtor) began on 20.04.2018, pursuant to admission of Section 7 application (CP 1832/I&BP/NCLT/MB/2017) filed by a Financial Creditor IDBI Bank Ltd. The CoC in this matter has approved the resolution plan of Royal Partners Investment Fund Limited (hereinafter referred to as "RPIF") and the Resolution Professional has filed an application MA no. 315 of 2019 u/s 31 of the Insolvency & Bankruptcy Code, 2016 (I&B Code) for approval of Resolution Plan.
2. The present Miscellaneous Application in hand is filed by an Operational Creditor of the Corporate Debtor i.e. 'Indian Oil Corporation Limited' (IOCL) challenging the Resolution Plan on the ground that it is arbitrary and discriminatory as it provides for 'nil' payment to Operational Creditors. The applicant's case is that the resolution plan is not fair and equitable as per the requirements of the I&B Code, therefore, it seeks modification or deletion of certain provisions of the Resolution Plan which adversely affects the interests of the Applicant.
3. The grievance of the Applicant is that the Resolution Plan of RPIF provides for liquidation value as 'NIL' and therefore, the Operational Creditors in the said plan are not being given anything. The Applicant states that the 'nil' liquidation value as given in the plan is incorrect as the two valuation reports given by RBSA Valuation Advisors LLP and Rakesh Narula & Co. have provided for a substantial liquidation value of the Corporate Debtor. So the basis of 'NIL' liquidation value as given in the plan is not known.
4. The Applicant states that on 04.09.2018, the claim of the Applicant for an amount of ₹464.37 Crore in Form B as prescribed in CIRP Regulations was submitted to the RP and on 08.09.2018, the RP acknowledged the receipt of the claim filed by the Applicant. The 270 days period for completion of CIRP ended on 13.01.2019. On the same date, an Application being MA No. 315 of 2019 was filed in this Tribunal for approval of Resolution Plan by the RP.
5. The Applicant states that its claim was rejected by the RP. The reason for doing so as per the RP is that the claim is uncrystallised as it is pending for adjudication under arbitration. On 25.02.2019, the Applicant filed two Applications being MA No. 773 of 2019 (for Group A Contract) and MA No. 767 of 2019 (for Group C Contract) being aggrieved by the decision taken by the RP for rejection of claims of the Applicant. The Applications are pending disposal before this Bench.
6. The Applicant states that the rights of the Applicant cannot be nullified in the Resolution Plan. The Applicant particularly challenges Clause 3 in the Resolution Plan which gives zero payment to Operational Creditors.

7. The Applicant states that the total claim of the Operational Creditors of the Corporate Debtor is ₹3696.87 Crore, out of which the RP has admitted only an amount of ₹384.22 Crore. It is submitted that around 90% of the claims of the Operational Creditors have been rejected by the RP. As against this, the Financial Creditors' claims as admitted by the RP are to the extent of ₹7,487.45 Crore and the Plan proposes an amount of about ₹900 Crore to be paid to the Financial Creditors. The Applicant states that this is an arbitrary treatment to the Operational Creditors which is clearly barred by the judgement of the Hon'ble NCLAT in the case of *Standard Chartered Bank Vs. Satish Kumar Gupta, RP of Essar Steel Ltd. & Ors.* [Company Appeal (AT) (Ins.) No. 242 of 2019], Order dated 04.07.2019. The judgement states that :

> *"168. A 'Resolution Plan' shows upfront payment in favour of the Creditors including the 'Financial Creditors', 'Operational Creditors' and the other Creditors. It is not a distribution of assets from the proceeds of sale of liquidation of the 'Corporate Debtor' and, therefore, the 'Resolution Applicant' cannot take advantage of Section 53 for the purpose of determination of the manner in which distribution of the proposed upfront amount is to be made in favour of one or other stakeholders namely— the 'Financial Creditor', 'Operational Creditor' and other creditors.*
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> *169. Sub-clause (b) of sub-section (2) of Section 30 of the 'I&B Code' mandates that the 'Resolution Plan' must provide for the payment of the debts of 'Operational Creditors' in such manner as may be prescribed by the Board which shall not be less than the amount to be paid to the 'Operational Creditors' in the event of a liquidation of the 'Corporate Debtor' under Section 53. That means, the 'Operational Creditors' should not be paid less than the amount they could have received in the event of a liquidation out of the asset of the 'Corporate Debtor'. It does not mean that they should not be provided the amount more than the amount they could have received in the event of a liquidation which otherwise amount to discrimination.*
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> *170. In view of the aforesaid position of law, we hold that Section 53 cannot be made applicable for distribution of amount amongst the stakeholders, as proposed by the 'Resolution Applicant' in its 'Resolution Plan'."*

8. The Applicant states that the above said order pertains to the question whether operational creditors are to be treated at par with the financial creditors when it comes to the distribution under a resolution plan. The Applicant also mentions that unlike in liquidation, where operational creditors are placed much below the financial creditors in the waterfall mechanism, the same priority to financial creditors over the operational creditors cannot be given under resolution. Hence, Section 53 of the I&B Code cannot be applied on distribution under a resolution plan.

9. The next contention of the Applicant is that the Resolution Applicant was supposed to furnish a Performance Bank Guarantee of 10% of the Resolution Plan Value i.e. ₹90 Crore, however, only ₹42 Crore have been given as security other than EMD. The balance amount of ₹48 Crore is not given till date. Hence, the Resolution Applicant is ineligible to be considered as a Resolution Applicant.
10. The Applicant also pointed out that the Resolution plan is bad in commercials as only a payment of ₹420 Crore is upfront and the rest of the amount is based on projections. The Applicant states that the Resolution plan amount is much less than what was being offered by Arcelormittal, whose resolution plan was rejected by CoC on merits.

SUBMISSIONS BY THE RESOLUTION PROFESSIONAL/RESOLUTION APPLICANT

11. The Ld. Counsel for the Resolution Professional submits that the order of the Hon'ble NCLAT in case of Essar Steel (*supra)* is challenged before the Supreme Court and a status quo has been granted in this case. However, to clarify this position, reliance can be placed on Section 30(2)(b) of the I& B Code, which has come into picture after coming into force of the Insolvency & Bankruptcy Code (Amendment) Act, 2019. The amendment came into force on 06.08.2019. Section 30(2)(b) of the I&B Code states as under:

> *"(b) provides for the payment of debts of operational creditors in such manner as may be specified by the Board which shall not be less than—*
>
> *(i) the amount to be paid to such creditors in the event of a liquidation of the corporate debtor under section 53; or*
>
> *(ii) the amount that would have been paid to such creditors, if the amount to be distributed under the resolution plan had been distributed in accordance with the order of priority in sub-section (1) of section 53,*
>
> *whichever is higher, and provides for the payment of debts of financial creditors, who do not vote in favour of the resolution plan, in such manner as may be specified by the Board, which shall not be less than the amount to be paid to such creditors in accordance with sub-section (1) of section 53 in the event of a liquidation of the corporate debtor.*

12. The above said provision clarifies that the payment to the operational creditors under a resolution plan should be higher of the amount to be paid to such creditors in the event of a liquidation of the corporate debtor under section 53 or the amount that would have been paid to such creditors, in the event the amount to be distributed under the resolution plan had been distributed in accordance with the order of priority in sub-section (1) of section 53. Hence, it is clarified that section 53 of the I&B Code is applicable to distribution under resolution mechanism also.

13. It may be further noted that the Statement of Objects and Reasons as given in the Insolvency and Bankruptcy (Amendment) Bill, 2019 clearly mention that different classes of creditors cannot be treated at parity with each other as it would lead to equality among unequals and would lead to defeating the object of the Code.

> *"2. The Preamble to the Code lays down the objects of the Code to include "the insolvency resolution" in a time bound manner for maximisation of value of assets in order to balance the interests of all the stakeholders. Concerns have been raised that in some cases extensive litigation is causing undue delays, which may hamper the value maximisation. There is a need to ensure that all creditors are treated fairly, without unduly burdening the Adjudicating Authority whose role is to ensure that the resolution plan complies with the provisions of the Code. Various stakeholders have suggested that if the creditors were treated on an equal footing, when they have different pre-insolvency entitlements, it would adversely impact the cost and availability of credit. Further, views have also been obtained so as to bring clarity on the voting pattern of financial creditors represented by the authorised representative."*

14. While hearing this Miscellaneous Application, the Resolution Professional submitted that the remaining security deposit of ₹48 Crore is yet to come from the Resolution Applicant, and the Applicant herein has no locus to question the understanding between the CoC and the Resolution Applicant. The RP further submitted that in the event of the Bench giving its approval to the Resolution Plan and if the Bench so decides, it can order the Resolution Applicant to immediately deposit the remaining security deposit of ₹48 Crore.

15. It is further submitted that in this case, the Liquidation Value is 'NIL' for the claims of Operational Creditors, therefore 'NIL' payment has been proposed with respect to this class of creditors, barring workmen and Employees. The liquidation value as per the RNC valuation Report is ₹891.96 Crore and the admitted claims of the financial creditors are in excess of the Liquidation Value. Therefore, if the amount under the resolution plan is distributed as per the waterfall mechanism under section 53 of the I&B Code, the value available to Operational Creditors is NIL.

16. In the Resolution Plan of RPIF, the total payment which is being made to revive the Corporate Debtor is ₹901.74 crore, out of which ₹420 Crore is the upfront payment to the Financial Creditors, and ₹480 Crore is the deferred payment to financial creditors realisable in a period of 5 years by issuing Non-Convertible Debentures. In addition, ₹1.74 Crore is being paid to Workmen and Employees. It is seen that as against zero payment to Operational Creditors, the financial creditors are getting only around 12% of their debt, therefore, this contention of the Applicant that the Operational Creditors are being discriminated against, is wrong in law.

17. The Hon'ble Supreme Court while discussing the constitutionality of the I&B Code, throws light on Section 53 in the case of *Swiss Ribbons Pvt. Ltd. & Ors. V. Union of India & Ors.* [Writ Petition (Civil) No. 99 of 2018], order dated 25.01.2019, reproduced below for ready reference:

> *84. It will be seen that the reason for differentiating between financial debts, which are secured, and operational debts, which are unsecured, is in the relative importance of the two types of debts when it comes to the object sought to be achieved by the Insolvency Code. We have already seen that repayment of financial debts infuses capital into the economy inasmuch as banks and financial institutions are able, with the money that has been paid back, to further lend such money to other entrepreneurs for their businesses. This rationale creates an intelligible differentia between financial debts and operational debts, which are unsecured, which is directly related to the object sought to be achieved by the Code. In any case, workmen's dues, which are also unsecured debts, have traditionally been placed above most other debts. Thus, it can be seen that unsecured debts are of various kinds, and so long as there is some legitimate interest sought to be protected, having relation to the object sought to be achieved by the statute in question, Article 14 does not get infracted. For these reasons, the challenge to Section 53 of the Code must also fail.*

18. Pursuant to this application kept reserved for orders by this Bench, the Hon'ble Principal Bench while giving its verdict on the above said issue that the Operational Creditors are to be kept at par with Financial Creditors or not, on 05.09.2019, it has been laid down that:

> *"104. We may state that view of the Hon'ble NCLAT in Binani Industries case (supra) did not meet the Legislative approval. It is appropriate to notice that Section 30(2)(b) of the Code has been amended vide notification dated 05.08.2019. There is thus no contravention of law under section 30(2)(e) of the Code. We further find that the primary focus of the Legislation is to ensure revival and continuation of the Corporate Debtor by protecting the Corporate Debtor from its own management and from a Corporate Death by Liquidation……*
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> *111. A perusal of the aforesaid provision makes it evident that the amount to be paid to operational creditor shall not be less than the amount payable to such creditor in the event of liquidation of the Corporate Debtor under section 53. It further clarifies that the amount would have been paid to such creditors if the amount is to be distributed under the resolution plan then the same had been distributed in accordance with the order of priority and sub-section 1 of Section 53. The waterfall providing for the priority has been now incorporated and the position of law has bene clarified. It is further appropriate to mention that*

explanation '2', it has been clarified that the amendment is to apply to all those resolution plans which approved or rejected by the Adjudicating Authority-NCLT or even at the stage of appeal etc. Therefore, we are of form opinion that the legislative intent has to be given effect and the resolution plan must be read to mean that it will release the amount the Operational Creditors in accordance with priorities given in section 53(1)."

19. In view of the above facts, this Bench holds that section 53 of the I&B Code is applicable to resolution mechanism, and the Operational Creditors being placed below the financial creditors is not arbitrary or unreasonable. The value being paid to operational creditors is determined pursuant to and in accordance with the recent amendment in section 30(2)(b) of the I&B Code which provides that the RP shall examine each Resolution Plan received to confirm that the plan provides for the payment of debts of operational creditors in such manner which shall not be less than the amount to be paid to the operational creditor in the event of liquidation of the Corporate Debtor under section 53 of the I&B Code. By insertion of this sub-section, simply a mechanism is provided, which is in nature of a helping guideline for the RP as how to ascertain the minimum quantum of the claim of the operational creditor. Therefore, this Bench makes it clear that the provisions incorporated in Chapter III of the I&B Code containing liquidation process from section 33 to Section 54 is a "Code" in itself, enforceable independently and by no means over reaching to the provisions of Chapter II of the I&B Code. Hence, in view of the above findings, MA 2738 of 2019 is **Dismissed.** Ordered Accordingly.

MISCELLANEOUS APPLICATION NO. 354 OF 2019

20. This is an application filed on 24.01.2019 by the Applicant Export-Import Bank of India, a Financial creditor of the Corporate Debtor having 12.20% voting share in the Committee of Creditors. By this application, the Applicant seeks directions to amend the Resolution Plan filed in MA 315 of 2019 so far as to remove the restrictions under the Resolution Plan on the Applicant to enforce its rights against the guarantors of the Corporate Debtor.
21. The Applicant submits that its rights against the guarantor of the Corporate Debtor ought to be protected while approving or implementing the resolution plan.
22. It is submitted that the Applicant and Central Bank of India had sanctioned a financial facility in the nature of Pre cum Post Shipment Supplier Credit for an amount of ₹900,00,00,000/- in favour of the Corporate Debtor, out of which an amount of ₹600,00,00,000/- was sanctioned. The Financial Facility was *inert alia* secured by a

corporate guarantee issued by Essar Project Ltd., UAE, holding company / promoter of the Corporate Debtor ("guarantor").

23. The guarantor executed a Deed of Guarantee dated 05.06.2012 in favour of the Applicant and Central Bank of India, thereby irrevocably and unconditionally agreeing to pay, on demand, any and all amounts payable by the Corporate Debtor under the Financial Facility.
24. The Applicant states that a notice dated 14.07.2016 was issued to the Corporate Debtor to pay an amount of USD 100,470,506.95. However, the Corporate Debtor defaulted in repayment. Thereafter, Central Bank of India on its own behalf and on behalf of the Applicant, vide a letter dated 21.10.2016 invoked the guarantee provided by the guarantor and called upon to pay an amount of USD 102,461,447.32 as on 30.09.2016. The guarantor failed and neglected to repay.
25. The CIRP of the Corporate Debtor commenced on 20.04.2018 and the applicant was classified as financial creditor of the Corporate Debtor upon filing of claim with the IRP.
26. The Applicant states that RPIF submitted a Resolution Plan in respect of the Corporate Debtor during the CIRP period. The Resolution Plan, *inter alia,* provides that upon approval of the Resolution Plan by this Tribunal, all guarantee, security, letter of credit or pledge provided by the promoters of the Corporate Debtor in respect of any debt at any time prior to the date of approval of the resolution plan would be automatically released and all liabilities in respect thereof would be extinguished.
27. It is further submitted that the Resolution Plan sought to protrct the interests of the promoters and guarantors of the Corporate Debtor over the rights of creditors, which is against the object of the Code and hence the Applicant voted against the Resolution Plan in the CoC meeting dated 10.01.2019, when the resolution plan was approved by majority of the creditors i.e. by 73.17%.
28. It is contended that the very purpose of the guarantee is to recover the amount from the guarantor in case the principle debtor is unable to repay the debt. In this case, when the resolution plan does not provide for the full payment of debt of the financial creditor, imposing a restriction on the rights of the applicant to proceed against the guarantor of the corporate debtor, aims at defeating the statutory right of the Applicant to prosecute the guarantor for its unsatisfied claims.
29. During the course of hearing, it was submitted by the Resolution Professional that only one member of CoC i.e. Applicant/EXIM Bank has voted against the approval of resolution plan. Rest of the CoC members have voted in favour of the resolution plan. The resolution plan is approved by 73.17% majority of the creditors of the Corporate Debtor.

30. Further, the Resolution Professional relies upon the judgement of the Hon'ble Supreme Court in the matter of *Vijay Kumar Jain V. Standard Chartered Bank & Ors.* [Civil Appeal No. 8430 of 2018], order dated 31.01.2019. The relevant extracts of the judgement are reproduced below:

> *"12……. The committee of creditors, in turn, gets information so that they can assess the financial position of the corporate debtor from various sources before they meet. It is, therefore, difficult to understand the Notes on Clause 24. Even assuming that the Notes on Clause 24 may be read as being a one-way street by which erstwhile members of the Board of Directors are only to provide information, we find that Section 31(1) of the Code would make it clear that such members of the erstwhile Board of Directors, who are often guarantors, are vitally interested in a resolution plan as such resolution plan then binds them. Such plan may scale down the debt of the principal debtor, resulting in scaling down the debt of the guarantor as well, or it may not. The resolution plan may also scale down certain debts and not others, leaving guarantors of the latter kind of debts exposed for the entire amount of the debt. The Regulations also make it clear that these persons are vitally interested in resolution plans as they affect them. Thus, under Regulation 36 of the CIRP Regulations, the information memorandum that is given to each member of the CoC and to any potential resolution applicant, will contain details of guarantees that have been given in relation to the debts of the corporate debtor (see Regulation 36(2)(f) of the CIRP Regulations). Also, under Regulation 37(d) of the CIRP Regulations, a resolution plan may provide for satisfaction or modification of any security interest. Security interest is defined by Section 3(31) of the Code as follows:*
>
> > *"3. Definitions.—In this Code, unless the context otherwise requires,—*
> >
> > *xxx xxx xxx*
> >
> > *(31) "security interest" means right, title or interest or a claim to property, created in favour of, or provided for a secured creditor by a transaction which secures payment or performance of an obligation and includes mortgage, charge, hypothecation, assignment and encumbrance or any other agreement or arrangement securing payment or performance of any obligation of any person:*
> >
> > *Provided that security interest shall not include a performance guarantee;*
> >
> > *xxx xxx xxx"*
>
> *This would certainly include a guarantor who may be a member of the erstwhile Board of Directors. Further, under Regulation 37(1)(f), a resolution plan may provide for reduction in the amount payable to the creditors, which again vitally impacts the rights of a guarantor. Last but not least, a resolution plan which has been approved or rejected by an order of the Adjudicating Authority, has to be sent to "participants" which would include members of the erstwhile Board of Directors – vide Regulation 39(5) of the CIRP Regulations……."*

31. It is noted that the proposals in the resolution plan are one kind of settlement between the Resolution Applicant and the creditors of the Corporate Debtor to pay off the dues of the Corporate Debtor and take over the Corporate Debtor company. Until and unless the resolution plan expressly provides that guarantees would survive even after the approval/implementation of resolution plan, it cannot be said that the guarantors would be liable to pay the debt of the Corporate Debtor. The Resolution Plan in hand expressly provides for the extinguishment of guarantors' right of subrogation pursuant to approval of resolution plan.
32. An insight discussion on this aspect is that if the creditors are allowed to claim their remaining dues from the guarantors after the approval of resolution plan, and the guarantors pay off the remaining debt of the Corporate Debtor, the guarantors would step into the shoes of the creditor of the Corporate Debtor. Thereafter, they would be entitled to exercise their right of subrogation against the Corporate Debtor which is then under the control and management of the Resolution Applicant. Hence, the Resolution Applicant will then pay the debt of the guarantor under its right of subrogation. Hence, in effect, the Resolution Applicant would pay the full amount of creditors, therefore, there was no idea left for filing the resolution plan and taking over the debtor company by settling the dues of the creditors. This vicious circle is a never ending process and it was definitely not intended by the legislators while framing the I&B Code.
33. The RP of the Corporate Debtor has clarified that the Resolution Plan of Royal Partners Investment Fund Limited has been approved by a majority of 73.17% of Creditors and considering the fact that this issue of guarantee is very well placed before the CoC while approving the resolution plan, this Bench is not inclined to interfere with the commercial wisdom exercised by CoC qua the issue of guarantee.
34. In view of these findings, MA No. 354 of 2019 is hereby rejected. Ordered Accordingly.

SD/-
CHANDRA BHAN SINGH
MEMBER (TECHNICAL)

SD/-
M. K. SHRAWAT
MEMBER (JUDICIAL)

DATE: 20.09.2019