

NATIONAL COMPANY LAW TRIBUNAL
GUWAHATI BENCH, GUWAHATI

IA No.46 of 2020
In
CP(IB)/02/GB/2018

Under Section 60(5) of the Insolvency & Bankruptcy Code, 2016 read with Rule 4 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

In the matter of: -

M/s Akshar Plastchem Investment Pvt. Ltd. ...Applicant/Operational Creditor

-Versus-

- 1) Shri Bijoy Murmuria & Anr.,
Resolution Professional of Kitply Industries
- 2) SREI Multiple Asset Investment Fund ... Respondents

In the matter of:

IDBI Bank Ltd. Vs. Kitply Industries Ltd.

Coram:

Hon'ble Shri H.V. Subba Rao, Member (J)

Hon'ble Shri Prasanta Kumar Mohanty, Member (T)

.....

ORDER

Date of Order: 27th November 2020

[Per Se: Hon'ble Shri Prasanta Kumar Mohanty, Member (T)]

That the present application has been preferred by the applicant U/s 60 (5) of IBC, 2016 read with Rule 11 of the National Company Law Tribunals Rules, 2016 seeking appropriate directions from this Hon'ble Tribunal for realization of its claims against the CD which has already

taken over by the Respondent No.2 in terms of the order dated 07.12.2018 passed by this Hon'ble Tribunal in the connected company petition.

2. The applicant begs to state that the applicant company is engaged in the business of importers and dealers in solvents, dyes and chemicals for paints, plastic, resins, and such other allied items. In the ordinary course of business, the CD, M/s Kitply Industries Ltd. placed orders of Phenol, Melamine (imported) from time to time with the applicant by its various Purchase Orders and the same were complied with by the applicant, inter alia, by supplying the materials as specified in the said Purchase Orders. The applicant issued various Invoices/Delivery challans against the supplying of the materials as per the Purchase Orders. The applicant submits that during the period from 03.02.2010 till 28.08.2010, the applicant company supplied goods worth Rs.1,41,85,730/- and as against that, the CD made payment of Rs.19,99,104/- at the foot of accounts. Accordingly, the amount of Rs.1,21,86,626/- (One crore twenty-one lakhs eighty-six thousand six hundred and twenty-six rupees only) has remained outstanding and the same is due and payable by the CD to the applicant. The applicant submits that last payment of Rs.1,50,000/- was made by the CD on 11.12.2010 for the goods supplied to the CD. The applicant submits that the CD thereafter did not make any payment and therefore the applicant through his engaged counsel issued two statutory notices dated 07.04.2011 calling upon the CD to make payment of outstanding dues amounting to Rs.1,21,86,626/- along with interest at the rate of 18% per annum.

3. It is further stated by the Applicant that in the aforesaid circumstances, the applicant was constrained to approach the Hon'ble Gauhati High Court by filing Company Petition being Company Petition No.11 of 2011 for winding up of the CD.

4. It is stated that subsequently the applicant and his engaged counsel made search in the website of this Hon'ble Tribunal whereby they came across with the various orders passed by this Hon'ble Tribunal in the above Company Petition. It was found that the Hon'ble Tribunal vide order dated 07.11.2018 approved the Resolution Plan as submitted by the Respondent No.2.

5. That the applicant begs to state that the aforesaid I.A.(Civil) No.4156 of 2019 along with the Company Petition No.11 of 2011 were listed before the Hon'ble Gauhati High Court on 07.01.2020 whereby the Hon'ble High Court vide two separate orders dated 07.01.2020 disposed of both the Interlocutory applicants as well as the company petition as withdrawn with liberty to the applicant to file the appropriate application before this Hon'ble Tribunal. Accordingly, the instant application has been filed in view of the liberty granted by the Hon'ble High Court.

6. It is stated by the Applicant that upon perusal of the said report/letter, it reveals that the R.P.(respondent No.1) made the public announcement regarding initiation of CIRP against the CD and calling the Creditors to submit the proof of claims by way of Public Notice dated 4.5.2018 published in the Newspaper viz. (1) Financial Express (English) at Kolkata where the Corporate Office of the CD is situated and (2) The Sentinel (English) and Amar Asom (Regional Language) at Tinsukia where the registered office of the CD is situated. By the said public notice, the R.P. communicated the public at large that the last date of submission of claim was 18.5.2018.

7. That the applicant begs to state that the R.P. (Respondent No.1) violated the provisions of Section 15 of IBC, 2016 read with Regulation 6 of the Insolvency & Bankruptcy Board of India, (Insolvency Resolution Process for Corporate Persons) Regulation 2016 while making the public announcement for which the applicant couldn't know about the initiation of the CIRP against the CD and thereby failed to file its bonafide claims before the R.P.

8. Further, the Applicant begs to state that in the premises aforesaid, it is therefore most respectfully prayed that this Hon'ble Tribunal may graciously be pleased to call for the records and proceedings of the Company Petition No.(IB/02/GB/2018) along with the records of interim application filed therein and after perusing the records and proceedings, this Hon'ble Tribunal may be pleased:

“a) To set aside and quash and/modify the order dated 07.12.2018 passed by this Hon'ble Tribunal approving the Resolution Plan submitted by the Respondent No.2 and further direct the R.P. to consider the claim of the applicant and start the process of CIRP denovo from the stage of preparation of claims

b) In the alternative of prayer clause (a) hereinabove, this Hon'ble Tribunal may be pleased to direct the Respondent No.2 to pay the legitimate claims/dues of the applicant to the tune of Rs.1,21,86,626/- (One crore twenty-one lakhs eighty-six thousand six hundred and twenty-six rupees only) along with 18% interest as claimed by the applicant vide the statutory notices dated 7.4.2011 and 18.4.2011.”

It is observed that:

9. The application under Section 7 was filed by the FC on 10.01.2018;

9.1 Application was admitted on 01.05.2018. CIRP started. The RP issued public notice at Dibrugarh and Kolkata being the Registered and Corporate office of the CD respectively inviting the Creditors to submit their claim by 18.05.2018;

- 9.2 The Resolution Plan was approved by this Bench on 07.12.2018 and the Plan is under implementation;
- 9.3 The present Applicant being an Operational Creditor has filed this I.A. 46/2020 on 02.03.2020 praying for setting aside the Resolution Plan approved by this Adjudication Authority on 07.12.2018 or to direct the Resolution Professional to pay its claim of Rs.1,21,86,626/- (Rupees one crore twentyone lakhs eightysix thousand six hundred twentysix only) as the Applicant could not know about admission of the petition/CIRP/Approval of Resolution Plan because the R.P. had published notice inviting the claim at Registered and Corporate Office Areas only i.e. Guwahati and Kolkata. Resolution Professional should have also published the notice in the Newspapers in the city of Mumbai and Nasik as in these places the CD used to conduct business and also the Registered office of the OC (Mumbai);
- 9.4 This Applicant/OC had supplied materials during the period from 03.02.2010 till 28.08.2010 and the last payment was received by the Applicant on 11.12.2010;
- 9.5 The last date of submission of claims from the Creditors was 18.05.2018 and the Resolution Plan was approved on 07.12.2018. This Applicant/Operational Creditor has filed this application on 02.03.2020 i.e. after around 20 months from the last date of the submission of claim and 14 months after approval of the Resolution Plan by this Adjudicating Authority;
- 9.6 The Resolution Plan was approved by 92.74% and the Resolution Applicant has paid 0.63% of the total operational Creditors' claim of Rs.725.17 lakhs. Had this applicant/OC filed its claim in time and claim admitted, the OC would have got Rs.76,775/- i.e. 0.63% of its claim amount of Rs.1,21,86,626.00

10. Hon'ble Supreme Court in the matter of Committee of Creditors of Essar Steel India Ltd. Vs. Satish Kumar Gupta & Others (Civil Appeal No.8766-67/2019 has held that a Successful Resolution Applicant cannot suddenly be faced with "undecided" claims after the resolution plan submitted by the Resolution Applicant has been accepted as this would amount to a hydra head popping up which would throw into uncertainty amounts payable by the successful resolution applicant. All claims must be submitted to and decided by the resolution professional so that a prospective resolution applicant knows exactly what has to be paid in order that it may then take over and run the business of the CD.

11. We do not find any merit in this I.A. Resolution Professional has published notice in the areas where the CD's Registered Office and Corporate Offices are located. The contention of this Applicant, that it could not know the CIRP and the approval of Resolution Plan on 07.12.2018 is not convincing when the Applicant has been proceeding against the CD for recovery of its dues from 07.04.2011.

12. Hence the prayer of the Applicant/OC for setting aside the Resolution Plan approved by this Adjudication Authority on 07.12.2018 or to direct the Resolution Professional to pay its claim of Rs.1,21,86,626/- is rejected.

13 The I.A.46/2020 is hereby disposed of with the above observations. No order as to costs.

Sd/-

(Prasanta Kumar Mohanty)
Member (Technical)
& Adjudicating Authority

Sd/-

(Shri H.V. Subba Rao)
Member (Judicial)
& Adjudicating Authority

nkmm