

**THE NATIONAL COMPANY LAW TRIBUNAL
JAIPUR BENCH, JAIPUR
(through web-based video conferencing platform)**

**IA No. 320/JPR/2019
In
CP (IB) No. 86(ND)/2017
T.A. No. 83(ND)/2018
(Admitted Matter)**

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

In the matter of:-

Oriental Bank of Commerce ...Financial Creditor

Vs.

Mount Shivalik Industries Ltd. ...Corporate Debtor

And in the matter of IA No. 320/JPR/2019:-

Ranika Investment Pvt. Ltd.Applicant

Vs.

Pratibha Khandelwal,
Resolution Professional of
Mount Shivalik
Industries Limited & another ...Respondents

Order delivered on: 16.07.2021

**Coram: HON'BLE MR. AJAY KUMAR VATSAVAYI, MEMBER (JUDICIAL)
HON'BLE MR. RAGHU NAYYAR, MEMBER (TECHNICAL)**

Present through Video Conferencing:-

For the applicant : Mr. Rishabh Khandelwal

For the respondent-Resolution Professional : 1). Mr. Abhishek Anand, Advocate
2). Ms. Pratibha Khandelwal,
Resolution Professional in
person

Per: Ajay Kumar Vatsavayi, Member (Judicial)

ORDER**IA No. 320/JPR/2019**

Ranika Investment Private Limited filed this application against the Resolution Professional of the Corporate Debtor-M/s Mount Shivalik Industries Limited and M/s Kals Distilleries Private Limited, the Successful Resolution Applicant, under Section 60(5) of the I&B Code, 2016 praying for the rejection of the resolution plan of the second respondent-Kals Distilleries Private Limited or alternatively modify/alter the resolution plan by requiring the resolution applicant to settle the related party unsecured financial creditors, including the applicant, in similar terms, i.e. 93% of the admitted financial debt on par with the other unsecured financial creditors.

2. The applicant, through the instant application, submits that it is a related party unsecured creditor and its claim to the extent of ₹3,98,26,502/- has been admitted as shown in the resolution plan of the second respondent. The applicant seeks rejection of the resolution plan of the second respondent, *inter alia*, on the following grounds:-

- (i) The application under Section 30(6) read with Section 31(1) seeking for approval of the plan by the Resolution Professional bearing IA No. 186 of

2019 was filed after the expiry of the maximum period of the CIRP and hence, liable to be dismissed.

- (ii) The resolution plan as approved by the COC discriminated the related party unsecured financial creditors and un-related party financial creditors, accordingly, the plan grossly violated the provisions of the I&B Code, 2016 and Regulations made thereunder, in particular Section 30(2)(b)(ii) read with Regulation 38(1) and (1A) of IBBI (IRP for CP) Regulations, 2016.

3. The first respondent-Resolution Professional filed the reply, denying the application averments and prayed for dismissal of IA No. 320 of 2019 and for allowing of the IA No. 186 of 2019.

4. Heard Mr. Rishabh Khandelwal, the learned counsel for the applicant and Mr. Abhishek Anand, the learned counsel for the first respondent-Resolution Professional and perused the pleadings on record.

5. CP (IB) No. 86(ND)/2017 T.A. No. 83(ND)/2018 was filed by M/s Oriental Bank of Commerce (now since merged with Punjab National Bank) against the corporate debtor-Mount Shivalik Industries Limited under Section 7 of the I&B Code, 2016 seeking initiation of CIR Proceedings. This Adjudicating Authority admitted the said CP by order dated 12.06.2018 and accordingly, the CIR Proceedings were commenced against the corporate debtor thereon. In IA No. 82 of 2018 filed by the RP, this Adjudicating Authority extended the period of the CIRP, by another period of 90 days, beyond the period of 180 days, vide order dated 29.11.2018. This Adjudicating Authority vide its order dated 28.02.2019 allowed IA No. 50 of 2019 filed by the RP seeking exclusion of 113 days from the total period of CIRP which was expiring on 09.03.2019, for the reasons mentioned therein. Accordingly, after excluding the period of 113 days,

270 days' period of CIRP was to expire on 29.06.2019 and the IA No. 186 of 2019 was filed seeking approval of the plan under Section 30(6) read with Section 31(1) of the Code on 14.06.2019, i.e., well before the expiry of the maximum period of CIRP. Further, it is to be seen that though 113 days were excluded, vide order dated 28.02.2019, which will take the expiry date of CIRP to 29.06.2019 but it was directed to file the application under Section 30(6) of the Code before 06.04.2019. However, this Adjudicating Authority vide its order dated 04.04.2019 filed by M/s Kals Distilleries Private Limited, i.e. in IA No. 98 of 2019 permitted to avail the time upto 29.06.2019 as per the exclusion granted on 28.02.2019. Therefore, the application under Section 30(6) read with Section 31(1) of the Code filed by the Resolution Professional bearing IA No. 186 of 2019 is well before the extended/excluded period of CIRP, by this Adjudicating Authority. Accordingly, the submission of the applicant that the I.A. No. 186/2019 was filed after expiry of the CIRP Period is rejected.

6. It is now a well settled principle of law that the rejection of a resolution plan or approval of a resolution plan and distribution of the resolution plan amount among various stakeholders is within the commercial wisdom of the COC and that this Adjudicating Authority cannot interfere with the said commercial wisdom, as long as the resolution plan is in conformity with Section 30(2) of the I&B Code, 2016.

7. The Hon'ble Supreme Court of India in ***K. Sashidhar v. Indian Overseas Bank and others, 2019 (12) SCC 150*** held as under:-

"42. The argument, though attractive at the first blush, but if accepted, would require us to rewrite the provisions of the I&B Code. It would also result in doing violence to the legislative intent of having consciously not stipulated that as a ground to challenge the

commercial wisdom of the minority (dissenting) financial creditors. Concededly, the process of resolution plan is necessitated in respect of corporate debtors in whom their financial creditors have lost hope of recovery and who have turned into nonperformer or a chronic defaulter. The fact that the concerned corporate debtor was still able to carry on its business activities does not obligate the financial creditors to postpone the recovery of the debt due or to prolong their losses indefinitely. Be that as it may, the scope of enquiry and the grounds on which the decision of “approval” of the resolution plan by the CoC can be interfered with by the adjudicating authority (NCLT), has been set out in Section 31(1) read with Section 30(2) and by the appellate tribunal (NCLAT) under Section 32 read with Section 61(3) of the I&B Code. No corresponding provision has been envisaged by the legislature to empower the resolution professional, the adjudicating authority (NCLT) or for that matter the appellate authority (NCLAT), to reverse the “commercial decision” of the CoC muchless of the dissenting financial creditors for not supporting the proposed resolution plan. Whereas, from the legislative history there is contra indication that the commercial or business decisions of the financial creditors are not open to any judicial review by the adjudicating authority or the appellate authority.”

8. The Supreme Court of India in **Committee of Creditors of Ess Aar Steel India vs. Satish Kumar Gupta and others, Civil Appeal No. 8766-67 of 2019 dated 15.11.2019**, held as under:-

“So long as the provisions of the Code and the Regulations have been met, it is the commercial wisdom of the requisite majority of the Committee of Creditors which is to negotiate and accept a resolution plan, which may involve differential payment to different classes of creditors, together with negotiating with a prospective resolution applicant for better or different terms which may also involve differences in distribution of amounts between different classes of creditors.”

xx xx

“the Code and the Regulations, read as a whole, together with the observations of expert bodies and this Court’s judgment, all lead to the conclusion that the equality principle cannot be stretched to treating unequals equally, as that will destroy the very objective of the Code - to resolve stressed assets. Equitable treatment is to be accorded to each creditor depending upon the class to which it belongs: secured or unsecured, financial or operational.”

9. The Hon’ble NCLT Bench at Allahabad in **J.R. Agro Industries P Limited vs. Swadisht Oils P Ltd., Company Application No. 59 of 2018, dated 24.07.2018**, observed as under:-

“Since debt of Jya Finance and investment Ltd. is an intragroup debt. The Jya finance and investment Ltd. has always acted as a financial arm of the corporate debtor. In UNCITRAL legislative guide on insolvency law, such type of debt has been treated as an equity contribution rather than as an intragroup loan, with the consequence that intragroup obligations will rank lower priority than the same obligation between unrelated parties.

Therefore they can be treated in the waterfall as provided in section 53(1)(h) of the code in the category of "the equity shareholders and partners, as the case may be" which is below the rank of both the unsecured financial creditors and as well as other debts and dues.

Para 55, UNCITRAL legislative guide of insolvency law deals with the provision of subordination of claims, which is as follows:

55. When in the natural person or organisation owes debts to more than one creditor, the priority scheme established in the applicable law bracket which may provide for subordination of certain types of claim, for example, those of related persons) are by agreement between the parties will determine the order in which those debts should be paid. Even while a priority scheme is in place, however, a creditor with a higher priority may be paid after 1 with the lower priority because of subordination.

56. Subordination refers to rearranging of the creditors priorities and does not relate to the validity or legality of a claim. A subordinated claim may be valid and enforceable, but, because of an agreement or a court decision, it will be paid later in the distribution scheme than it would otherwise be paid. Subordination by agreement and by operation of law are discussed below.

Subordination by court (referred to as "equitable subordination")

60. Where this type of subordination is used, where a court has the power to change the priority of claims to prevent, for example, a creditor who has committed fraud or some other illegal activity and are acted inappropriately to gain an advantage over other creditors from benefiting from that act. The doctrine originally arose to prevent a related persons from using legal mechanism to obtained advantages in priority.

61. Where this type of subordination is used, it will generally apply only if the conduct under consideration results in some harm to other creditors, such as altering the normal distribution scheme and giving a creditor an unfair priority position. The court could then use subordination to restore the priority scheme so that a fair distribution occurs. If the conduct occurs but does not result in an unfair advantage, this type of subordination generally cannot be used."

76. Owners and equity holders:

Owners and equity holders may have claim arising from loans extended to the data and claims arising from their equity ownership interest in the debt. Many insolvency laws distinguish between these different claims. Concerning claims arising from equity interests, many insolvency laws adopt the general rule that the owners and equity holders of the business are not entitled to a distribution of the proceeds of assets until all other claims that are senior in priority have been fully repaid (including claims of interest accruing after commencement). As such, these parties will rarely receive any distribution in respect of their interest in the debtor. Where a distribution is made, it would generally be made by the ranking of shares specified in the company Law and the corporate charter. Debt claims, such as those relating to loans, however, are not always subordinated.

77. Related persons:

The category of creditors that may require special consideration is that of persons related to the debtor, whether in a familial or business capacity (see chapter II, para 183, and above, para 48). Under some insolvency laws, these claims are always subordinated, and under other laws, they are subordinated only on the basis of India to inequitable conduct. Where they are subordinated, the claims may rank after ordinary unsecured claims. Other approaches for treatment of these claims do not relate to ranking, but to restrictions on voting rights are to the amount of percentage of the claims that will be admitted in the proceedings.

92. Intra-group debts:

Intragroup debts may be dealt with in a number of ways. Under some insolvency laws, intragroup transactions may be subject to avoidance proceedings. Under some insolvency laws that provide for consolidation, intragroup obligations are terminated by the consolidation order. Other approaches involve classifying intragroup transactions differently from similar transactions conducted between unrelated parties (e.g., a debt may be trouble treated as an equity contribution rather than as an intragroup loan), with the consequence that the intragroup obligation will rank lower in priority than the same obligation between unrelated parties."

In this case, promoters of corporate debtor and its related party Jya Finance and investment Company Ltd., and resolution applicant RLL are under same management. Promoters and two directors are also common. On perusal of transaction details of corporate debtor, resolution applicant and it's related party jam finance and investment Company Ltd. it appears that during the preceding two years on several occasion there have been intragroup transactions. It shows that regulation applicant was liquor Ltd. has taken advance of Seven Crore from the corporate debtor, and after some time RLL has refunded 5,48,00,000 to the corporate debtor. The debt Jya finance and investment Co. Ltd. to the corporate debtor is an intragroup debt. In UNCITRAL legislative guide, it is stated that intragroup transactions may be subject to avoidance proceedings. It is further stated that intragroup brand transactions should be treated differently from similar transactions conducted within between unrelated parties i.e. debt will be treated as an equity contribution rather than as an intragroup loan, with the consequence that the intragroup obligation will rank lower in priority than the same obligation between unrelated parties.

If claim of related party is given priority over operational creditors, it would not be just to operational creditor. In this case, CIRP was initiated at the instance of unpaid claim of operational creditor, and if the resolution plan does not take care of his claim/interests, the purpose of resolution will be defeated.

Therefore, keeping in view the global practices, especially UNCITRAL legislative guide to insolvency law, we are of the view that claim of a related party, i.e. Jya Finance And Investment Company Limited should rank subordinate to the claim of operational creditors and treated at par with equity shareholders are partners under waterfall principle under section 53(1)(h) of the Code.

Thus, we hold that the debt of Rs. 36.6643 crore of Jay Finance & Investment Co. Ltd. Crores, which is admittedly a related party of corporate debtor should fall in the category of "equity shareholders are partners" as provided in section 53(1)(h) of the Code. Their claim will be treated at par with equity shareholders are partners, who are other unsecured creditors they rank below the operational creditors of the corporate debtor."

10. In these circumstances and in view of the clear finding of the Hon'ble Apex Court and of the Hon'ble NCLT Allahabad Bench, the submission of the learned counsel for the applicant that the related party unsecured financial creditors are discriminated as against the unrelated unsecured financial creditors and hence, the resolution plan is liable to be rejected, is unsustainable and untenable.

11. In these circumstances and for the aforesaid reasons, we do not find any merit in the instant IA No. 320/JPR/2019 and accordingly, the same is dismissed.

Sd/-
(Raghu Nayyar)
Member (Technical)

Sd/-
(Ajay Kumar Vatsavayi)
Member (Judicial)

July 16th, 2021
YP