

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 203 of 2019

(Arising out of Order dated 1st February, 2019 passed by the Adjudicating Authority (National Company Law Tribunal), Single Bench, Chennai in MA/71/2019 in CP/682/IB/CB/2017)

IN THE MATTER OF:

Saravana Global Holdings Ltd. & Anr.

...Appellants

Vs.

Bafna Pharmaceuticals Ltd. & Ors.

...Respondents

Present: For Appellants: - Mr. Sudhir Makkar, Senior Advocate with Mr. Jatin Mongia, Mr. Yashvardhan Bandi, Ms. Riya, Mr. Abhishek Chaudhary, Ms. Sumya Gupta and Mr. N. Srikanth, Advocates.

For Respondents:- Mr. Basava Prabhu. S Patil, Senior Advocate with Mr. T.N. Purga Prasad, Mr. Soumik Ghosal, Mr. Geet Ahuja and Mr. Gaurav Singh, Advocates for Respondent No. 2.

Mr. Rana Mukherjee, Senior Advocate with Mr. K.V. Balakrishnan and Mr. R.K. Sharma, Advocates for Respondent No.3.

Mr. P. V. Dinesh, Ms. Sindhu T.P and Mr. R.S. Lakashman, Advocates for SBI.

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

Pursuant to an application filed by 'M/s. Aries' under Section 9 of the Insolvency and Bankruptcy Code, 2016 ("I&B Code" for short),

‘Corporate Insolvency Resolution Process’ was initiated against ‘M/s. Bafna Pharmaceuticals Limited’- (‘Corporate Debtor’), a Micro, Small & Medium Enterprises (‘MSME’, for short). The 3rd Respondent- Mr. Mahaveer Chand Bafna, Promoter of the ‘Corporate Debtor’ filed improved ‘Resolution Plan’ which was approved by the ‘Committee of Creditors’ and placed before the Adjudicating Authority (National Company Law Tribunal). By impugned order dated 1st February, 2019, the Adjudicating Authority approved the improved plan of the promoter of the ‘Corporate Debtor’ which is under challenge in this appeal.

2. Learned counsel appearing on behalf of the Appellants submits that ‘Saravana Global Holdings Ltd.’ along with Mrs. P. Shobha (Appellants herein) were interested to submit their ‘Resolution Plan’ but no opportunity was given to them to file the same.

3. According to the Appellants, the impugned order has been passed approving the ‘Resolution Plan’ without complying the mandatory provisions of the ‘I&B Code’. It was submitted that as per Section 25 (2) (h) of the ‘I&B Code’, it is the duty of the ‘Resolution Professional’ to invite prospective ‘Resolution Applicants’ who fulfil criteria laid down by him with the approval of the ‘Committee of Creditors’. Once the ‘Expression of Interest’ has been published under Regulation 36A and prospective ‘Resolution Applicants’ have been invited, the ‘Information Memorandum’ prepared under Section 29 of the ‘I&B Code’ shall be shared with them.

4. It was submitted that the Respondents have failed to follow the aforesaid procedure as prescribed under the 'I&B Code'.

5. It was further submitted that the 'Information Memorandum' was prepared but it was not circulated. 2nd and 4th Respondents decided to defer the publication of 'Expression of Interest' and inviting prospective 'Resolution Applicants' which they could not have done away with the provisions entirely on account of the provisions being mandatory under the 'I&B Code'.

6. Learned counsel appearing on behalf of 2nd Respondent- 'Resolution Professional' submitted that the 'Committee of Creditors' in its 3rd meeting held on 27th September, 2018, informed the members that the Draft Invitation for 'Expression of Interest' and submission of 'Resolution Plan' with eligibility details to be published in newspapers had been prepared and the same had already been circulated to all the members of the 'Committee of Creditors'. The 'Committee of Creditors' members have expressed that the publication of 'Expression of Interest' may be deferred for the time being as there is an active consideration of 'Resolution Plan' with the 'Corporate Debtor' itself.

7. In the 4th 'Committee of Creditors' meeting which was held on 30th November, 2018, the reasons for deferring the issue of 'Expression of Interest' was discussed by the 'Committee of Creditors' members with reasoning and the issue pertaining to extension application before the Adjudicating Authority was discussed.

8. In the 5th ‘Committee of Creditors’ meeting held on 20th December, 2018, the ‘Resolution Professional’ was asked by the ‘Committee of Creditors’ members regarding the eligibility of the ‘Resolution Applicant’ (promoter of the ‘Corporate Debtor’). The ‘Resolution Professional’ confirmed the eligibility of the ‘Resolution Applicant’ being an MSME and eligible under 29 A of the ‘I&B Code’. The ‘Resolution Applicant’ (3rd Respondent) presented his plan to the ‘Committee of Creditors’, which was discussed in the meeting and unanimous decision was taken by the ‘Committee of Creditors’, relevant of which reproduced below:

“.....(1) CD (Resolution Applicant) to submit the full set of resolution plan again by 26th December, 2018 incorporating the further details required by the CoC members points.

(2) The Resolution Plan to be presented to the CoC again by the RP if the plan is in order incorporating the changes proposed as per (1) above.

(3) In case details are not adequate or resolution plan if presented is not approved, then the RP to seek for ‘Expression of Interest.’”

9. It was submitted that all the requirements under the ‘I&B Code’ have been complied with by the ‘Interim Resolution Professional’ and ‘Resolution Professional’, more specifically the ‘Information Memorandum’ was prepared in compliance with section 25(2) (g) and

the same were furnished to the members of 'Committee of Creditors' on obtaining the Non-Disclosure Agreement.

10. It is informed that the revised 'Resolution Plan' submitted by the 3rd Respondent was discussed and put to vote which was approved by 74.84 % votes in favour of the resolution plan. A monitoring committee was constituted in order to successful implementation of the 'Resolution Plan'.

11. It was also informed that 3rd Respondent in the initial stages also tried for settlement under 12(A) of the 'I&B Code'. The 'Resolution Applicant's' plan was under active consideration in at least three 'Committee of Creditors' meetings.

12. It was informed that the 'Resolution Plan' provides for payment to 'Operational Creditors' who had submitted their claim and which was admitted by the 'Interim Resolution Professional'/'Resolution Professional' and the statutory dues, employee's and workmen dues. The financial creditors have been provided for to the tune of 70% of the admitted claims. Thus the 'Resolution Plan' has taken care of all the stakeholders and there is no discrimination of any kind whatsoever amongst the same set of creditors.

13. Similar plea has been taken by the 'State Bank of India' on behalf of lead Bank of the 'Committee of Creditors'. They have also taken plea that in terms of Section 25(2) (h), the 'Resolution Professional' shall invite prospective 'Resolution Applicants', who fulfil such criteria as

may be laid down by him with the approval of 'Committee of Creditors', having regard to the complexity and scale of the operations of the business of the 'Corporate Debtor'.

14. The 3rd Respondent has been in the pharmaceutical business for close to 40 years, the 'Resolution Plan' having filed by 3rd Respondent being viable and feasible and fulfils all other financial matrix has been accepted.

15. With regard to Appellant- 'Saravana Global Holdings Ltd.', it is stated that Mr. Padam J Challani is also a Director, had a NPA account with the answering Respondent, State Bank of India, for a debt amounting to INR 48.33 Crores. This account was declared NPA on 29th March, 2012. Even restructuring attempts had failed as the borrower could not repay any amount. Finally, the bank was constrained to settle the account by taking a painful haircut of close to 50% in March, 2018. The sacrifice made by the bank in this settlement was INR 23.14 crores. It may be noted that the Appellants, belonging to the same group companies, is making tall claims of proposing a plan worth 100 Crores. However, before this Appellate Tribunal, learned counsel for the Appellant submitted that the Appellant is ready to pay total amount of Rs. 81.57 Crores.

16. The Statement of Objects and Reasons of the 'I&B Code' specifically states the objective of the 'I&B Code' is to consolidate and amend the laws relating to reorganization and insolvency resolution of

corporate persons, partnership firms and individuals in a time bound manner for maximization of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the priority of payment of Government dues and to establish an Insolvency and Bankruptcy Fund, and matters connected therewith or incidental thereto. An effective legal framework for timely resolution of Insolvency and Bankruptcy would support development of credit markets and encourage entrepreneurship. It would also improve ease of doing business, and facilitate more investments leading to higher economic growth and development.

17. In **“Swiss Ribbons Pvt. Ltd. & Anr. vs. Union of India & Ors.— 2019 SCC OnLine SC 73”**, the Hon’ble Supreme Court while deal with preamble observed:

“20. As is discernible, the Preamble gives an insight into what is sought to be achieved by the Code. The Code is first and foremost, a Code for reorganization and insolvency resolution of corporate debtors. Unless such reorganization is effected in a time-bound manner, the value of the assets of such persons will deplete. Therefore, maximization of value of the assets of such persons so that they are efficiently run as going concerns is another very important objective of the Code. This, in turn, will

promote entrepreneurship as the persons in management of the corporate debtor are removed and replaced by entrepreneurs. When, therefore, a resolution plan takes off and the corporate debtor is brought back into the economic mainstream, it is able to repay its debts, which, in turn, enhances the viability of credit in the hands of banks and financial institutions. Above all, ultimately, the interests of all stakeholders are looked after as the corporate debtor itself becomes a beneficiary of the resolution scheme – workers are paid, the creditors in the long run will be repaid in full, and shareholders/investors are able to maximize their investment. Timely resolution of a corporate debtor who is in the red, by an effective legal framework, would go a long way to support the development of credit markets. Since more investment can be made with funds that have come back into the economy, business then eases up, which leads, overall, to higher economic growth and development of the Indian economy. What is interesting to note is that the Preamble does not, in any manner, refer to liquidation, which is only availed of as a last resort if there is either no resolution plan or the resolution plans submitted are not up to the mark. Even in liquidation, the liquidator can sell the business of the

corporate debtor as a going concern. [See ArcelorMittal (supra) at paragraph 83, footnote 3].”

18. Therefore, it is clear that ‘I&B Code’ envisages maximization of value of the assets of the ‘Corporate Debtor’ so that they are efficiently run as going concerns and in turn, will promote entrepreneurship. The preamble does not, in any manner, refer to liquidation, which is only availed of as a last resort if there is either no ‘Resolution Plan’ or the ‘Resolution Plan’s submitted are not up to the mark.

19. Admittedly, the ‘Corporate Debtor’ is a ‘MSME’ and the promoters are not ineligible in terms of Section 29A of the ‘I&B Code’. Therefore, it is not necessary for the ‘Committee of Creditors’ to find out whether the ‘Resolution Applicant’ is ineligible in terms of Section 29A or not.

20. The ‘Committee of Creditors’ is to consider the feasibility, viability and such other requirements as has been specified by the Board. If it proposes maximisation of the assets and is found to be feasible, viable and fulfil all other requirements as specified by the Board, the company being MSME, it is not necessary for the ‘Committee of Creditors’ to follow all the procedures under the ‘Corporate Insolvency Resolution Process’. For example, if case is settled before the constitution of the ‘Committee of Creditors’ or in terms of Section 12A on the basis of offer given by Promoter, in such case, all other procedure for calling of application of ‘Resolution Applicant’ etc. are not followed. If the Promoter satisfy all the creditors and is in a position to keep the ‘Corporate Debtor’ as a going

concern, it is always open to 'Committee of Creditors' to accept the terms of settlement and approve it by 90% of the voting shares. The same principle can be followed in the case of MSME.

21. The Parliament with specific intention amended the provisions of the 'I&B Code' by allowing the Promoters of 'MSME' to file 'Resolution Plan'. The intention of the legislature shows that the Promoters of 'MSME' should be encouraged to pay back the amount with the satisfaction of the 'Committee of Creditors' to regain the control of the 'Corporate Debtor' and entrepreneurship by filing 'Resolution Plan' which is viable, feasible and fulfils other criteria as laid down by the 'Insolvency and Bankruptcy Board of India'.

22. Therefore, we hold that in exceptional circumstances, if the 'Corporate Debtor' is MSME, it is not necessary for the Promoters to compete with other 'Resolution Applicants' to regain the control of the 'Corporate Debtor'.

23. In the present case, the Adjudicating Authority on perusal of the 'Resolution Plan' observed as follows:

"7. The perusal of the 'Resolution Plan' shows that it provides for the Resolution for all the Financial Creditors, out of the total claim of Rs.49.23 Crores, the payment proposed is Rs.34.46 Crores. It further provides that 70% of the admitted claims of all the Financial Creditors

shall be paid within three months from the 'Approval Date' as full and final settlement of the dues and personal guarantees. In relation to the Workmen dues, it provides for total payment of Rs. 0.24 Crores, as far as the Employees' dues are concerned, the Plan provides for total payment of Rs.0.32 Crores. The Plan also provides for payment of Insolvency Resolution Process Costs, the dues for PP and ESI. A provision has also been made for payments of Rs.6.53 Crores to other Operational Creditors and Rs.0.13 Crores towards statutory liabilities. In essence, the Plan provides to settle the claim of various stakeholders.

8. *The Plan provides that to balance the interest of all stakeholders, a capital reduction is proposed and the capital of all the fully paid up equity shareholders as on 30.06.2018 shall be reduced to 10% and consequently, the existing 2.36 Crores number of shares shall be reduced to 0.236 number of shares.*

9. *The Resolution Plan provides that upon its approval the Resolution Applicant shall have authority to reconstitute the Board of Director*

and the Board shall have the authority to act and execute in the name and on behalf of the Corporate Debtor all deeds, receipts, and other documents, as may be required. However, the Resolution Applicant shall be responsible for the proper implementation of the proposed Resolution Plan from the date of its approval. Further, the Resolution Plan provides that the Resolution Applicant will appoint a Chartered Accountant or a Resolution Professional qualified and registered under the IBBI as the supervisor ("supervisor") for the supervision of the approved Resolution Plan, a representative from Corporate Debtor and other two representatives from the Financial Creditors. The supervisor shall be appointed for a period till the payment of all the liabilities mentioned in the Resolution Plan. Therefore, the Resolution Plan provides suitable arrangement for management of the Corporate Debtor and the implementation of the same (Plan).

10. Thus, the 'Resolution Plan' filed with the Application meets the requirements of Section 30(2) of the I&B Code, 2016 and Regulations

37, 38, 38(1A) and 39 (4) of IBBI (CIRP) Regulations, 2016. The 'Resolution Plan' is also not in contravention of any of the provisions of Section 29A. The Resolution Professional has also certified that the "Resolution Plan" approved by the CoCs does not contravene any of the provisions of the law for the time being in force. The Compliance Certificate is placed at pages 7 to 11 of the typed set filed with the Application. The 'Resolution Plan' stands approved by the CoCs with 74.84% voting share."

24. In view of the fact that the 'Resolution Applicant' is the Promoter of the 'M/s. Bafna Pharmaceuticals Limited'- ('Corporate Debtor'), 'MSME', we hold that it is open to the 'Committee of Creditors' to defer the process of issuance of 'Information Memorandum', if the Promoter of MSME offers a viable and feasible plan maximising the assets of the 'Corporate Debtor' and balancing all the stakeholders. For such purpose, it is not required to follow all the procedure as the case for accepting the proposal under Section 12A of the 'I&B Code'.

25. This apart, one of the Director of the Appellant having declared 'NPA' by the 'State Bank of India', lead Bank of the 'Committee of Creditors', at this stage, we are not inclined to give opportunity to the Appellant to file its offer.

26. We find no merit in this appeal. It is accordingly, dismissed. No costs.

(Justice S.J. Mukhopadhaya)
Chairperson

(Justice A.I.S. Cheema)
Member(Judicial)

NEW DELHI
4th July, 2019

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