

Per: Ajay Kumar Vatsavayi, Member (Judicial)

ORDER

The Oriental Bank of Commerce, a financial creditor of the respondent Mount Shivalik Industries Limited, (the corporate debtor) filed CP (IB) No. 86(ND)/2017 under Section 7 of the Code before this Adjudicating Authority seeking initiation of CIRP against the said corporate debtor. This Adjudicating Authority vide its order dated 12.06.2018 admitted the said CP and declared moratorium. Further, Ms. Pratibha Khandelwal was appointed as the Interim Resolution Professional vide its order dated 12.06.2018 in the said CP (IB) No. 86(ND)/2017.

2. It is submitted that public announcement in Form A was made on 15.06.2018. Pursuant to the public announcement, claims were received from 5 (five) financial creditors. After the verification and admission of the claims, the Committee of Creditors (**CoC**) was constituted consisting of 5 (five) financial creditors. The CoC in its 1st Meeting on 12.07.2018, unanimously resolved to continue Interim Resolution Professional as the Resolution Professional. A copy of minutes of meeting dated 12.07.2018 is attached as Annexure A-3.

3. It is stated that the CoC in its 2nd meeting dated 04.08.2018 (Annexure A-4), the applicant informed that an undertaking is required for the members of the CoC to maintain confidentiality of the information contained in Information Memorandum. The CoC in the same meeting has discussed and decided the eligibility criteria for submission of resolution plan which is mentioned as follows:-

(a) Net worth of at least Rs. 50 Crores,

(b) Along with Expression of Interest, the prospective resolution applicant shall deposit Rs. 50 lakhs towards earnest money deposit in favour of corporate debtor.

4. It is submitted that the Form G for the first time was published on 22.08.2018 (Annexure A-6) and thereafter, CoC in its 4th meeting was informed that four prospective resolution applicants have submitted the Expression of Interest alongwith the earnest money of Rs. 50 lakhs. An undertaking under Section 29A has also been submitted by the prospective resolution applicants. A copy of minutes of 4th COC Meeting held on 19.09.2018 is attached as Annexure A-7.

5. It is further submitted that as per order dated 05.10.2018, the CoC was reconstituted and the voting shares of the members of the CoC were revised.

6. It is further submitted that in the 6th Meeting of the CoC which was held on 19.11.2018 (Annexure A-10), it was informed that out of four prospective resolution applicants, only two prospective resolution applicants namely Carlsberg India Private Limited and Som Distilleries Pvt. Ltd. have submitted their resolution plans. The other two resolution applicants have withdrawn from the process and their EMD has been refunded. In the 8th Meeting of CoC, the resolution plans of resolution applicants were discussed in length and the resolution applicants were asked to submit the revised offer. Thereafter, CoC has discussed the resolution plan of Som Distilleries Pvt. Ltd. but the negotiations with the resolution applicants were unsuccessful. Afterwards, CoC has decided to issue fresh Expression of Interest for invitation of submission of resolution plan in the same meeting. A copy of

minutes of 8th and 9th CoC Meetings are attached as Annexure A-13 and A-14 respectively.

7. It is further submitted that the applicant has filed an IA No. 82/JPR/2018 and this Adjudicating Authority has extended the period of CIRP by 90 days vide order dated 29.11.2018. Copy of order dated 29.11.2018 found attached as Annexure A-11.

8. A fresh Expression of Interests were issued on 01.01.2019 in Form G as per terms of Section 25 (2)(h) of the Code. Thereafter, only one EOI has been received by RP and Corrigendum was issued on 20.01.2019 extending the timelines for submission of EOI by 10 days. The copies of newspaper publication made in Business Standard (English) and Punjab Kesari (Hindi) of Form G and Corrigendum to Form G are attached as Annexure A-15 and A-17.

9. In the 11th meeting of CoC, RP has informed to the members of CoC that four Expression of Interests have been received. In the meanwhile, vide order dated 28.02.2019 (Annexure A-19), this Adjudicating Authority has allowed the application for exclusion of certain period which was lost in litigation.

10. In the 14th Meeting of COC which was held on 27.03.2019, The resolution plan submitted by Som Distilleries Pvt. Ltd. was put forward by RP before the members of CoC. Another resolution applicant namely 'Kals Distilleries Pvt. Ltd.' was allowed to submit the resolution plan within two weeks vide order of this Adjudicating Authority dated 04.04.2019 (Annexure A-23). After detailed discussions by the Members of CoC in further meetings, both resolution plans were modified/amended many times.

11. In the 19th Meeting of COC, which was convened on 04.06.2019, the Members of COC has discussed in detail the resolution plan submitted by Som Distilleries Pvt. Ltd. and by Kals Distilleries Pvt. Ltd. The Members of COC, after detailed discussions, have unanimously rejected the resolution plan of Som Distilleries Pvt. Ltd. mainly on the grounds of credit worthiness of Som Distilleries Pvt. Ltd. The COC has also discussed the plan submitted by Kals Distilleries Pvt. Ltd. and has unanimously approved the same. The copy of minutes of 19th COC Meeting is attached as Annexure A-28. Accordingly, a letter of intent dated 07.06.2019 (Annexure A-32) was issued to the Successful Resolution Applicant and the same was unconditionally accepted.

12. Having heard the learned counsels for the Resolution Professional and the respondents, we find that it would be first necessary to ascertain whether the requirements of the Code and Regulations made thereunder, have been complied with or not.

13. In view of the mandatory requirements of Section 30(2) of the Code, and the peculiar facts of this case, we examine the resolution plan of the **Kals Distilleries Pvt. Ltd.**, as approved by the Committee of Creditors.

14. As per Section 30 (2) (a) of the Code, the Resolution plan approved by the Committee of Creditors must provide for payment of insolvency resolution process cost in a manner specified by the Board in priority to the payment of other debts of the corporate debtor. In Part 5.1 of the Resolution Plan, it is stated that the resolution applicant shall pay any outstanding Insolvency Resolution Process cost in priority to any other payment under the resolution plan and has made a provision of Rs.1.25

Crores in respect of the same. In Clause 5.1(ii) that resolution applicant has identified the sources of fund that would be used for the payment of Insolvency Resolution Process cost.

15. As per Section 30(2)(b) of the Code, the resolution plan must provide for payments of the debts of operational creditors in such manner as may be specified by the Board which shall not be less than the amount to be paid to the operational creditors in the event of liquidation of the corporate debtor under Section 53 or 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 under Section 53(1) whichever is higher. It is stated in Part 5.4 of the resolution plan that dues of 150 unrelated employees of the corporate debtor are settled at 33% of the admitted claim. The claims of non-related operational creditors (Goods and Services) are settled at 10% of the admitted claims. The statutory dues of the corporate debtor are also settled at 10% of the admitted claims. It is further mentioned that the statutory dues which are not admitted shall be settled at 0.1% of the principal amount.

16. As per Section 30(2) (c) of the Code, the resolution plan must provide for the management of the affairs of the corporate debtor after its approval. There is specific provision made for the management and control of the company after the approval of the resolution plan. A detailed mechanism regarding the management and control is discussed in Clause 6 of the resolution plan under the heading 'Management and Control During the Term of Resolution Plan'. It is stated therein that after the approval of the resolution plan all the present Directors of the Mount Shivalik Industries

Limited shall be deemed to have removed from the Board of Directors. The representatives nominated by the resolution applicant shall join the Board of Directors of Mount Shivalik Industries Limited.

17. Section 30(2) (d) of the Code envisages that it must provide for implementation and supervision of the resolution plan. Clause 7 of the Resolution Plan provides for a detailed mechanism for effective implementation of the resolution plan.

18. Section 30 (2) (e) of the Code requires that the resolution plan does not contravene any of the provisions of the law for the time being in force. In Form H, filed as Annexure A-31 of the application, it has been submitted by the RP as per the requirement of Regulation 39(4) of the CIRP Regulations, she has certified that the resolution plan did not contravene any of the provisions of the law for the time being in force and is in compliance with the provisions of the Code and the CIRP Regulations.

19. It is also certified by the RP that **Kals Distilleries Pvt. Ltd.** has submitted an affidavit pursuant to Section 30 (1) of the Code confirming its eligibility under Section 29A of the Code to submit its resolution plan. The above mentioned affidavit by Mr. Nadessan Siva Prakasan on behalf of Kals Distilleries Pvt. Ltd. is attached at (Annexure A-30 Page No. 297 to 300) Page Nos. 297-301 of the application.

20. The Resolution Plan should conform to all such requirements which may be specified by the IBBI. A statement to this effect has been made by the RP in the Form H referred above.

21. With regard to compliance of Regulation 39 (4) in relation to submission of the Performance Bank Guarantee by the successful resolution

applicant is concerned, the resolution applicant has submitted a performance guarantee of ₹2 Crores by way of fixed deposit receipt dated 11.06.2019 has been received by RP with lien marked to Oriental Bank of Commerce, New Delhi.

22. With regard to the compliance of the second proviso to Section 31 (4) of the Code i.e. obtaining the approval of the Competition Commission of India, it is observed that there is no statement made anywhere in this application.

23. With regard to the compliance under Regulation 35A, it is stated that an application has been filed by the Ex-Directors of Mount Shivalik Industries Limited challenging the decision of COC for conducting the forensic audit of corporate debtor for a period of four years and the same is pending before this Adjudicating Authority and that the same shall not be an impediment in approving the plan.

24. Further, the resolution plan fulfills all the requirements of Regulation 38 and 39 of the CIRP Regulations. A perusal of Regulation 38 would clearly show that by virtue of mandatory contents of resolution plan as discussed in the preceding paragraphs in relation to Section 30 and Section 31 of the Code, the requirement of Regulation 38 also stands fulfilled. Even the requirement of Regulation 39 has been satisfied, as the RP has submitted that the resolution plan of Resolution applicant, as approved by the Committee of Creditors, to this Tribunal along with the compliance certificate in Revised Form H, as per the requirements of Regulation 39(4) of the CIRP Regulations meets all the requirements of the Code and the CIRP

Regulations and that the resolution plan has been duly approved by the Committee of Creditors.

25. In view of our finding that the resolution plan submitted by **Kals Distilleries Pvt. Ltd**, as approved by the COC satisfies all the requirements of the Code and Regulations made thereunder.

26. It is relevant to be stated here that after the instant IA was heard and orders were reserved, Sach Marketing Pvt. Ltd. filed Company Appeal (AT) (Insolvency) No. 180 of 2021 having aggrieved with the order dated 18.01.2021 in IA No. 135/JPR/2019 of the Adjudicating Authority in dismissing the said IA by confirming the decision of the RP in considering the claim of M/s Sach Marketing Pvt. Ltd. as operational debt. The Hon'ble NCLAT vide its order dated 09.03.2021 directed the Adjudicating Authority not to pass any final orders. The said company appeal was finally disposed of by the Hon'ble NCLAT vide order dated 07.10.2021 and the relevant paragraphs of the same read as under:-

"21. The Appellant had specifically denied securing any 'stocks' 'goods' or other properties to the 'Corporate Debtor' and was only appointed for the sole purpose of sales promotion of beer. The financial statement of the Appellant for the Financial Year 2017-18 shows revenue from interest on the 'Security Deposit'. The financial statements mention the 'Security Deposit' under the head of other financial liabilities alongwith entries such as 'interest accrued on borrowings'. The said amounts were treated as long term loans and advance in the financial statement of the 'Corporate Debtor' for the Financial Year 2015-16 and under 'other long term liabilities' for the Financial Year 2016-17. To reiterate, the 'Security Deposit' amount had admittedly an element of interest payable at 21% per annum and hence can be construed as having commercial effect of borrowing. The fact that amounts were paid with a specific term and tenure is evident from the term loan dated 01.04.2014, 01.04.2015 which specifies the time periods. It is significant to note that the Appellant paid tax on the net interest income earned by it on accrual basis.

22. The 'Corporate Debtor' had accepted the 'Security Deposit' from the Appellant and credited the interest for some time against such amounts for the period 2014-15, and bearing in mind the payment of interest on the amounts borrowed by the 'Corporate Debtor' is nothing but a consideration for the time value of money and the interest is being paid to the Appellant for using the money belonging to the Appellant over a period of time and hence we arrive at the conclusion that the status of Appellant is that of a Financial Creditor vis-à-vis the amount of 'Security Deposit' as per Section 5(7) read with Section 5(8) of the Code. We are of the considered view that the ratio of the Judgement of the Hon'ble Supreme Court in 'M/s. Orator Marketing Pvt. Ltd.' (Supra) is squarely applicable to the facts of this case and we hold that the 'debt' in question is a 'Financial Debt'.

23. Now we address ourselves to the fact that the Resolution Plan has already been accepted by the CoC and is pending before the NCLT for approval. The material on record shows that the Appellant herein had filed an Interim Application on 02.05.2019, challenging the rejection, but while the I.A. preferred by the Appellant was kept pending, the RP filed I.A. 186/JPR/2019 seeking approval of the Resolution Plan was filed and the Adjudicating Authority dismissed the I.A. preferred by the Appellant only on 18.01.2021. The Appellant Counsel has submitted that they are not pressing for reconstitution of the CoC at this stage and do not intend to challenge or oppose the Resolution Plan, but only to seek for the debt amount to be treated as a 'Financial Debt'.

24. For all the aforementioned reasons, this Appeal is allowed and the Impugned Order is set aside. We hold that the said amount of debt herein is to be treated as a 'Financial Debt'. We are also conscious of the importance of timelines to be maintained by us as observed by the Hon'ble Supreme Court in 'Ebix Singapore Pvt. Ltd.' Vs. 'Committee of Creditors of Educomp Solutions Ltd. & Anr.' Civil Appeal No. 3224 of 2020 and therefore request the Adjudicating Authority to decide the matter as expeditiously as practicable.'

27. The Hon'ble NCLAT while holding the debt of M/s Sach Marketing Pvt. Ltd. is a financial debt, set-aside the order dated 18.01.2021 in IA No. 135/2019 of the Adjudicating Authority however, observed that "the Appellant Counsel has submitted that they are not pressing for reconstitution of the CoC at this stage and do not intend to challenge or oppose the Resolution Plan, but only to seek for the debt amount to be treated as a 'Financial Debt'". In view of this

specific observation made by the NCLAT, there is no impediment subsisting in considering the resolution plan for approval.

28. In view of the orders passed by the Hon'ble NCLAT, as referred above and in view of our observations made with regard to the resolution plan as approved by the COC and the statement made by the counsel for the appellant before the Hon'ble NCLAT there is no impediment in approving the plan.

29. As a sequel to the above, we pass the following orders:-

- a. The Resolution Plan, as approved by the Committee of Creditors and submitted by the "**Kals Distilleries Pvt. Ltd.**" (**Successful Resolution Applicant**) is approved and the same is binding on the Corporate Debtor and its employees, members, creditors, including the Central Government, any State Government or any Local Authority to whom a debt is due in respect of the payment of dues arising under any law for the time being in force, such as authorities to whom statutory dues are owed, guarantors and the other stakeholders involved in the Resolution Plan.
- b. In terms of the observations made by the Hon'ble NCLAT in Company Appeal (AT) (Insolvency) No. 180/2021 dated 07.10.2021 and by this Adjudicating Authority in Paragraph Nos. 26 to 28 above, M/s Sach Marketing Private Limited shall be treated as a financial creditor for the purpose of settlement of its claim.
- c. The Resolution Applicant is directed to obtain the approval of the Competition Commission of India within a period of one year of

approval of this resolution plan by this Tribunal as stated under Section 31 (4) of the Code.

- d. The moratorium order passed by the Adjudicating Authority under Section 14 shall cease to have effect.
- e. The RP shall forward all records relating to the CIRP and the resolution plan to IBBI to be recorded at its database in terms of Section 31(3) (b) of the Code.

30. Accordingly, IA No.186/JPR/2019 is disposed of.

Sd/-
(Raghu Nayyar)
Member (Technical)

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

October 13th, 2021
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