



* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Judgment reserved on : 20 September 2024**
Judgment pronounced on : 23 September 2024

+ **W.P.(C) 13278/2024 & CM APPL. 55477/2024**

GATEWAY INVESTMENT MANAGEMENT SERVICES LTD

.....Petitioner

Through: **Mr. Rajiv Nayar, Sr. Adv. along with Mr. Vaibhav Mishra, Mr. Ekansh Mishra, Mr. Ashu Kansal, Mr. Akash Shrivastav, Ms. Devika Mohan & Ms. Udita Singh, Advs.**

versus

RESERVE BANK OF INDIA & ORS.Respondents

Through: **Mr. Ayush Srivastava, Adv. for R-1/RBI. Mr. Jayant Mehta, Sr. Adv. along with Mr. Dhruv Malik, Ms. Aditi Sinha and Mr. Rajnandini Singh, Advs. for R2. Mr. Prashant Mehta and Mr. Raghav Marwaha, Advs. for R4**

CORAM:

HON'BLE MR. JUSTICE DHARMESH SHARMA

J U D G M E N T

W.P.(C) 13278/2024 & CM APPL. 55477/2024

1. The petitioner company invokes the writ jurisdiction of this Court under Article 226 of the Constitution of India, 1950, seeking the following reliefs against the respondents:

- “a. Allow the present writ petition;
- b. Issue a Writ or order or direction in the nature of Mandamus against Respondent No. 1 to develop a framework under the Banking Regulation Act, 1949 for the financial institutions,

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Signing Date: 23/09/2024
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W.P.(C) 13278/2024

Page 1 of 10



including Banks and Asset Reconstruction Companies, to act in a fair, transparent and reasonable manner while exercising decision making power in approving a resolution plan to ensure public interest and maximization of recovery;

c. Issue a Writ or order or direction in the nature of Mandamus upon Respondent Nos. 2, 4, 5 and 6 to initiate the process of fresh voting on the Resolution Plan of the Petitioner after taking into consideration the email dated 05.09.2024 addressed by the Petitioner;

d. Issue a Writ or order or direction in the nature of Mandamus against Respondent Nos. 2 to 6 to abide by the principle of equality and fairness while considering the Resolution Plan of the Petitioner;

e. Pass any such other and further order(s) as this Hon'ble Court may deem fit and proper in the interest of justice, in favor of the Petitioner and against the Respondents.”

2. Shorn of unnecessary details, the petitioner claims that it was the highest bidder in the CIRP¹ in respect of the Corporate Debtor [“CD”] viz., Helios Photo Voltaic Private Limited, both in terms of monetary value and net present value and yet its bid has not been accepted by the CoC² comprising of respondent no. 2, 4 & 5 in the meeting held on 05.09.2024 throwing all commercial norms & financial prudence to the wind. It is pertinent to mention that respondent no. 3 Punjab National Bank is lead secured creditor.

3. Mr. Rajiv Nayar, learned Senior Advocate for the petitioner, while inviting the attention of this Court to the result of the bidding process, has pointed out that the petitioner as one of the Resolution Applicant [“RA”] bided in the e-auction held on 29.07.2024 and had offered revival plan by infusion of Rs. 109,87,50,000/- (Rupees One Hundred and Nine Crores Eighty Seven Lakh Fifty Thousand)

¹ Corporate Insolvency Resolution Process

² Committee of Creditors



(Annexure ‘P-3’) payable to the secured creditors over a period of 12 months³, which was the highest bid and yet it has been declined by the CoC on 18.09.2024 in an arbitrary manner, exhibiting complete lack of ‘commercial wisdom’ despite the fact that the Successful Resolution Applicant {SRA} had offered to infuse Rs. 99 crores in thirty days besides overlooking the fact that the petitioner had made a revised offer to make payment of the second instalment of Rs. 75 crores within 90 days during the time deliberations were going in the CoC.

4. Learned Senior Advocate for the petitioner has relied upon the decision by a Co-ordinate Bench of this Court titled as **Kunwar Sachdev v. IDBI Bank & Ors.**⁴ and referred to the following observations:

“70. It is relevant to point out that the CoC is entrusted with fiduciary duties as per the legislative mandate of the IBC. The functions entrusted to the CoC are wide in nature and in order to effectively deliver the duties entrusted upon it, a code of conduct is of pertinent value.

71. It is widely said that, “with *great power comes great responsibility*”. One of the foremost functions of law is to circumscribe power with responsibility. The CoC, being entrusted with the fiduciary duty to bring back the Corporate Debtor from the vicious cycle of debt trap and revive the company, must be saddled with the responsibility of ensuring that the decisions taken by it in the exercise of its „commercial wisdom“ shall be in tune with the *bonafide* objectives of the Code. In order to facilitate an effective and responsible functioning of the CoC, an elaborate, determinative and efficient code of conduct for the functioning of CoC assumes great relevance.

72. Thus, there is an urgent need for an effective code of conduct for the functioning of the CoC. It be noted that the code of conduct

³ Offering payment of Rs. 27,47,70,000/- within 45 days (at least 25% of the entire plan value as per RFRP) and remaining within 46 days to 12 months, with Net Present Value Rs. 101,05,01742/-

⁴ W.P. (C) 10599/2021 dated 12.02.2024



is not intended to question the justness of the decision, as the wisdom of the CoC is to be upheld. Even the Adjudicatory Authority is not empowered to do so, as the interference of the Adjudicatory Authority is also limited to the manner set forth in the Code. A code of conduct shall be subservient to the Code and not in excess of it. However, the process of decision-making must reflect fairness, reasonableness and objectivity, irrespective of the outcome.

73. The code of conduct shall be effectively based on the principles of integrity, objectivity, professional competence, due care and confidentiality. Furthermore, the code of conduct must also reflect the fundamental features of the Wednesbury principles of fairness and proportionality in order to give true meaning to the legislative intent of the IBC. Moreover, it should also reflect the principles of natural justice to be followed by the CoC while taking any measure with respect to any stakeholder during the subsistence of the entire CIRP.”

5. *Per contra*, Mr. Jayant Mehta, learned Senior Advocate appearing for respondent No.2 *viz.*, National Asset Reconstruction Company Limited, submitted that in the realm of a ‘private contract’ between the parties and the bidding process, the petitioner/bidder is only entitled to be considered but there is no rule of thumb that the highest bidder should also be accorded priority or be preferred for the Resolution Plan. It was urged that the IBC⁵ is a complete Code in itself which cannot be by-passed and this is a case where the CoC, after a series of deliberations, in its ‘commercial wisdom’, accepted the Resolution Plan bided/submitted by respondent No.4 envisaging a total payment of Rs. 99 crores within a period of 30 days.

6. It was vehemently urged that in terms of Sections 31⁶ and 34⁷

⁵ Insolvency and Bankruptcy Code, 2016

⁶ 31. (1) If the Adjudicating Authority is satisfied that the resolution plan as approved by the committee of creditors under sub-section (4) of section 30 meets the requirements as referred to in sub-section (2) of section 30, it shall by order approve the resolution plan which shall be binding on the corporate debtor and its employees, members, creditors, guarantors and other stakeholders involved in the resolution plan.



of the IBC, the Resolution Plan accepted by the CoC shall be placed for approval before the Adjudicating Authority/NCLT⁸ and the petitioner is at liberty to air his grievances by filing objections before the NLCT and cannot approach this Court in writ jurisdiction. Alternatively, it was argued that although the respondent No.4 is not enjoined upon to justify the decision arrived at by the CoC, it could be appreciated that the petitioner initially made a bid for revival and

(2) Where the Adjudicating Authority is satisfied that the resolution plan does not confirm to the requirements referred to in sub-section (1), it may, by an order, reject the resolution plan.

(3) After the order of approval under sub-section (1),—

(a) the moratorium order passed by the Adjudicating Authority under section 14 shall cease to have effect; and

(b) the resolution professional shall forward all records relating to the conduct of the corporate insolvency resolution process and the resolution plan to the Board to be recorded on its database.

⁷ 34. (1) Where the Adjudicating Authority passes an order for liquidation of the corporate debtor under section 33, the resolution professional appointed for the corporate insolvency resolution process under Chapter II shall act as the liquidator for the purposes of liquidation unless replaced by the Adjudicating Authority under sub-section (4).

(2) On the appointment of a liquidator under this section, all powers of the board of directors, key managerial personnel and the partners of the corporate debtor, as the case may be, shall cease to have effect and shall be vested in the liquidator.

(3) The personnel of the corporate debtor shall extend all assistance and cooperation to the liquidator as may be required by him in managing the affairs of the corporate debtor and provisions of section 19 shall apply in relation to voluntary liquidation process as they apply in relation to liquidation process with the substitution of references to the liquidator for references to the interim resolution professional.

(4) The Adjudicating Authority shall by order replace the resolution professional, if—

(a) the resolution plan submitted by the resolution professional under section 30 was rejected for failure to meet the requirements mentioned in sub-section (2) of section 30; or

(b) the Board recommends the replacement of a resolution professional to the Adjudicating Authority for reasons to be recorded in writing.

(5) For the purposes of clause (a) of sub-section (4), the Adjudicating Authority may direct the Board to propose the name of another insolvency professional to be appointed as a liquidator.

(6) The Board shall propose the name of another insolvency professional within ten days of the direction issued by the Adjudicating Authority under sub-section (5).

(7) The Adjudicating Authority shall, on receipt of the proposal of the Board for the appointment of an insolvency professional as liquidator, by an order appoint such insolvency professional as the liquidator.

(8) An insolvency professional proposed to be appointed as a liquidator shall charge such fee for the conduct of the liquidation proceedings and in such proportion to the value of the liquidation estate assets, as may be specified by the Board.

(9) The fees for the conduct of the liquidation proceedings under sub-section (8) shall be paid to the liquidator from the proceeds of the liquidation estate under section 53.

⁸ National Company Law Tribunal

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KUMAR VATS
Signing Date: 23/09/2024
20:39:17

WP.(C) 13278/2024

Page 5 of 10



reconstruction of the CD by infusing funds over a period of 12 months, whereas the respondent No.4 offered infusion of funds within 30 days.

7. It was further urged that due to systematic leakage from some disgruntled members of the CoC, when the CoC was convening a meeting, a fresh offer was made thereby offering to infuse funds within a period of 90 days, just when the voting was going to take place on the three bids who had submitted by the Resolution applicants. It was urged that Sections 60(5)(c) and 60(6) of the IBC cannot be bypassed and the decision of the NCLT upon the said matters have an overriding effect in terms of Section 238⁹ of the IBC.

8. Pointing out that the IBBI¹⁰ has not been impleaded as a party in the instant writ, the case law relied upon by the petitioner pertains is urged to distinguishable since it was a case where the IBBI was made a party and the observations made were in respect of the course of impugned action that had been by the IBBI that was held to be flawed in law. Lastly, it was urged that the CoC has taken a decision in its commercial wisdom in terms of the 'Guidelines for Committee of Creditors' dated 06.08.2024 framed by the IBBI.

9. Mr. Prashant Mehta, learned counsel for the respondent No.4 viz., Alchemist Asset Reconstruction Company Limited, urged respondent no. 4 was in minority in the CoC having 18.69 % shares, and voted against the Resolution as the bid of the petitioner was

⁹ **Provisions of this Code to override other laws.**- The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.

¹⁰ Insolvency and Bankruptcy Board of India



bringing more funds than the two others. Alluding to the Regulation 39(3) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, it was urged that evaluation matrix has not been followed in letter and spirit by the CoC. It was urged that it is not fathomable as to why respondent no. 2, which is a government entity, is not according consent to the bidding of the petitioner which is 10% higher; and the decision of the CoC is flawed.

10. Suffice to state that in rebuttal, learned Senior Advocate for the petitioner relied upon the decision of the Supreme Court in the case of **M.K. Rajagopalan v. Dr. Periasamy Palani Gounder**¹¹ wherein, with regard to the manner in which Resolution Plan should be approved by the CoC, it was observed as follows:

“47. As noticed hereinbefore, commercial wisdom of CoC is given such a status of primacy that the same is considered rather a matter nonjusticiable in any adjudicatory process, be it by the Adjudicating Authority or even by this Court. However, the commercial wisdom of CoC means a considered decision taken by CoC with reference to the commercial interests and the interest of revival of the corporate debtor and maximization of value of its assets. This wisdom is not a matter of rhetoric but is denoting a well-considered decision by the protagonist of CIRP i.e., CoC. As observed by this Court in K. Sashidhar (supra), the financial creditors forming CoC ‘act on the basis of thorough examination of the proposed resolution plan and assessment made by their team of experts. The opinion on the subject-matter expressed by them after due deliberations in CoC meetings through voting, as per voting shares, is a collective business decision.’ This Court also observed in K. Sashidhar that ‘there is an intrinsic assumption that financial creditors are fully informed about the viability of the corporate debtor and feasibility of the proposed resolution plan.’ These observations read with the observations in Essar Steel (supra) with reference to the reasons stated in the report of Bankruptcy Law Reforms Committee of November 2015, **make it clear that commercial wisdom of CoC is assigned primacy in CIRP for it**

¹¹ Civil Appeal Nos. 1682-1683 of 2022 dated 03.05.2023



represents collective business decision, which is arrived at after thorough examination of the proposed resolution plan and assessment made with involvement of experts by the body of persons who are most vitally interested in rapid and efficient decision making. It follows as a necessary corollary that to be 128 worth its name, the commercial wisdom of CoC would come into existence and operation only when all the relevant information is available before it and is duly deliberated upon by all its members, who have direct and substantial interest in the survival of corporate debtor and in the entire CIRP.”

ANALYSIS & DECISION:

11. Having heard the learned counsels for the parties present and on perusal of the record, at the outset, this Court is not inclined to issue notice for the elementary reason that the petitioner has an alternative and efficacious remedy to assail the impugned action or inaction on the part of the CoC, if any, before the NCLT.

12. First things first, it is well ordained in law that the Adjudicating Authority alone has the jurisdiction to regulate the conduct of the CoC and finally adjudicate upon the resolution plan through the powers of judicial review and thereby ensure that the CoC functions as per the role and responsibilities delineated under the IBC. In other words, the Adjudicating Authority maintains a supervisory role over the entire CIRP proceedings and is empowered under Section 60 of the IBC to take action on any issue relating to the insolvency proceedings. Thus, the resolution plan decided by the CoC shall be put up for consideration before the Adjudicating Authority, which forum alone shall finally decide whether the CoC has performed its fiduciary duty as per the legislative mandate of the IBC.

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KUMAR VATS
Signing Date: 23/09/2024
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WP.(C) 13278/2024

Page 8 of 10



13. At this juncture, it would not be out of place to make a reference to the guidelines for the functioning of the CoC framed by the IBBI dated 06.08.2024, which warrant the CoC to exercise its duties while taking into consideration the following factors:

“6. Guidelines

A member of the CoC shall:-

Objectivity and Integrity

- (a) follow relevant provisions of the Code and regulations, in letter and spirit, while performing their roles and functions.
- (b) maintain integrity in discharging their roles and functions as envisioned under the Code.
- (c) maintain objectivity during the decision-making process.
- (d) foster informed decision making and share with the CoC/Insolvency Professional any relevant information relating to transactions, guarantees, recoveries, claims, etc. relating to the corporate debtor.

Independence and impartiality

- (e) disclose to the CoC/Insolvency Professional the details of any existing or potential conflict of interest arising due to pecuniary, personal or professional relationship with any stakeholder, immediately on becoming aware of it.”

14. In view of the aforesaid guidelines coupled with the relevant provisions of the IBC, which have been referred to during the course of arguments, this Court is not enjoined upon to exercise its power of judicial review and thereby usurp upon the powers of the NCLT to inquire into the commercial wisdom of the CoC whereby the Resolution Plan of the petitioner was rejected *vide* impugned letter dated 18.09.2024.

15. In the end, a last desperate attempt is made by the petitioner that it is willing to renew its offer and match the offer given by the **SRA** in every aspect, but the same cannot be entertained by this Court. Although there is no gainsaying that in matters of public funds auction



the best methodology for discovering fair value and the principle criteria is to ensure maximizing the recovery, the bottom line is that the decision of the CoC shall definitely be considered by the NCLT in a just and expedient manner, and if it deems fit it, may even allow “Open Court Bidding” in accordance with law.

16. In view of the foregoing discussion, the present writ petition is dismissed with liberty to the petitioner to take appropriate recourse before the NCLT, which forum alone shall decide the objections of the petitioner, if any preferred, on its own merits in accordance with law.

17. The present writ petition, along with the pending application, accordingly stands disposed of.

DHARMESH SHARMA, J.

SEPTEMBER 23, 2024

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WP.(C) 13278/2024

Page 10 of 10