

IN THE NATIONAL COMPANY LAW TRIBUNAL  
KOLKATA BENCH

**IA No.1293/KB/2020**  
**and**  
**IA No.1449/KB/2020**  
**in**  
**CP (IB) No.759/KB/2017**

*In the matter of*

The Insolvency and Bankruptcy Code, 2016  
read with Insolvency & Bankruptcy Board of India  
(Insolvency Resolution Process for Corporate Persons) Regulations, 2016

and

*In the matter of*

An application under section 60(5) of the Insolvency and Bankruptcy Code, 2016

and

*In the matter of*

State Bank of India	...	Financial Creditor
	Versus	
Visa International Limited	...	corporate debtor

**IA No.1293/KB/2020**

Arun Kumar Agarwal, Director Suspended Board of Visa International Limited	...	Applicant
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Versus

<b>1. Ashok Kumar Gulla, RP of Visa International Limited</b>		
<b>2. Progressive Star Finance Pvt Ltd (Resolution Applicant)</b>	...	Respondents

**IA No.1449/KB/2020**

<b>Ashok Kumar Gulla, RP of Visa International Limited</b>	...	Applicant
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IN THE NATIONAL COMPANY LAW TRIBUNAL  
KOLKATA BENCH

IA No.1293/KB/2020 & IA 1449/KB/2020 in CP (IB) No.759/KB/2017  
[In the matter of Visa International Ltd]

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**Coram:**

Mr Rajasekhar V.K. : Member (Judicial)  
Mr Harish Chander Suri : Member (Technical)

**Appearances (via videoconferencing):**

For the applicant : Mr SN Mookherjee, Sr Adv  
Mr Sabyasachi Chaudhury, Adv  
Ms Nikita Jhunjhunwala, Adv

For the Committee of Creditors (CoC) : Mr Jishnu Saha, Sr Adv  
Mr Siddhartha Datta, Adv  
Ms Suhani Dwivedi, Adv  
Mr Deepanjan Dutta Roy, Adv

For the Resolution Professional (RP) : Mr Ajay Gaggar, Adv  
Ms Rakhi Purnima Paul, Adv

**Date of hearing: 09.02.2021**

**Date of pronouncement: 11.05.2021**

**ORDER**

*Per: Rajasekhar V.K., Member (Judicial)*

**IA No.1293/KB/2020**

**1. Preamble**

1.1. This is an application filed by Mr Ajay Kumar Agarwal, member of the suspended board of directors of Visa International Limited (*“the corporate debtor or “VIL”*), praying to set aside the decision of the Committee of Creditors (CoC) at its 15<sup>th</sup> meeting held on 28.10.2020 rejecting a Resolution Plan; and to approve the Resolution Plan that was found “viable and feasible” at the 14<sup>th</sup> CoC meeting held on 14.10.2020.

**2. *The conspectus***

- 2.1. Originally, State Bank of India (SBI) filed an application under section 7 of the Insolvency and Bankruptcy Code (IBC), being CP (IB) No.759/KB/2017 against the corporate debtor, which was admitted *vide* order dated 07.08.2019. Mr Ashok Kumar Gulla, the respondent No.1 herein, was appointed as the Interim Resolution Professional (IRP). The Committee of Creditors (CoC) later on confirmed him as the Resolution Professional (RP).
- 2.2. The RP invited Expressions of Interest (EoIs) under regulation 36A(1) of the Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (“*CIRP Regulations*”) for submitting resolution plans. The revised last date for submitting EoIs was 23.01.2020.
- 2.3. In terms of the Request for Resolution Plans (RFRP) document, two resolution applicants, being – (i) Progressive Star Finance Private Limited, and (ii) East India Udyog Limited, were shortlisted. The last date for submitting the Resolution Plans was 27.02.2020.
- 2.4. The bids received were opened at the 5<sup>th</sup> CoC meeting held on 02.03.2020, and discussed at the 6<sup>th</sup> CoC meeting held on 16.03.2020,<sup>1</sup> when both applicants were advised to submit revised Resolution Plans. Progressive Star Finance Private Limited, the successful resolution applicant (SRA) and the second respondent herein, submitted two financial offers as follows: -
- (a) ₹10.17 crore, subject to release of the corporate debtor’s shares pledged with SBI consortium; or
  - (b) ₹6.10 crore without release of the corporate debtor’s shares pledged with SBI consortium.

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<sup>1</sup> Pages 14-41 of the Application

- 2.5. At the 7<sup>th</sup> CoC meeting held on 12.06.2020, it was decided not to accept the resolution plan submitted by East India Udyog Limited, since there was downward revision from ₹5.00 crore to ₹2.50 crore in their revised resolution plan. The two Resolution Plans submitted by Progressive Star Finance Private Limited was placed before the CoC for considering which of the two offers should be taken up for further consideration. E-voting was conducted and it was decided, with a vote of 74.19% that the Resolution Plan without release of pledged shares alone shall be considered.<sup>2</sup>
- 2.6. The revised resolution plan submitted by Progressive Star Finance Private Limited was considered at various subsequent CoC meetings. Notably, at the 13<sup>th</sup> CoC meeting held on 30.09.2020, it was decided that the feasibility, viability and provisions for implementation of the Resolution Plan submitted by Progressive Star Finance Private Limited would be put up for voting. Further, Progressive Star Finance Private Limited was also directed to make necessary changes and submit compliance certificate in Form H.<sup>3</sup>
- 2.7. Progressive Star Finance Private Limited submitted its final revised Resolution Plan on 06.10.2020. At the 14<sup>th</sup> CoC meeting held on 14.10.2020,<sup>4</sup> it was decided with 100% voting that the Resolution Plan without release of pledged shares (Plan size: ₹8.46 crore) was found viable and feasible.
- 2.8. The Resolution Plan was put to vote when the 15<sup>th</sup> CoC meeting took place on 28.10.2020.<sup>5</sup> Voting commenced on 24.10.2020 and went on till 26.10.2020. At the request of Punjab National Bank (PNB) and Bank of India (BoI), voting was extended till 27.10.2020. In the event, the

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<sup>2</sup> Pages 42-51 of the Application

<sup>3</sup> Pages 89-96 of the Application

<sup>4</sup> Pages 97-116 of the Application

<sup>5</sup> Pages 117-126 of the Application

Resolution Plan submitted by Progressive Star Finance Private Limited could garner only 24.45% of the votes in favour. The Plan, therefore, was voted against. Although the possibility of seeking extension of time was mooted, it did not find favour since the CoC members felt that the Resolution Plan submitted by Progressive Star Finance Private Limited had been discussed several times with the RA and put up for approval twice through e-voting and rejected both times.<sup>6</sup> The CoC, therefore, resolved to recommend liquidation of the corporate debtor.

- 2.9. The applicant feels that once the viability and feasibility of the Resolution Plan submitted by Progressive Star Finance Private Limited was considered viable and feasible at a meeting where 100% of the CoC members were present, it was surprising to see that the Resolution Plan was once again put to a formal vote on another date, when it failed to gather the requisite percentage of votes.
- 2.10. The applicant submits that a Resolution Plan that found viable and feasible by 100% of the CoC and thus approved, cannot be subsequently disapproved arbitrarily, by holding an electronic voting subsequently and not simultaneously. The applicant averred that this is contrary to regulation 39(3)(c) of the CIRP Regulations *ibid*. It also deprives the chance of any improvement by a resolution application should the situation so require. The applicant submits that the arbitrary and *mala fide* rejection of a plan that was found to both feasible and viable earlier, reflects extraneous consideration in deliberately trying to push the corporate debtor towards liquidation.<sup>7</sup>

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<sup>6</sup> Page 120, para 5 of the Application

<sup>7</sup> Page 9, para 15 of the Application

- 3. Arguments of Mr SN Mookherjee, learned Sr Counsel for the applicant**
- 3.1. Mr SN Mookherjee, learned Senior Counsel for the applicant, submitted that the corporate debtor is a corporate guarantor of a facility granted to Visa Steel Limited (VSL). On the basis that VSL had defaulted in its loans, State Bank of India (SBI) instituted a section 7 application against the corporate debtor. The CIRP commenced on 07.08.2019. At the 14th CoC meeting, 100% of the voting strength on the CoC was represented, the CoC found the resolution plan submitted by Progressive Star Finance Private Limited to be both feasible and viable. Thereafter, voting was held, and on 28.10.2020, at the next meeting it was disclosed that the voting was concluded between 19.10.2020 and 23.10.2020, with the result that the Resolution Plan was rejected. The CoC resolved that it was best for the corporate debtor to be liquidated.
- 3.2. Mr Mookherjee, learned Senior Counsel, submitted that the principal grounds of challenge in the application are that –
- (a) The applicant does not press his challenge with regard to reg.39(3) of the CIRP Regulations;
  - (b) The CoC did not keep in mind the maximisation of value of assets of the corporate debtor.
  - (c) The minutes do not disclose the reasons why the Resolution Plan was being rejected, when the same CoC had found it viable and feasible. The only reason now disclosed is in the reply of the CoC, which is to say that the admitted debt of the corporate debtor exceeds ₹6,000 crore and the financial offers under the resolution plan are ₹14.4 crore and ₹8.4 crore.<sup>8</sup>
- 3.3. The main defences raised by the respondents are as follows:
- (a) The applicant has no locus to challenge the CoC decision;

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<sup>8</sup> Page 4, para 6 of the CoC's Reply

(b) The decision reflects the commercial wisdom of CoC and no reasons are required to be disclosed. The CoC relies on the decision of the Hon'ble Supreme Court in *K. Sashidhar v Indian Overseas Bank*,<sup>9</sup> and the *Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta and Others*.<sup>10</sup>

**On locus**

3.4. On the locus to challenge the rejection of the resolution plan, Mr Mookherjee submitted that as a member of the board, the applicant has the right to prefer an appeal against an order of admission, or decision of the CoC. Therefore, the applicant herein has locus and this cannot be denied.

**On commercial wisdom**

3.5. Mr Mookherjee submits that the commercial decision of the CoC can be challenged if the objects of the IBC are not considered in the decision-making process. The only reason given for rejection is that the principal borrower has dues in excess of ₹6000 crore and the financial offer under the Resolution Plan is ₹14.4 crore (if pledged shares are released) and ₹8.4 crore (if pledged shares are not released). This is an extraneous consideration. What the CoC was required to consider is maximisation of assets of the corporate debtor. The corporate debtor never had assets which was equal to the debt, and this was in the full knowledge of the CoC. The only way of achieving the object of maximisation of value and keep it going as a going concern was to accept the Resolution Plan. Completely extraneous consideration has weighed with the CoC in rejecting the Resolution Plan, Mr Mookherjee claimed.

3.6. Mr Mookherjee relied on four decisions: -

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<sup>9</sup> (2019) 12 SCC 150 @ para 52

<sup>10</sup> (2019) SCC OnLine SC 1478 at para 48

**(a) K. Sashidhar v Indian Overseas Bank:<sup>11</sup>**

- (1) In this decision, no doubt the Hon'ble Supreme Court has held that the commercial wisdom of the CoC in rejecting or accepting a Resolution Plan is non-justiciable, in terms of paras 62, 64 and 68 of the decision. But there is also para 67 and subsequent decisions interpreting *K Sashidhar*, which cannot be ignored.
- (2) At para 66, the Hon'ble Supreme Court *inter alia* noticed the substitution of sub-section (4) of section 30 of the Code brought about in the Code *vide* IBC (Amendment) Act, 2017, which is deemed to have come into force with effect from 23.11.2017.
- (3) After noticing the same, the Hon'ble Supreme Court observed that the change brought about by the insertion of the words, “*after considering its feasibility and viability, and such other requirements as may be specified by the Board,*” is only to declare that the financial creditors ought to consider the feasibility and viability and such other requirements as may be specified by the Board, while exercising their option on the resolution plan – to approve or not to approve the same. The court went on to state that the financial creditors who are called upon to consider the proposed resolution plan would take into account all the relevant materials, including the feasibility and viability and such other requirements. Additionally, the financial creditors are also required to bear in mind that the legislative intent is to bring about resolution and revival of the corporate debtors so as to benefit not only the corporate debtor but also other stakeholders in equal measure.

**(b) Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta and Others:<sup>12</sup>**

- (1) This decision came after considering *K. Sashidhar (supra)* and *Swiss Ribbons Private Limited and another v Union of India & others.*<sup>13</sup> In para 48 thereof, the Hon'ble Supreme Court held that the limited

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<sup>11</sup> (2019) 12 SCC 150 @ para 52

<sup>12</sup> (2019) SCC OnLine SC 1478

<sup>13</sup> (2019) 4 SCC 17 : 2019 SCC OnLine SC 73



judicial review available, which can in no circumstance trespass upon a business decision of the majority of the CoC, has to be within the four corners of section 30(2) of the Code, the parameters of such review having been clearly laid down in *K. Sashidhar (supra)*.

- (2) In para 53, the Hon'ble Supreme Court noticed that the preamble of the Code does speak of maximisation of the value of assets of the corporate debtors and the balancing of the interests of all stakeholders. In para 54, the Court laid down that where the CoC exercises its commercial wisdom to arrive at a business decision to revive the corporate debtor, it must necessarily take into account these key features before it arrives at a commercial decision to pay off the dues of financial and operational creditors.
- (3) Most importantly, the court stated that while the ultimate discretion of what to pay and how much to pay each class is with the CoC, the decision must reflect the fact that it has taken into account maximising the value of assets of the corporate debtor and the fact that it has adequately balanced the interests of all stakeholders including operational creditors.
- (4) This being the case, judicial review of the Adjudicating Authority that the resolution plan as approved by the CoC has met the requirements referred to in section 30(2) would include judicial review that is mentioned in section 30(2)(e), as the provisions of the Code are also provisions of law for the time being in force.
- (5) The court went on to state that while the Adjudicating Authority cannot interfere on merits with the commercial decision taken by the CoC, the limited judicial review available is to see that the CoC has taken into account the fact that the corporate debtor needs to be kept as a going concern during the insolvency resolution process, that it needs to maximise the value of its assets, and that the interests of all stakeholders including operational creditors has been taken care of. The court held that if the Adjudicating Authority finds that on a given set of facts, the aforesaid parameters have not been kept in view, it may send a resolution plan back to the CoC to resubmit such plan after satisfying those parameters.

**(c) *Hammond Power Solutions Pvt Ltd v Sanjit Kumar Nayak & Others*:<sup>14</sup>**

- (1) In this case, Hon'ble NCLAT noticed in para 15 that if the minutes are perused, it can be hardly be that there are any reasons given by the CoC to demonstrate that it has taken care of the interests of all stakeholders (*para 15*).
- (2) Therefore, the Hon'ble NCLAT held that the resolution plan does not appear to have taken care of the interests of all stakeholders. The impugned order was set aside and the matter was remitted back to the Adjudicating Authority with directions to send the resolution plan back to the CoC for resubmission after satisfying the parameters laid down by the Hon'ble SC in the *Essar Steel (supra)* judgment.

**(d) *Ushdev International Limited*:<sup>15</sup>**

- (1) The NCLT, Mumbai Bench, in this matter was considering the question whether to accept the resolution for liquidation of Ushdev International Limited, the corporate debtor therein, in the context of rejection of a resolution plan by the CoC.
- (2) The CoC's decision to reject the resolution plan submitted by Taguda Pte. Ltd., with a voting share of 77.61% was challenged by four persons – (1) Lodha Development Management Pvt Ltd, one of the financial creditors having 1.03% share in the CoC; (2) the promoters of the corporate debtor; (iii) the employees of the corporate debtor, represented by their Association; and (iv) the unsuccessful resolution applicant. The objection raised is regarding justification of the 'commercial wisdom' claimed to be exercised by the CoC.
- (3) NCLT observed that the resolution plan was rejected despite it being more than the liquidation value. The resolution applicant was willing to put in ₹200 crore upfront within 90 days, as against the liquidation value of ₹76 crore. It was noticed that liquidation was chosen over revival because the CoC was under the erroneous impression that the receivables of the corporate debtor are worth

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<sup>14</sup> 2020 SCC OnLine NCLAT 99

<sup>15</sup> CP No.1790/IBC/NCLT/MB/MAH/2017 dated 07.11.2019

₹400-500 crore, but the time period of recovery was not certain. On the face of it, it is ascertainable that the basis on which the commercial wisdom is exercised, was not sound enough

(4) however, the time period noticed the preamble of the Code, analysing *K. Sashidhar (supra)*, and that in that case, the CoC had not applied its mind at all, much less a commercial mind, and that therefore the decision is fit to be discarded at the very threshold (para 35). A resolution plan which is otherwise fit to be approved but on some flimsy ground rejected is nothing but contravention of provision of law (para 40.2). The learned Single Member held that his reason and conscience did not allow him to let the company go into liquidation when such a better beneficial offer is already on the table. The CoC's recommendation for liquidation was overruled, and the resolution plan was approved.<sup>16</sup>

3.7. Mr Mookherjee submitted that in the present case, the Resolution Plan was both feasible and viable. The corporate debtor otherwise does not have any value to be able to pay off a debt of ₹6000 crore. It never had that kind of assets. It is nobody's case that the value that was being given was not commensurate with the value of the corporate debtor. The CoC in its commercial wisdom must only see whether the value of the concerned corporate debtor is being maximised. It is not to see the total debt of the principal debtor. Without taking in to account the relevant consideration, the CoC acted in a completely extraneous fashion. Therefore, Mr Mookherjee submitted that the matter should go back to the CoC.

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<sup>16</sup> This Adjudicating Authority observes that the above order of NCLT Mumbai Bench was challenged by SBI before the Hon'ble NCLAT in Company Appeal (AT) (Insolvency) No.1377/2019 a/w Company Appeal (AT) (Insolvency) No.7/2020 filed by Canara Bank. During the course of the appeal, the unsuccessful resolution applicant materially revised the offer from the earlier resolution plan. It was submitted that the majority of the CoC members were interested in considering the revised resolution plan. Therefore, the appeal was dismissed, but without expressing any opinion on the merits of the matter, and keeping all contentions open.

**4. Arguments of Mr Jishnu Saha, learned Sr Counsel for the CoC**

- 4.1. Opening his submissions, Mr Jishnu Saha, learned Senior Counsel appearing for the CoC, submitted that the resolution applicant whose application was not approved, has not come forward.
- 4.2. Mr Jishnu Saha, learned Senior Counsel, submitted that when we talk about a viable scheme, we talk about a scheme which satisfied the requires of the Code. When there were no matching assets of the corporate debtor, that may not be the case. That essentially means that the CoC will not have any discretion in the matter. Interestingly, all procedures that were required to be gone through, were undertaken.
- 4.3. Mr Jishnu Saha urged us to have a look at section 30 of the Code. Sub-section (2) enjoins upon the RP to examine the Resolution Plan. Under sub-section (3), the RP shall present to the CoC for its approval such Resolution Plans which confirm the conditions in sub-section (2). sub-section (4)<sup>17</sup> may – not shall – approve a Resolution Plan by a vote of 66% after considering

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<sup>17</sup> 30(4): The committee of creditors may approve a resolution plan by a vote of not less than sixty-six per cent of voting share of the financial creditors, after considering its feasibility and viability, the manner of distribution proposed, which may take into account the order of priority amongst creditors as laid down in sub-section (1) of section 53, including the priority and value of the security interest of a secured creditor and such other requirements as may be specified by the Board:

Provided that the committee of creditors shall not approve a resolution plan, submitted before the commencement of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2017, where the resolution applicant is ineligible under section 29A and may require the resolution professional to invite a fresh resolution plan where no other resolution plan is available with it:

Provided further that where the resolution applicant referred to in the first proviso is ineligible under clause (c) of section 29A, the resolution applicant shall be allowed by the committee of creditors such period, not exceeding thirty days, to make payment of overdue amounts in accordance with the proviso to clause (c) of section 29A:

Provided also that nothing in the second proviso shall be construed as extension of period for the purposes of the proviso to sub-section (3) of section 12, and the corporate insolvency resolution process shall be completed within the period specified in that sub-section

Provided also that the eligibility criteria in section 29A as amended by the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018 shall apply to the resolution applicant who has not submitted resolution plan as on the date of commencement of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018.

its feasibility and viability. What Mr Mookherjee says is that simply because the CoC found it feasible and viable, the Resolution Plan must be approved, Mr Jishnu Saha submitted.

- 4.4. Next, Mr Jishnu Saha requested us to look at regulation 39 of the CIRP regulations. Sub-regulation (3) stipulates that the CoC shall evaluate the Resolution Plans received under sub-regulation (2) as per evaluation matrix. The proviso to regulation 39(3)(a) was substituted on 07.08.2020. the proviso was removed after substitution. After substitution, there is no need for recording reasons for approving or rejecting the Resolution Plan.
- 4.5. Mr Jishnu Saha thereafter directed our attention to the averments in the application that the decision of the CoC does not reflect that it has taken into account the fact that the corporate debtor needs to be kept as a going concern and that there is need to maximise the value of the assets.<sup>18</sup> The corporate debtor has no business, no employees, no workmen. There is no indication anywhere in the application how the public interest or the purposes of the Code, is imperilled.
- 4.6. Mr Jishnu Saha read out from Agenda Item No.4 of the 14<sup>th</sup> CoC minutes:<sup>19</sup>
- “2. The members of the CoC discussed the Resolution Plan submitted by Progressive Star Finance Pvt Ltd dated 06.10.2020 and found the same to be feasible and viable for following reasons:*
- (a) The Resolution Plan provides for payment of resolution amount within 30 days of the Hon'ble NCLT approval date.*
- (b) The resolution applicant has got adequate liquid funds by way of various investments to meet this resolution amount.*
- (c) As per Request for Resolution Plans (RFRP), the resolution applicant is to provide for performance security to the extent of 15% of resolution amount*

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<sup>18</sup> Page 10, para 16

<sup>19</sup> Page 100, para 2 of the Application

*within 10 days of approval of resolution plan by CoC which provides additional comfort to the creditors.*

*(d) The resolution applicant has adequate experience in real estate sector.”*

- 4.7. The extent of assets of corporate debtor was also noted. It was informed that the corporate debtor has nine properties and shares of VSL. Out of these nine properties, three are mortgaged to Writers and Publishers Private Limited.<sup>20</sup> Therefore, contrary to what has been stated in para 3 of the application, there was complete application of mind on the part of the CoC.
- 4.8. Mr Jishnu Saha submitted that the CoC is not required to give reasons for approval or rejection.
- 4.9. Mr Jishnu Saha then led us through the minutes of the 15<sup>th</sup> CoC meeting.<sup>21</sup> Agenda Item No.3 reveals that both the plans were put up for consideration. Both plans did not garner the requisite shares. Today, the question is whether the CoC decision is arbitrary or unreasonable or contrary to the spirit of the Code. The Code speaks in no uncertain terms that the corporate debtor should be kept going, to the extent that it can be. The argument that is being put forward is to hedge the commercial wisdom of the CoC with the maximum value being offered. Mr Jishnu Saha pointed out the applicant does not know the liquidation value.<sup>22</sup>
- 4.10. Mr Jishnu Saha then turned his attention to the judgments cited by Mr Mookherjee. He submitted that in *Hammond (supra)*, the court was really concerned with the fact the OCs were not provided for, and hence the plan must fail. Therefore, it was rejected and sent back. So far as *Ushdev (supra)* is concerned, there the court was not prepared to accept that the company

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<sup>20</sup> Page 102, para 5 of the Application

<sup>21</sup> Page 117 of the Application

<sup>22</sup> Page 10, para 18 of the Application

cannot be revived. There were 400 crores to be received by the corporate debtor, and yet the CoC felt that the company should be sent into liquidation. However, the Adjudicating Authority felt that in these circumstances, the resolution cannot be said to be impossible. In so far as the other judgments relied on by Mr Mookherjee is concerned, there are stray observations made which are sought to be relied upon, Mr Jishnu Saha submitted.

- 4.11. Mr Jishnu Saha submitted that the unsuccessful RA has not approached this Authority. In this connection he drew attention to para 52 and 64 of *K. Sashidhar (supra)*. Quoting from para 52, Mr Jishnu Saha observed that upon receipt of a “rejected” resolution plan, the Adjudicating Authority is not expected to do anything more, but is obligated to initiate liquidation process under section 33(1) of the Code. The legislature has not endowed the Adjudicating Authority with the jurisdiction or authority to analyse or evaluate the commercial decision of the CoC, much less to enquire into the justness of the rejection of the resolution plan by the dissenting financial creditors. ... The commercial wisdom of the CoC has been paramount status without any judicial intervention, for ensuring completion of the stated processes within the timelines prescribed by the Code. There is an intrinsic assumption that financial creditors are fully informed about the viability and feasibility of the corporate debtor and of the resolution plan. Therefore, the legislature has made commercial wisdom of the CoC non-justiciable before the Adjudicating Authority.
- 4.12. On the question of locus, Mr Jishnu Saha submitted that when the RA did not come forward to challenge, what is the interest of a member of the suspended Board to challenge the rejection? There lies the question of locus. Simply because some rights are available to the members of the suspended board to challenge an order of admission, it cannot be said that the suspended board can challenge the decision of CoC to reject a Resolution

Plan, particularly in the context of total outstanding and without knowledge of the liquidation value. He is not an aggrieved party. Therefore, he should not have a locus to maintain a challenge, Mr Jishnu Saha urged strongly.

**5. *Arguments of Mr Ajay Gaggar, learned Counsel for the RP***

5.1. Mr Ajay Gaggar, learned Senior Counsel appearing for the RP, supported the arguments of Mr Jishnu Saha, learned Senior Counsel appearing for the CoC. He stated that there is no role for the RP *apropos* this application. He, however, submitted that feasibility and viability of the resolution plan submitted by Progressive Star Finance Private Limited were actually considered by the CoC. He also questioned the locus of the applicant, as promoter of the corporate debtor, to question the rejection of the resolution plan.

**6. *Analysis of the rival contentions and findings thereon***

6.1. We have carefully considered the pleadings, the arguments of the learned senior counsel appearing for the applicant and for the CoC, and the learned counsel appearing for the RP. We have also weighed the judgments quoted by the learned senior counsel for the applicant and for the CoC.

6.2. On the question of locus, the argument was that when the unsuccessful resolution applicant has not come before the Adjudicating Authority, how can the promoter of the corporate debtor challenge the CoC's decision. He is not a party affected.

6.3. Though neither side cited any authorities, we find that in *Deepak Singhania v LML Ltd & others*,<sup>23</sup> the Hon'ble NCLAT has answered this question. In that case, an argument was made that the Adjudicating Authority should have given an opportunity to call for resolution plan before passing order of liquidation. The Hon'ble NCLAT rejected this argument, holding that the promoter cannot challenge such rejection as he is not supposed to know

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<sup>23</sup> [2018] ibclaw.12 21 NCLAT decided on 12.07.2018



whether the resolution plan was in accordance with section 30(2) of the Code or not.

- 6.4. The main person to be aggrieved would be the unsuccessful resolution applicant. The promoter of the corporate debtor certainly cannot have a grievance greater than the unsuccessful resolution applicant himself. Therefore, we hold that the applicant, in his capacity as promoter of the corporate debtor, does not have the locus to challenge the rejection of the plan.
- 6.5. In the normal course, the application ought to be dismissed on this ground alone. However, both sides have argued the matter on merits along with the question of locus, and the same has not been urged to be taken up separately as a preliminary issue before deciding the main application. Therefore, we have proceeded to examine the issues without reference to the issue of locus.
- 6.6. With the issue of locus out of the way, the primary issue to be considered is the question whether the CoC's decision in the matter rejecting the resolution plan submitted by Progressive Star Finance Private Limited was *mala fide* or borne out of extraneous considerations, warranting interference by the Adjudicating Authority.
- 6.7. It was inevitable that both the primary contestants – the applicant and the CoC – would rely on the *K. Sashidhar (supra)* and the *Essar Steel (supra)* judgments of the Hon'ble Supreme Court. The RP, quite naturally, is playing the role of a disinterested observer in these proceedings.
- 6.8. Both *K. Sashidhar (supra)* and *Essar Steel (supra)* predicated a circumstance where the CoC would take an informed commercial decision on the feasibility and viability of the resolution plans under consideration before it. In *K. Sashidhar (supra)*, in para 52, the Hon'ble Supreme Court held that There is an intrinsic assumption that financial creditors are fully informed

about the viability and feasibility of the corporate debtor and of the resolution plan. Therefore, the legislature has made commercial wisdom of the CoC non-justiciable before the Adjudicating Authority. It would be very easy to be persuaded that once the CoC has taken a particular stand *apropos* the resolution plan, every authority must adopt a *laissez faire* attitude.

- 6.9. Mr Mookherjee, learned Senior Counsel appearing for the applicant, submitted that the CoC is supposed to keep in mind relevant factors while voting on a resolution plan. It may be that the fact of the corporate debtor not having the ability to pay off a debt of ₹6000 crore was already known to the CoC. However, we see in the present case that deliberations at the CoC do not reflect which way the CoC was inclined to go when it came to the resolution plan itself. The plan as well as the steps to be taken post liquidation have both been considered at the same 14<sup>th</sup> CoC meeting of 14.10.2020.
- 6.10. In the present case, we see from the 14<sup>th</sup>CoC meeting minutes of 14.10.2020, that Agenda Item No.4 had two limbs – (i) to discuss the feasibility, viability and provision for implementation of the resolution plan in terms of sections 30(4) and 31(1) of the Code; and (ii) to discuss matters pertaining to regulations 39B,<sup>24</sup> 39C<sup>25</sup> and 39D<sup>26</sup> of the CIRP Regulations. This is in line with regulation 39B, which enjoins upon the CoC, while approving a resolution plan under section 30(4) or deciding to liquidate the corporate debtor under section 33(2), to make a best estimate of the amount required to meet liquidation costs, in consultation with the RP, in the event an order for liquidation is passed under section 33. These minutes, therefore, do not reveal any predisposition of mind on the part of the CoC as to which way it

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<sup>24</sup> Regulation 39B: Meeting liquidation cost

<sup>25</sup> Regulation 39C: Assessment of sale as a going concern

<sup>26</sup> Regulation 39D: Fee of the liquidator

was inclined to go. It maintained equidistance from both options, while deliberating on both.

- 6.11. The minutes of 14.10.2020 also records that the resolution plan submitted by Progressive Star Finance Private Limited passed the “*feasibility and viability*” test at the 14<sup>th</sup> CoC meeting held on 14.10.2020.<sup>27</sup> The relevant portion of the minutes has been extracted at para 4.6 (*supra*). No dissent is voiced by any member of the CoC. Questions were raised and answered as to the constitution of the Monitoring Committee. Agenda Item No.5 is about CIRP costs and is of no relevance to us. Agenda Item No.6 was to put up for approval the resolution plan dated 06.10.2020 submitted by Progressive Star Finance Private Limited (*incorrectly mentioned in the agenda heading as “Progressive Star Finance Limited”*).
- 6.12. As things turned out, the resolution plan did **not** pass muster when the voting lines were opened up between 19.10.2020 and 23.10.2020. Thereafter, as required under the second proviso to regulation 39(3B)<sup>28</sup> of the CIRP Regulations, the Resolution Plan with option to release pledged shares, which received the highest votes in the first round of voting but below the requisite 66%, was put to vote a second time, when it received only 24.45% of the votes.
- 6.13. A question arises here: when it had already been decided at the 7<sup>th</sup> CoC meeting held on 12.06.2020 with a vote of 74.9%<sup>29</sup> that the Resolution Plan

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<sup>27</sup> Page 100 of the Application (part 14<sup>th</sup> CoC meeting minutes of 14.10.2020)

<sup>28</sup> (3B) Where two or more resolution plans are put to vote simultaneously, the resolution plan which receives the highest votes but not less than the requisite votes, shall be considered as approved:

\* \* \*

Provided further that where none of the resolution plans receives requisite votes, the committee shall again vote on the resolution plan that received the highest votes, subject to the timelines under the Code.

<sup>29</sup> Recorded in the 8<sup>th</sup> CoC meeting minutes at p.54 of the application – Agenda Item No.3(iv).

without release of pledged shares alone shall be considered, what was the need to place the other resolution plan with release of pledged shares for voting at the 14<sup>th</sup> CoC meeting held on 14.10.2020? There are no answers to be had from the minutes of the CoC meetings attached to the application. However, the answer to that question does not materially affect the decision in the present application.

- 6.14. Therefore, at best, the CoC could be accused of playing its cards very close to its chest. Feasibility and viability of the resolution plan are not the only elements required to be gone into. It appears to us from a careful reading of the minutes of the 14<sup>th</sup> CoC meeting that the CoC assessed the feasibility and viability of the resolution plan, but did not, in its wisdom, choose to go with the plan. Just because the CoC found the plan to be both feasible and viable, it cannot be said that the CoC ought to have approved the resolution plan. They may have good reasons to have reservations about the plan itself, and the law does not require them to spell out such reasons.
- 6.15. Mr Mookherjee's arguments to the effect that the CoC's commercial wisdom should be based on material considerations, are no doubt impressive. However, we do not think that in the present case, extraneous considerations may have weighed with the CoC. We find from the minutes of CoC meetings previous to the 14<sup>th</sup>, that several members have expressed that the offer from the resolution applicant should be enhanced.<sup>30</sup> Some members even quoted a ballpark figure - the enhancement that was expected was between 15%<sup>31</sup> and 50%.<sup>32</sup> At the 13<sup>th</sup> CoC meeting held on 30.09.2020 where CoC members having 95.52% vote share were present, all the members were in agreement that as already more than adequate time was given for deliberations, no further time is required and that the resolution

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<sup>30</sup> Pages 57-58 of the Application, 8<sup>th</sup> CoC meeting held on 29.06.2020

<sup>31</sup> Page 58 (representative of HUDCO's views)

<sup>32</sup> Page 66 of the Application, para 5, 10<sup>th</sup> CoC meeting held on 12.08.2020

plan be put to vote immediately after the decision of the Adjudicating Authority in the application filed by Mr Vishal Agarwal, shareholder of the corporate debtor was received.

- 6.16. Therefore, it is clear from the above that the CoC had reached the end of its tether as far as the plan size was concerned. If anything, in the present case, though it has not been spelt out in so many words, and rightly so because the law does not so require, the consideration that weighed with the CoC in rejecting the resolution plan is visible in plain sight. Therefore, we are unable to persuade ourselves to agree with Mr Mookherjee that extraneous considerations have weighed with the CoC in rejecting the resolution plan submitted by Progressive Star Finance Private Limited.
- 6.17. After the matter was reserved for orders on 09.02.2021, the Hon'ble Supreme Court decided *Kalparaj Dharamshi v Kotak Investment Advisors Limited*,<sup>33</sup> on 10.03.2021. Taking note of the previous decisions of the Supreme Court, it was once again emphasised that the legislative scheme is unambiguous in not providing any ground to challenge the commercial wisdom of the CoC before the Adjudicating Authority. Therefore, the court ought to cede ground to the commercial wisdom of the creditors rather than assess the plan on the basis of quantitative analysis.
- 6.18. If anything, in the present case, since the feasibility and viability of the resolution plan was already considered and approved by the CoC, the only other consideration that appears to have weighed in the CoC's mind, as borne out from the previous CoC meeting minutes mentioned at para 6.11 *supra*, is the quantitative aspect of the plan. That part falls squarely within the domain of the CoC, brooking no interference from the Adjudicating

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<sup>33</sup> 2021 SCC OnLine SC 204

Authority. *Kalparaj Dharamshi (supra)* forbids the Adjudicating Authority from undertaking any such misadventure.

**7. Orders in IA No.1293/2020**

7.1. The result of the foregoing discussion is that **IA No.1293/KB/2020 is dismissed as devoid of any merit**. Consequently, IA No.1449/KB/2020, the application filed by the RP seeking liquidation for the corporate debtor is taken up for orders.

**8. IA No.1449/KB/2020**

8.1. IA No.1449/KB/2020 is an application filed by the RP under section 33(1) of the Code seeking liquidation of the corporate debtor in view of the fact that the two resolution plans submitted by Progressive Star Finance Private Limited did not secure the requisite votes from the CoC.

8.2. We have dismissed the challenge to the rejection of the resolution plans submitted by Progressive Star Finance Private Limited, *vide* order para 7.1 *supra* in IA No.1293/2020. Since there are no other resolution plans for consideration, the only option is to order liquidation of the corporate debtor.

8.3. The CoC has, at its 15<sup>th</sup> meeting held on 28.10.2020,<sup>34</sup> decided that no further efforts will be feasible to negotiate further with the resolution applicant, hence, suitable application be filed under section 33(1) of the Code be filed with the Adjudicating Authority.

8.4. Section 33(1)(a) of the Code lays down *inter alia* that where the Adjudicating Authority does not receive a resolution plan under section 30(6) *ibid*, it shall pass an order requiring the corporate debtor to be liquidated.

8.5. Mr Ashok Kumar Gulla, the outgoing RP, has given his consent to act as liquidator, as required in terms of section 34(1) of the Code.

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<sup>34</sup> Agenda Item No.3, clause 9 at 220 of the Application (IA No.1449/KB/2020)

- 8.6. We, therefore, hereby order as follows: -
- a. IA No.1449/KB/2020 filed by Mr. Ashok Kumar Gulla, RP of Visa International Limited, the corporate debtor, is allowed and the corporate debtor is ordered to be liquidated in terms of section 33(1)(a) of the Code;
  - b. Mr. Ashok Kumar Gulla [Reg. No.IBBI/IPA-001/IP-P00188/2017-18/10367, the Applicant/RP herein, is hereby appointed as liquidator as provided under section 34(1) of the Code, subject, however, to his possessing a valid Authorisation for Assignment (AFA) issued by the Insolvency Professional Agency (IPA) of which he is a professional member, in terms of regulation 7A of the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2019.
  - c. The Liquidator shall initiate liquidation process as envisaged under Chapter-III of the Code and the Insolvency & Bankruptcy Board of India (Liquidation Process) Regulations, 2016.
  - d. Public Notice shall be issued in the same newspapers in which advertisements were issued earlier, stating that the corporate debtor is in liquidation.
  - e. All the powers of the Board of Directors, and of key managerial persons, shall cease to exist in accordance with section 34(2) of the Code. All these powers shall henceforth vest in the Liquidator.
  - f. The personnel of the corporate debtor are directed to extend all assistance and co-operation to the Liquidator as required by him in managing the liquidation process of the corporate debtor.
  - g. On initiation of the liquidation process but subject to section 52 of the Code, no suit or other legal proceeding shall be instituted by or against the corporate debtor save and except the liberty to the liquidator to institute suit or other legal proceeding on behalf of the corporate debtor with prior approval of this Adjudicating Authority, as provided in section 33(5) of the Code read with its proviso.

IN THE NATIONAL COMPANY LAW TRIBUNAL  
KOLKATA BENCH

IA No.1293/KB/2020 & IA 1449/KB/2020 in CP (IB) No.759/KB/2017  
[In the matter of Visa International Ltd]

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- h. In accordance with section 33(7) of the Code, this liquidation order shall be deemed to be a notice of discharge to the officers, employees and workmen of the corporate debtor except to the extent of the business of the corporate debtor continued during the liquidation process by the Liquidator.
- i. In terms of section 33(1)(b)(iii), the Liquidator shall file a copy of this Order with the Registrar of Companies, West Bengal, Kolkata, within whose jurisdiction the corporate debtor is been registered. Additionally, the Registry shall also forward a copy of this Order to the Registrar of Companies, West Bengal, Kolkata.
- 8.7. **IA (IB) No.1449/KB/2020** shall stand disposed of in accordance with the above directions. **IA (IB) No.1293/KB/2020** is already dismissed *vide* para 7.1 *supra*.
- 8.8. **CP (IB) No.759/KB/2017** to come up for filing of progress report on **17.07.2021**.
- 8.9. The Registry is directed to send e-mail copies of the order forthwith to all the parties and their Ld. Counsel for information and for taking necessary steps.
- 8.10. Certified copy of this order may be issued, if applied for, upon compliance of all requisite formalities.

**Harish Chander Suri**  
**Member (Technical)**

**Rajasekhar V.K.**  
**Member (Judicial)**

11.05.2021