

**IN THE NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD (COURT – II)**

IA No. 431 of 2021

IN

CP (IB) No. 586 of 2019

[Under Section 60(5) r.w Section 31(2) of the Insolvency and Bankruptcy Code, 2016]

In The Matter Between:

PANI LOGISTICS

....APPLICANT

Vs.

VIKASH G JAIN RP OF
SONA ALLOYS PVT. LTD. & ORS.

....RESPONDENT

In The Matter of:

NOBLE RESOURCE INTERNATIONAL PVT. LTD.

...FINANCIAL CREDITOR

V/s.

SONA ALLOYS PVT. LTD.

...CORPORATE DEBTOR

Order Pronounced on: 06/02/2023

Coram:

**DR. DEEPTI MUKESH
MEMBER (JUDICIAL)**

**AJAI DAS MEHROTRA
MEMBER (TECHNICAL)**

MEMO OF PARTIES

PANI LOGISTICS

No.35 A, Ward No.19,
Patel Nagar, 3rd Cross,
Opp: Post Office,
Ananthpur Road, Ballari,
Karnataka – 583 101

.....Applicant

V/s.

1. **Mr. Vikash G Jain,**
Resolution Professional,
Sona Alloys Private Limited
Registered Address at:
204, Wall Street - !, Opp. Orinent Club,
Nr. Gujarat College, Ellis Bridge,
Ahmedabad -380 006
2. **Committee of Creditors,**
Sona Alloys Private Limited
Represented by its lead stakeholder,
Rare Asset Reconstruction Limited
104 – 106, Gala Argos, Bs. Harikrupa Tower,
Gujarat College Road,
Ahmedabad – 380 006.
3. **MTC Business Private Limited**
401, 4th Floor, Navkar Commercial Complex,
Sr. M.V. Road, Andheri (East)
Mumbai, Maharashtra – 400 069

.... Respondents

Appearance:

For the Applicant : Mr. Karan Sanghani, Adv.
For the Respondent : Mr. Jaimin Dave, Adv., Mr. Mihir Thakore, Sr. Adv.,
Mr. Krishnendu Dutta, Sr. Adv.

ORDER

1. The present application is filed by M/s. Pani Logistics against Mr. Vikash G Jain, Resolution Professional and Committee of Creditors of M/s Sona Alloys Private Limited (under CIRP) and M/s MTC Business Private Limited, the Successful Resolution Applicant in the CIRP of M/s. Sona Alloys Private Limited u/s 60(5) r.w Section 31(2) of IBC, 2016 claiming following reliefs:

- “i. Reject the Resolution Plan (Annexure-A1) submitted by the Resolution Applicant (Respondent No.3, MTC Business Pvt. Ltd.);*
- i. Direct the Respondent No.1, Resolution Professional to issue Public Announcement for submission of fresh Resolution Plans;*
- ii. Pass any other order / directions as this Hon'ble Tribunal may deem fit and proper in the facts and circumstances of the case”.*

2. Applicant in present IA has made out case for rejection of the Resolution Plan mainly on the ground stated in para 22 to 27 of the IA No.431 of 2021, which are reproduced below for benoivalent reference:

“22. As per the provisions of the Code and the Regulations made thereunder, a Resolution Plan must fulfill the following criteria for it to be viable;

- (a) The Resolution Plan must be fair and equitable in terms of settlement of claims of the Operational Creditors vis-as-vis the Financial Creditor.*
- (b) The Resolution Applicant must provide for performance security in accordance with Regulation 36B(4A) of the Regulations, 2016 and the same should be sufficient to*

ensure the performance of obligations by the Resolution Applicant according to the approved plan.

- (c) *The Resolution Professional is obligated to submit evidence of receipt of performance security (as required under Regulations 36B (4A) along with the certificate in Form H of the Schedule.*
23. *Contrary to the requirements mentioned above, the Resolution Plan submitted by the Respondent No.3 does not ensure balancing the interest of all the stakeholders and is contrary to Section 30(2)(b) of the Insolvency and Bankruptcy Code, 2016. The Section 30(2)(b) of the Code requires that the Operational Creditors be paid at least the liquidation value and be treated fairly. Contrary to this, the Resolution Plan approved by the Committee of Creditors of the Corporate Debtor does not treat the operational creditors equitably and fairly as required by the mandate of the Code, 2016.*
24. *The Resolution Plan undermines the interest of the Operational Creditors. The Resolution Plan provides for payment of Rs.365.85 Crores to the secured financial creditors as against the admitted claim of Rs.1696.82 crore, while the application against the Resolution Professional for having rejected the claims are still pending before this Tribunal in I.A. No.457, 458, 507, 508 of 2020. The claim of the secured financial creditors agreed upon by the Respondent No.3 to be paid is equivalent to 21.56%.*
25. *Contrary to the aforementioned settlement, the claims of the operational creditors is unjustly paid under the Resolution Plan and in contravention to the Code and the Regulations, 2016. As against the admitted claim of Rs.114.7 Crores, only Rs.0.19 Crores is approved by the Committee of Creditors to be paid as per the Resolution Plan to the Operational Creditors. This is equivalent to approximately 0.096% of the admitted claims of the Operational Creditors other than the statutory dues.*

<i>Category</i>	<i>Admitted Claim</i>	<i>Payment as per Plan</i>	<i>Percentage of Admitted Claim paid in Resolution Plan</i>
<i>Financial Creditors</i>	<i>Rs.1696.82 Crore</i>	<i>Rs.365.85 Crores</i>	<i>21.56%</i>
<i>Operational Creditors</i>	<i>Rs.114.7 crores</i>	<i>Rs.0.19 Crores</i>	<i>0.096%</i>

26. *The Regulations stipulate that the performance security be provided by the Resolution Applicant pursuant to approval of the plan by the CoC. The Respondent No.3 failed to provide 'sufficient' performance security. As per the Resolution Plan, the Respondent No.3 had agreed to provide merely 10 crore as performance security in the form of Bank Guarantee and the same is insufficient as against the sanction of Rs.808 Crores involved in the Resolution Plan.*
27. *Additionally, the Respondent No.1, Resolution Professional has failed to produce evidence of receipt of performance security as required by Regulation 39 (4) of the Regulations, 2016. In fact the IA filed before this Hon'ble Tribunal seeking approval of Resolution Plan states that performance security provided. However, only certificate in Form- H is filed and no evidence of performance security is provided."*
3. On perusal of the objections of the Applicant to the resolution plan, it is apparent that the objections can be categorized as below:
- (i) The Operational Creditors have been paid a meagre amount of (0.096%) of their total claim as against the Financial Creditors who have been proposed to be given 21.56% of their claims in the resolution plan.

- (ii) Insufficiency of the performance guarantee amount of Rs.10 crore as against the resolution plan of Rs.808 Crores.
 - (iii) Lack of evidence regarding receipt of performance security.
4. The grounds for objections raised by the Applicant are discussed item-wise as below:
- (i) In the resolution plan, Financial Creditors are being paid Rs.365.85 Crores as against the claim of Rs. 1696.82 Crores, i.e only 21.56% of the admitted claim and on the other hand, Operational Creditors are being paid **0.19** Crores (stated in the pleadings) as against the admitted claim of Rs. 114.7 Crores, which comes to 0.096% of the admitted claim. A reference to Sub-section 2 of Section 30 of the IBC, 2016 is necessary at this stage. The relevant portion read as under:

“(2) The resolution professional shall examine each resolution plan received by him to confirm that each resolution plan—

(a)

(b) provides for the payment of debts of operational creditors in such manner as may be specified by the Board which shall not be less than—

(i) the amount to be paid to such creditors in the event of a liquidation of the corporate debtor under section 53; or

(ii) 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 in sub-section (1) of section 53,

whichever is higher, and provides for the payment of debts of financial creditors, who do not vote in favour of the resolution plan, in such manner as may be specified by the Board, which shall not be less than the amount to be paid to such creditors in accordance with sub-section (1) of section 53 in the event of a liquidation of the corporate debtor.

The provisions of Section 53 of the IBC, 2016 regarding distribution of assets on liquidation read as under:

*“53. (1) Notwithstanding anything to the contrary contained in any law enacted by the Parliament or any State Legislature for the time being in force, the proceeds from the sale of the liquidation assets **shall be distributed in the following order of priority** and within such period and in such manner as may be specified, namely :—*

(a) the insolvency resolution process costs and the liquidation costs paid in full;

(b) the following debts which shall rank equally between and among the following :—

(i) workmen’s dues for the period of twenty-four months preceding the liquidation commencement date; and

(ii) debts owed to a secured creditor in the event such secured creditor has relinquished security in the manner set out in section 52;

(c) wages and any unpaid dues owed to employees other than workmen for the period of twelve months preceding the liquidation commencement date;

(d) financial debts owed to unsecured creditors;

(e) the following dues shall rank equally between and among the following:—

(i) any amount due to the Central Government and the State Government including the amount to be received on account of the Consolidated Fund of India and the Consolidated Fund of a State, if any, in respect of the whole or any part of the period of two years preceding the liquidation commencement date;

(ii) debts owed to a secured creditor for any amount unpaid following the enforcement of security interest;

(f) any remaining debts and dues;

(g) preference shareholders, if any; and

(h) equity shareholders or partners, as the case may be.

(2) Any contractual arrangements between recipients under sub-section (1) with equal ranking, if disrupting the order of priority under that sub-section shall be disregarded by the liquidator.

(3) The fees payable to the liquidator shall be deducted proportionately from the proceeds payable to each class of recipients under sub-section (1), and the proceeds to the relevant recipient shall be distributed after such deduction.

Explanation.—For the purpose of this section—

*(i) it is hereby clarified that at each stage of the distribution of proceeds in respect of a class of recipients that rank equally, each of the debts will either be paid in full, or will be **paid in equal proportion within the same class of recipients, if the proceeds are insufficient to meet the debts in full;** and*

(ii) the term “workmen’s dues” shall have the same meaning as assigned to it in section 326 of the Companies Act, 2013.

The conjoint reading of Section 30 & Section 53 shows that the order of priority specified is such that the Financial Creditors have preference over Operational Creditors. The Secured Financial Creditors are covered by Section 53(1)(b)(ii) and Unsecured Financial Creditors are covered by Section 53(1)(d). The Operational Creditors are to be considered thereafter having lower priority and are covered by Section 53(1)(f). Since the Financial Creditors have not been paid in full, the Operational Creditors cannot claim a higher amount. No violation of the provisions of the IBC, 2016 and Regulations there under is noticed in the distribution of resolution proceeds to Financial Creditors and Operational Creditors

- (ii) In para 26 of the application, the Applicant has questioned the sufficiency of the performance security required to be given by the Resolution Applicant. The relevant provisions regarding performance security are given in Regulation 36B (4A) which is reproduced herein for benevolent reference:

36B. Request for resolution plans.

[(4A) The request for resolution plans shall require the resolution applicant, in case its resolution plan is approved under sub-section (4) of section 30, to provide a performance security within the time specified therein and such performance security shall stand forfeited if the resolution applicant of such plan, after its approval by the Adjudicating Authority, fails to implement or contributes to the failure of implementation of that plan in accordance with the terms of the plan and its implementation schedule.

Explanation I. – For the purposes of this sub-regulation, “performance security” shall mean security of such nature, value, duration and source, as may be specified in the request for resolution plans with the approval of the committee, having regard to the nature of resolution plan and business of the corporate debtor.

Explanation II. – A performance security may be specified in absolute terms such as guarantee from a bank for Rs. X for Y years or in relation to one or more variables such as the term of the resolution plan, amount payable to creditors under the resolution plan, etc.]”

As stated in explanation-1 of Regulation 36B (4A), “performance security” shall mean security of such nature, value, duration and source, as may be specified in the request for resolution plans with the approval of the committee, having regard to the nature of resolution plan and business of the corporate debtor. The Applicant has not given any cogent reason for considering that performance security is insufficient except the bald statement that it is only Rs.10 crore compared to the Resolution Plan of Rs.808 crores. In the present case, the quantum of performance security has been decided by the CoC in its own wisdom. In view of the Regulations stated above and the approval of the CoC, challenge to the Resolution Plan on the ground of insufficiency of performance security does not hold good. The fixation of the quantum of performance security strictly lies in the domain of CoC, and the Adjudicating Authority cannot sit in judgement over its sufficiency, or otherwise.

5. In para 27, the Applicant has stated that the Resolution Professional has failed to produce evidence of receipt of performance security as required

by Regulation 39(4). It is verified in Form – H and the bank statement filed by the RP that the performance security of Rs.10 Crore was deposited on 30.03.2021 in the account of Corporate Debtor as recorded in the resolution plan (Page 166 of IA 314/AHM/2021). Thus, it is seen that the amount of Rs.10 Crore, being performance security was duly received by the Resolution Professional.

6. The Hon'ble Supreme Court in the case of Vallal RCK Vs. Siva Industries and Holdings Limited and Ors. while referring to the earlier judgements, reiterated as follows:

“21. This Court has consistently held that the commercial wisdom of the CoC has been given paramount status without any judicial intervention for ensuring completion of the stated processes within the timelines prescribed by the IBC. It has been held 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. They act on the basis of thorough examination of the proposed resolution plan and assessment made by their team of experts. A reference in this respect could be made to the judgments of this Court in the cases of K. Sashidhar v. Indian Overseas Bank and Others², Committee of Creditors of Essar Steel India Limited through Authorised Signatory v. Satish Kumar Gupta and Others³, Maharashtra Seamless Limited v. Padmanabhan Venkatesh and Others⁴, Kalpraj Dharamshi and Another v. Kotak Investment Advisors Limited and Another⁵, and Jaypee Kensington Boulevard Apartments Welfare Association and Others v. NBCC (India) Limited and Others⁶.

7. In the present case, the resolution plan has been approved by the CoC with 99.732% voting in its favour. The requirements of performance guarantee, its sufficiency and receipt before approval of the Resolution plan are subject to the commercial wisdom of the CoC. The distribution

of proceeds available in the Resolution plan has to follow the priority given in Section 53 of the IBC, 2016. We do not find any irregularity in this regard in the present resolution plan. The objection raised by the Applicant is, hence, rejected and IA 431/AHM/2021 is disposed of as dismissed. No order as to cost.

S/d-

**AJAI DAS MEHROTRA
MEMBER (TECHNICAL)**

S/d-

**DR. DEEPTI MUKESH
MEMBER (JUDICIAL)**

Prakash/ Steno/Rahul/LRA