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SUCCESSFUL RESOLUTION PLAN NOT PERMITTED TO BE WITHDRAWN UNDER IBC: NCLAT

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INTRODUCTION

Recently, the Hon'ble National Company Law Appellate Tribunal has passed an order reiterating that once a resolution plan is approved by the Committee of Creditors (CoC), the successful resolution applicant cannot be permitted to be withdraw its plan.

RELEVANT FACTS

- Kundan Care Products Limited (Resolution Applicant), being the successful resolution applicant in the corporate insolvency resolution process (CIRP) of Astonfield Solar (Gujarat) Pvt. Ltd. (Corporate Debtor), whose resolution plan was approved by the CoC, filed an application before the Hon'ble National Company Law Tribunal (NCLT) praying for withdrawal of its resolution plan citing the plan to be unfit for implementation and commercially unviable on account of delay in its approval. In this regard, the NCLT held that it has no jurisdiction to permit withdrawal of a resolution plan which has been approved by the CoC. Further, taking note that another matter where similar request for withdrawal of resolution plan is made is sub-judice before the Hon'ble Supreme Court, NCLT held that it will not be appropriate for NCLT to deal with this issue.
- Aggrieved by the above order, the Resolution Applicant filed an appeal before the Hon'ble National Company Law Appellate Tribunal (NCLAT) challenging the same.

CONTENTIONS OF PARTIES

- The Resolution Applicant submitted *inter alia* that there is no basis for NCLT's finding that it has no power to allow withdrawal of a Resolution Plan approved by CoC. Further, IBC does not contain any provision to compel specific performance of a resolution plan and that a plea for withdrawal will have to be accepted if the plan is found unviable and unfit for implementation.
- The resolution professional of the Corporate Debtor (Respondent No. 1), placing reliance on the judgment passed by NCLAT in "*Committee of Creditors of Educomp Solutions Ltd. and Ebix Singapore Pte. Ltd. & Anr.*" ("*Educomp Judgment*"), argued *inter alia* that the appeal filed by the Resolution Applicant is not maintainable. In *Educomp Judgment*, the NCLAT

held, that after approval of the resolution plan by the CoC, NCLT has no jurisdiction to entertain or permit a withdrawal application filed by the Resolution Applicant

- On behalf of the CoC of the Corporate Debtor (Respondent No. 2), it was argued *inter alia* that once a resolution plan is approved, it becomes a binding contract and cannot be permitted to be withdrawn.

CONSIDERATIONS BY NCLAT

- The NCLAT took note of Respondent No.1's argument that the present case is squarely covered by its decision in Educomp Judgment, wherein NCLAT overturned the order of NCLT which originally permitted withdrawal of a resolution plan approved by the CoC of Educomp Solutions Limited.

In Educomp Judgment, NCLAT held that NCLT cannot enter into the arena of majority decision of CoC and once the Resolution Applicant has accepted the conditions of resolution plan, it was not open to it to make a U-turn and wriggle out of the liabilities under the resolution plan.

- NCLAT further stated that, a resolution applicant whose resolution plan stands approved by CoC cannot be permitted to alter his position to the detriment of various stakeholders after pushing out all potential rivals during the bidding process.
- Further, there is no express provision in IBC allowing a successful resolution applicant to stage a U-turn and frustrate the entire exercise of CIRP.
- Additionally, in the event if a successful resolution applicant is permitted to walk out with impunity, the corporate debtor's depleting value would leave all stakeholders in a state of devastation.
- Accordingly, NCLAT held that the sanctity of the resolution process must be maintained and a resolution plan which has been approved by the CoC cannot be permitted to be withdrawn.

PRINCIPLE LAID DOWN IN THE JUDGMENT

- NCLAT has in the present judgment clarified that despite the resolution plan becoming binding on the corporate debtor and all stakeholders only after the same is approved by NCLT in terms of Section 31(1) of IBC, a resolution plan once approved by the CoC would become binding on the resolution applicant.

RELIANCE ON EDUCOMP JUDGMENT

- We understand that the present judgment principally relies on the position taken by the NCLAT in the Educomp Judgment.
- In the aforesaid matter, the order for commencement of CIRP of Educomp Solutions Limited (Educomp) was passed by NCLT on 30 May 2017. In the CIRP, the resolution plan of Ebix Singapore Pte. Ltd. (Ebix) was approved by the CoC, and the same was filed before NCLT on 07 March 2018 for approval. Further, while Ebix's resolution plan remained pending before NCLT, Ebix filed an application before NCLT on 10 September 2019 for withdrawal of its resolution plan *inter alia* on the ground of delay in approval of the resolution plan, which was allowed by NCLT vide order dated 02 January 2020.
- Subsequently, the NCLT's order dated 02 January 2020 was overturned by the NCLAT vide the Educomp Judgment. Presently, the Educomp Judgment

has been challenged and the matter is pending before the Hon'ble Supreme Court.

COMMENTS

- Considering the ongoing pandemic situation and backlog of cases before NCLT and NCLAT, resolution applicants have started building in provisions in their resolution plans for withdrawal of resolution plan on happening of events including events having material adverse effects, force majeure, and delay in approval of resolution plan to protect their interests. However, such withdrawal provisions have severe implications on the interest of creditors and other stakeholders and the intent of IBC.
 - On the other hand, in many cases, the reason for deterioration in the value of the corporate debtor is delay in approval of the resolution plans by NCLT, and inordinate delay in such approval is not only leading to erosion in the value of the assets of the corporate debtor but also affecting the projections of the resolution applicant.
 - Considering the aforesaid scenario, it is imperative to strike a balance between the interests of the creditors/stakeholders and the resolution applicant, by providing for a timeline within which the NCLT should endeavour to approve/reject the resolution plan.
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