

EXPRESS RESORTS AND HOTELS LTD. V. AMIT JAIN & ORS.

Express Resorts and Hotels Ltd.

...Appellant

Versus

Amit Jain & Ors.

...Respondents

Case No: Company Appeal (AT) (Insolvency) No.1624 of 2023

Date of Judgement: 18.12.2023

Judges:

[Justice Ashok Bhushan]

Chairperson

[Barun Mitra]

Member (Technical)

[Arun Baroka]

Member (Technical)

For Appellant: Mr. Abhijeet Sinha, Mr. Himanshu Satija, Mr. Raheel Patel, Ms. Neha Mehta, Mr. Harsh Saxena and Ms. Heena Koccher, Advocates.

For Respondents: Mr. Varun Kalra, Advocate for R-1. Mr. Navin Kumar Pahwa, Sr. Advocate with Mr. Pratik Thakkar, Advocate for R-12. Mr. Aspi M. Kapadia, Advocate for R-16.

Facts

Express Resorts and Hotels Ltd (Appellant) is the successful resolution applicant in the corporate insolvency resolution process (CIRP) of a corporate debtor. Its resolution plan was approved by the Committee of Creditors (CoC) on 05.11.2020

(Paragraph 2). The National Company Law Tribunal (NCLT) later directed the resolution professional (RP) to invite fresh resolution plans, against which the Appellant approached the National Company Law Appellate Tribunal (NCLAT). The NCLAT set aside the NCLT's order and remitted the matter back to consider approval of the Appellant's plan (Paragraph 3). The NCLT then sought clarification on implication of a Supreme Court judgment on the resolution plan. It directed the RP to convene CoC meeting to apprise members and file affidavit. The Appellant has challenged this order of NCLT before NCLAT (Paragraph 4).

Court's Opinions

The impugned NCLT order indirectly overrides the NCLAT's earlier order dated 09.02.2023, which stated the matter cannot be sent back to CoC for reconsideration of resolution plans (Paragraph 9). The NCLT should have decided the approval application on merits after hearing parties. There was no need to obtain CoC's opinion again. This has further delayed resolution (Paragraph 10). All subsequent actions pursuant to impugned order including CoC meeting are unsustainable and set aside. However, this is not an opinion on merits of approval application (Paragraph 9-10).

Arguments by Parties

Appellant:

Impugned order overrides NCLAT's order directing consideration of approval application. Most CoC members agreed with RP's legal advisor's opinion on implication of Supreme Court judgment. Only one member disagreed. NCLT should have decided approval application without seeking CoC's opinion again. This has caused further delay.

Respondent 12 (CoC member – ACRE):

Supreme Court's decision in Rainbow Papers and Assam Company India cases are relevant. These judgments negatively affect the resolution plan. Fresh plans should have been invited and

considered by CoC.

Sections and Cases Cited

Supreme Court decision in State Tax Officer vs Rainbow Papers Limited. NCLAT decision in Principal Commissioner of Income Tax vs Assam Company India Limited

Referred Laws

The Insolvency and Bankruptcy Code, 2016 and regulations have been referred regarding corporate insolvency resolution process, its timelines and approval of resolution plans.

Conclusion

The NCLAT allowed the appeal by setting aside NCLT's impugned order. All subsequent actions including CoC meeting pursuant to such order were held unsustainable. The matter was remitted back to NCLT for expeditious disposal of approval application, preferably within one month.

Download

Court

Copy: <https://dreamlaw.in/wp-content/uploads/2024/01/6-2.pdf>

Full Text of Judgment:

1. Heard learned counsel for the Appellant, learned counsel appearing for the Resolution Professional and Shri Navin Pahwa, learned senior counsel appearing for Respondent No.12 (one of the member of the CoC, Asset Care Reconstruction Enterprise (ACRE)).
2. Learned counsel for the Appellant has also by an application brought on record minutes of 19th CoC meeting held on 13.12.2023 which was attended by all the members of CoC including Respondent No.12 – ACRE. The Appellant before us is the Successful Resolution Applicant whose Resolution Plan was approved by the CoC on 05.11.2020 and it was issued a letter of intent dated 07.11.2020. The Resolution Professional filed an application on 26.11.2020 for approval of Resolution

Plan. The Adjudicating Authority on 06.09.2022 while disposing off application under Section 30(6) allowed the Resolution Professional to accept new Resolution Plans from unsuccessful Resolution Applicants and even previously non-participating entities who may want to submit a Resolution Plan for the Corporate Debtor. The said order was challenged before this Tribunal in Company Appeal (AT) (Ins.) No.1158 of 2022 by the Appellant, which appeal was allowed by order dated 09.02.2023 and this Tribunal held that after approval of the CoC of the Plan, the matter could not have been send for inviting applications for fresh Resolution Plan. This Tribunal in Para 23 to 27 held as follows:

23. The IBC and the CIRP Regulations provide tight scheme and timeline for completion of entire process. In the present case, we have noticed that CIRP period had come to an end and by order dated 09.07.2020 an extension was granted by the Adjudicating Authority of 146 days. The extended period was also come to an end in October 2020. The CIRP period had come to an end and by an order passed on 09.11.2020, the Adjudicating Authority granted three weeks' time for filing of Resolution plan before it. The period of CIRP was over long ago and Adjudicating Authority after about two years, subsequent of completion of CIRP period cannot direct the CIRP process to begin again by providing for inviting applications for fresh Resolution Plan.

24. The maximisation of value of the Corporate Debtor is admittedly an object of the CIRP, but the said maximisation has to be achieved within the timeline provided in the scheme.

25. The present is not a case where in the process, which was completed by approval of the Resolution Plan by the CoC any breach has been committed. When after following the provisions of the Code and Regulations,

the Resolution Plan has been approved by the Adjudicating Authority, the said approval by the CoC has to be respected and cannot be interfered with in exercise of judicial review by the Adjudicating Authority. More so, when there is no such ground that the Plan approved, violates any of the provisions of Section 30, sub-section (2). The object of IBC is to revive the Corporate Debtor and put it again on the track. When a Resolution Plan, has been approved after due deliberations, in exercise of commercial wisdom of the CoC, it has to be accepted that Corporate Debtor was decided to be revived by the Resolution Plan. The mere fact that certain other offers have been received after the approval of the Resolution Plan, CoC cannot have a change of heart and start clamoring before the Adjudicating Authority that they have no objection to sending back the Resolution Plan for reconsideration. This will be permitting an unending process, since by passing of time situation keeps on changing. After coming to know about the financial offer in a Plan, which has been approved by the CoC, any subsequent offer by any entity, who did not participate in the process earlier, cannot be entertained.

26. The CoC being satisfied that financial offer given by the Applicant is satisfactory, exercise their commercial wisdom, even CoC cannot be allowed to change its view, since it is bound by its own decision taken in approving the Resolution Plan. Present is not a case where the CoC is pointing out any breach of procedure or manifest error in their approval of the Resolution Plan, which may be a ground to be pressed before the Adjudicating Authority. The CoC after full consideration has approved the Plan and the financial offer made by the Applicant in the Plan. In the name of receiving higher offer, subsequently, CoC cannot turn around and pray to the Adjudicating Authority to send the Plan back for consideration. The present case itself is an example

that adopting such course by the CoC and Adjudicating Authority, enormous delay shall take place, which is not in the interest of CIRP, nor in the interest of Corporate Debtor. The Corporate Debtor has to be revived with speed and in timelines, which has been prescribed in the CIRP. Once, the said object is achieved, the same shall not be allowed to frustrate on the grounds, which have been raised before the Adjudicating Authority in the present case. We may notice that in this Appeal, an interim order was passed on 21.09.2022, staying the further process in pursuance of the impugned order dated 06.09.2022, which order is still continued.

27. In the result of the foregoing discussion, we are satisfied that Adjudicating Authority has committed error in passing the impugned order. The impugned order is set aside. The matter is remitted to the Adjudicating Authority to pass fresh order on No./851/AHM/NCLT/2020 filed by the RP for the approval of the IA Resolution Plan. The Plan being pending since 2020, we direct the Adjudicating Authority to pass a final order on IA No./851/AHM/NCLT/2020 within a period of three months from the date the copy of this order is produced. Appeal is allowed. No order as to costs."

3. This Tribunal vide order dated 09.02.2023 remitted the matter to the Adjudicating Authority to pass order on approval of Resolution Plan. It was further directed that within a period of three months the Adjudicating Authority to pass final order on I.A. No. 851 of 2020. Order of this Tribunal was also unsuccessfully challenged before Hon'ble Supreme Court and appeal was rejected by order dated 17.03.2023. When the application I.A. No. 851 of 2020 came for consideration before the Adjudicating Authority, following order was passed on 28.11.2023:

"IA 851 of 2020 In view of the inordinate delay due to

the appeals made before the Tribunal by various the CoC after filing to the Resolution Professional to convene the meeting of the CoC after filing the necessary clarification affidavit in IA 584 of 2023. CoC be apprised of the judgement of State Tax Officer (1) Vs. Rainbow Papers Ltd, and its implication on the resolution plan and impact of any attachment or status qua order ordered by any Court of law including IA 584/2023, which would change the contents and financial proposal of the resolution plan that has been approved by the CoC on August 7, 2020. List for further consideration for final arguments on 15.12.2023."

4. Learned counsel for the Appellant challenging the order contended that the Adjudicating Authority by the said order has directed the Resolution Professional to convene meeting of CoC to appraise the CoC Members of the Rainbow Judgment and its implication on the Resolution Plan and impact of any attachment or status qua order ordered by any Court of law including I.A. No. 584 of 2023. Learned counsel for the Appellant submits that majority of Financial Creditor has no objection after considering the Resolution Plan and it is only one Financial Creditor –ACRE who had filed I.A. No. 584 of 2023, pointing out Writ Petition 11460 of 2021 filed in Rajasthan High Court. It is submitted that the Adjudicating Authority ought to have considered application I.A. No. 851 of 2020 as directed by this Tribunal vide its order dated 09.02.2023 and the Adjudicating Authority has indirectly done something which was not approved by this Tribunal in order dated 09.02.2023. It is submitted that the impact of Rainbow Judgment in the CIRP process was already explained by the Resolution Professional and Resolution Applicant. Even the Resolution Professional has filed an affidavit in response to the queries made by the Adjudicating Authority earlier which has been pointed out by Shri

Navin Pahwa, himself.

5. Learned counsel for the Appellant has brought on the record the minutes of CoC meeting held on 13.12.2023, which was convened in consequence of the impugned order, in which minutes the Resolution Professional sought view of all members and recorded the same. It is useful to extract said views, which are as follows:

“Thereafter RP sought views from all the CoC members and recorded the same in the below table:

S. No.	Name of the Bank	Vote Share	Comments
1	Asset Reconstruction Company (India) Ltd.	22.6%	- ARCIL representative agreed with/ noted the opinion of RP legal advisor of 12 December 2023 and stated that the same is as per Rainbow judgement – they took note/ were fine with the same.

2	IFCI Limited	<p>- IFCI representative initially asked whether the judgement of Commissioner of Income Tax & Anr. V M/s Assam Company India Ltd (Company Appeal (AT) (Insolvency) No. 243 of 2022) has been factored in RP legal advisor opinion.</p> <p>- RP legal advisor indicated that the above judgement relating to income tax dues has been considered by them and in their opinion, the Assam Company judgement is based on facts of that case- their legal opinion as placed before the CoC is based on the principles and ratio of Rainbow judgement and not any other judgement.</p> <p>- Basis above clarification, IFCI representative stated that they agree with the opinion of 12 December 2023 of the RP legal advisor.</p> <p>- IFCI representative suggested that either there should be fresh voting on Express plan or there should be a new process i.e. invite new plans from new Resolution Applicants</p>
---	--------------	---

3	Asset Care & Reconstruction Enterprise Limited (ACRE)	15.7%	<p>- ACRE representative stated that they do not agree with the views shared by RP legal counsel as they believe that Judgement passed by NCLAT in the case of Principal Commissioner of Income Tax & Anr. V M/s Assam Company India Ltd (Company Appeal (AT) (Insolvency) No. 243 of 2022) is relevant and basis the same income tax dues would be secured creditors</p> <p>- ACRE representative stated that the Rainbow judgement has a negative impact on distribution and both Assam Company judgement and Rainbow judgement cannot be ignored by them. They proposed that fresh plans should be called and considered afresh by COC</p>
---	---	-------	---

4	Edelweiss Asset Reconstruction Company Limited	8.2%	<ul style="list-style-type: none"> - Edelweiss representative agreed with the opinion received from the RP legal advisor on 12 December 2023. - They stated that impact of the Rainbow Judgement should be borne by the Successful Resolution applicant i.e. Express Group in this matter as an incremental cost. - If NCLT directs to issue fresh EOI and invite fresh plans then they will comply with the direction – however Edelweiss representative stated that as lender they would not want to initiate the fresh process again at this advanced stage.
5	Small Industries Development Bank of India (SIDBI)	8.0%	<ul style="list-style-type: none"> - SIDBI representative stated that Rainbow Paper Judgement should not affect the plan as the same came after the plan was already approved by CoC in 2020. - But if NCLT decides that there is any impact to be considered due to Rainbow paper judgement, the same should be borne by the Successful Resolution applicant i.e. Express Group in this matter as an incremental cost i.e. over and above the plan value stated by Express in its approved plan. - SIDBI representative also stated that they are not suggesting any new voting on the plan.

6	Bank of India	4.3%	- Not present in the CoC
7	State Bank of India	2.5%	- Not present in the CoC
8	Canara Bank (eSyndicate Bank)	2.2%	- Views not shared during the meeting. Legal officer was not attending the meeting and therefore the representative stated that they will share their comments separately. At the time of finalization of minutes, no comments have been shared with the RP.
9	Punjab National Bank (eOBC)	4.6%	- Not present in the CoC

10	Saraswat Co-operative Bank	4.7%	- Saraswat Cooperative bank representative agreed with the opinion received from the RP legal advisor on 12 December 2023
11	Union Bank (eCorporation Bank)	2.3%	- Not present in the CoC
12	12 Paisalo Digital – Corporate Guarantee of NLL (Loan to Neesa Infrastructure Ltd. and Neesa Agritech and Foods limited)	1.8%	- Not present in the CoC
13	HT media	0.7%	- Not present in the CoC

14	FD Holders	4.9%	- The representative stated that the impact of the Rainbow Judgement should be borne by the Successful Resolution applicant i.e. Express Group as an incremental cost. He also stated that the plan value earmarked for FD holders in the approved resolution plan should be retained or improved.
	Total	100%	

RP also sought views from the representatives of the Assistant Commissioner of Central GST, Gandhinagar Division regarding the impact of Rainbow Paper. The representative did not have any RP also sought views from the representative of the Assistant Commissioner of Central GST, view at the moment and requested some time for the same. RP has requested to send their views so the same could be factored in the Minutes of the meeting. At the time of finalization of minutes, no comments have been shared with the RP Representative of ACRE had mentioned about the NCLAT proceeding that was held today i.e. 13 December 2023 wherein an appeal has been filed by the Express Group, the successful Resolution Applicant. Thereafter RP replied that no formal communication has been received by the RP. He has sought views from his counsel in NCLAT and will inform CoC once there is any update from the legal team. SIDBI's representative asked about the amendments to be made to IA 584 of 2023 basis ACRE's representative comments on the same in the last CoC meeting. ACRE's representative stated that he has discussed this with his counsel who has assured that necessary amendments will be carried out however no further updates have been received so far. RP informed COC members that the views

taken by him in the meeting would be documented and the same would be filed in the NCLT on December 14, 2023, before the next hearing in IA 851 of 2020 As there was no other matter to be discussed. The meeting concluded with a vote of thanks to the chair.”

6. Most of the CoC members, as appear from the minutes of 13.12.2023, agreed by the opinion given by learned counsel for the Resolution Professional.

7. Shri Navin Pahwa has referred to Resolution Professional’s reply to applicability of Rainbow Paper judgment, where following has been noted in the reply:

“Applicability of Rainbow Judgement in our case

1. Resolution Plan of Neesa Leisure Limited was approved by the CoC on 05 November 2020 and was filed with the Hon’ble NCLT Ahmedabad bench on 26 November 2020. The 2020 in Rainbow papers was pronounced by Supreme Court on September 6, 2022.

2. Therefore, the Supreme Court judgement was not taken into account by the CoC while considering and approving the resolution plan. Please note that under the approved resolution plan, “Nil” payment is proposed to all Operational Creditors including statutory dues.

3. RP legal advisor has stated that the resolution plan of Express Hotels consortium which has been approved by the CoC is not compliant with the Supreme Court’s judgment in Rainbow Papers matter. The 18th CoC meeting was held on 08 December 2023 wherein RP discussed on the Agendas as directed by the NCLT Bench.

4. In the 18th CoC meeting, RP was asked to take the updated view of the RP legal advisor based on latest developments / judicial precedents etc for assessment of the impact of Rainbow judgment on the Secured Statutory claims admitted, by scrutinizing the same in the context of the Rainbow Paper Judgment and discuss the same in the next CoC meeting.

5. Consequently. RP instructed the RP legal advisor to provide its view on the impact of the Rainbow judgement ie in the matter of State Tax Officer (1) Vs. Rainbow Papers Ltd and its implication on the resolution plan, if any.

6. RP Legal advisor shared their opinion dated 12 December 2023, which was shared with COC on same day, post which the RP determined that the admitted amount of Secured Statutory claims as per Rainbow Paper judgement was Rs. 16.09 Crores.

Refer Annexure A details of Statutory claims admitted and covered by / not covered by Rainbow judgement.

Refer Annexure B on tentative impact of Rainbow judgement on payout to Secured Financial creditors.

Refer Annexure C – Advice received from RP legal counsel dated 12 December 2023”

7. We have heard learned counsel for the Resolution Professional and one of the member of the CoC. The opinion of all member of the CoC as were represented in meeting dated 13.12.2023 in the minutes of meeting was also noticed, we are of the view that no useful purpose shall be served in issuing notice to other members of the CoC for the purposes of this appeal. We, however, reserve liberty to any of the member of CoC who may feel necessity to file an application, if so advised. After considering submissions of learned counsel for the parties, we proceed to decide this appeal.

8. We have already noticed order of this Tribunal dated 09.02.2023, where this Court has disapproved the request to send matter again to CoC to reconsider the Resolution Plans. This Tribunal has directed the Adjudicating Authority to consider the plan approval application and decide the same within a period of three months. The

impugned order has directed the matter to be taken before the CoC, which was not approved by this Tribunal in order dated 09.02.2023. Insofar as merits of the plan, it was to be examined by the Adjudicating Authority and take a decision in accordance with law. It is further observed that no purpose shall be served in prolonging the matter by the Adjudicating Authority by sending the matter to CoC and obtain opinion of CoC. It was for the Adjudicating Authority, who has to take decision on I.A. No. 851 of 2020 after hearing the parties. We are of the view that order impugned passed in I.A. No.851 of 2020 is unsustainable and is set aside. In result of setting aside the impugned order all consequential actions are also unsustainable. Subsequent actions including meeting of CoC conducted in consequence to the impugned are set aside.

9. Learned counsel for the parties submit that the matter has been adjourned to 12.01.2024 on joint request of the parties. We are of the view that in view of the fact that date 12.01.2024 is already fixed, the Adjudicating Authority after hearing the parties shall endeavour to decide the application I.A. No. 851 of 2020 as expeditiously as possible, preferably within a period of one month from the date fixed. Appeal is allowed to the above extent.

10. We make it clear that we have not expressed any opinion on the merits of I.A. No. 851 of 2020 and it is for the Adjudicating Authority to decide the matter in accordance with law.