

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No.1650 of 2023

(Arising out of Order dated 09.10.2023 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, Court-II in IA No.3363 of 2023 in IA No.2787 of 2023 in CP (IB) 2742 (IB) 2019)

IN THE MATTER OF:

PRIO S.A.

Having its office at, Praia de Botafogo, 370,
13th Floor, Rio de Janeiro - RJ, Brazil

... Appellant

Vs

1. Mr. Pravin R. Navandar
Resolution Professional of VOVL Ltd.
Having his office address at: D519/520,
Neelkanth Business Park, Old Nathani Road,
Vidyavihar (West), Mumbai - 400086
2. BPRL Ventures BV
Schiphol Boulevard, 403, WTC
Tower, C-4, 1118 BK, Schipol, Netherlands
3. The Committee of Creditors of
VOVL Limited
Through its authorised signatory
Mr. Manish Ranjan, Assistant General
Manager at State Bank of India, and
having office address at Stressed
Assets Management Branch – I, at
“The Arcade” Second Floor, World
Trade Centre, Cuffe Parade, Mumbai - 400005 ... Respondents

Present:

For Appellant: **Mr. Arun Kathpalia, Sr. Advocate with Mr. Siddharth Ranade, Ms. Nishi Bhankharia, Ms. Bani Brar, Mr. Kshitij Wadhwa, Mr. Mihir Dalawai, Mr. Pushkar Deo, Mr. Vishal Pathak, Mr. Vivek Krishnani, Mr. Shourya Bari, Advocates.**

For Respondents: **Mr. Ramji Srinivasan, Sr. Advocate with Mr. Gaurav Juneja, Mr. Vishnu Shriram, Ms. Swastika Chakravarti, Ms. Muskan Narang, Mr. Kartik Pandey, Ms. Namrata Saraogi, Advocates**

Mr. Sajan Poovayya, Sr. Advocate with Ms. Anindita Roychowdhury, Ms. Trisha

Roychaudhuri, Mr. Saurabh Batra, Mr. Abhishek Kakkar, Advocates for R2.

Mr. Gopal Jain, Sr. Advocate with Mr. Madhav Kanoria, Mr. Raunak Dhillon, Ms. Surabhi Khattar, Ms. Dakshita Chopra, Advocates for R3.

J U D G M E N T

ASHOK BHUSHAN, J.

This Appeal has been filed challenging the order dated 09.10.2023 passed by National Company Law Tribunal, Mumbai Bench, Court-II by which order IA No.3363 of 2023 filed by the Appellant for intervention in IA No.2787 of 2023 was rejected. Aggrieved by the order of rejecting the Application seeking intervention, this Appeal has been filed.

2. We need to notice first the background facts giving rise to this Appeal:

- (i) The Adjudicating Authority in the impugned order has captured the brief facts of the Application in paragraphs 2 to 4, which are sufficient to notice for appreciating the facts giving rise to the Intervention Application by the Appellant. Paragraphs 2, 3 and 4 of the order of the Adjudicating Authority are as follows:

“2. The present Application has been filed by PRIO S.A, one of the prospective resolution applicants ("PRIO/ Applicant"). The corporate insolvency resolution process ("CIRP") was commenced against the Corporate Debtor vide this Hon'ble Tribunal's Order dated November 8, 2019, read with Corrigendum Order dated November 25, 2019. After the

commencement of CIRP, interim resolution professional ("IRP") was substituted with the resolution professional ("RP"), who published, in Form G, an invitation for submission of expression of interest ("EOI"). Pursuant thereto the Applicant submitted an EOI on May 7, 2020. As per the EOI, the Applicant submitted an offer ("First Offer") for the acquisition of the entire participating interest ("PI") held by VEBL (a step-down subsidiary of the Corporate Debtor, incorporated in the British Virgin Islands, through which the Corporate Debtor holds Quota/ shares in IBV) indirectly through IBV Brasil Petr6leo Lda. ("IBV") for amount of US\$32,500,000. Thereafter, the RP requested Applicant to present a revised offer in view of multiple extensions given by the RP. Accordingly, the Applicant presented a revised offer ("Second Offer") dated August 31 2022, for the acquisition of 17.857% of the PI in the Wahoo Field. Thereafter, during the 8th meeting of the Core Committee, after the discussion on Second Offer, a counterproposal was made by the Core Committee, which was accepted by the Applicant. The Applicant, on November 21, 2022, ultimately submitted a revised offer ("Third Offer") along with all the documents requested by the RP, receipt of which the RP acknowledged and confirmed.

3. *Thereafter, the RP did not revert to the Applicant after the submission of Third Offer. It had come to the knowledge that in the IM it was provided that the indirect acquisition of the PI is subject to the rights of contractual counterparties, including BPRL. The VEBL and BPRL were the contractual counterparties in a Quotaholders Agreement, which was regarding the governance of IBV, dated September 12, 2008. Basis the Quotaholders Agreement, the COC and the RP have arrived at terms with BPRL for BPRL to acquire VEBL's quotas/ shares in IBV, thereby indirectly rejecting the Third Offer.*

4. *From the website of this Hon'ble Tribunal, PRIO has learnt that the RP has filed the RP's Application, in which BPRL and the COC have been arrayed as Respondents. At the hearing of the RP's Application on July 5, 2023, PRIO verily believes that the RP's Application is for sale of VEBJ/ & quotas (i.e., shares) in IBV to BPRL. This amounts to rejection of PRIO's Offer and acceptance of an offer submitted by another person who did not even submit an EOI and was never a part of the final list of PRAs issued by the RP. Hence, this Application to intervene the Interlocutory Application No. 2787 of 2023 filed by the RP."*

- (ii) The Appellant submitted three offers successively to Expression of Interest in pursuance to Form-G and the Resolution Professional ("**RP**") and the Committee of Creditors ("CoC") interacted and negotiated with the Appellant. The Adjudicating Authority noticed in paragraph 2 that the Appellant on November 21, 2022 submitted a revised offer ("Third Offer") along with all the documents requested by the RP, receipt of which was acknowledged. The Appellant thereafter did not hear anything from the RP and came to know that RP has filed an Application before the Adjudicating Authority on July 5, 2023 for approval of the offer received from Respondent No.2 being IA No.2787 of 2023. The Application filed by RP was for approval of the offer of Respondent No.2. It was after coming to know about the filing of the above Application by RP for approval of offer of

Respondent No.2, the IA No.3363 of 2023 was filed by the Appellant praying for following reliefs:

“A. This Hon’ble Tribunal be pleased to allow the Applicant to intervene in Interlocutory Application No. 2787 of 2023 and be impleaded therein as a party Respondent;

B. That this Honhle Tribunal be pleased to defer the hearing of Interlocutory Application No. 2787 of 2023 till such time as this Application is heard and disposed finally;

C. That this Honhle Tribunal be pleased to order and direct the RP to supply a copy of Interlocutory Application No. 2787 of 2023 together with the details, particulars and relevant documents with regard to the arrangement arrived at between BPRL and the RP and COC to the Applicant and allow the Applicant to file its affidavit to oppose the Interlocutory Application No. 2787 of 2023;

D. In the alternative to Prayer B, that this Hon’ble Tribunal be pleased to permit the Applicant to file Affidavits / pleadings and make submissions at the time of hearing of Interlocutory Application No. 2787 of 2023;

E. Pending the hearing and final disposal of this Application, this Hon’ble Tribunal be pleased to stay the proceedings in Interlocutory Application No. 2787 of 2023;

- (iii) Reply was filed by the RP to the Intervention Application and Adjudicating Authority heard the Applicant/ Appellant, RP as well as Committee of Creditors (“**CoC**”) and Counsel for Respondent No.2 and by the impugned order rejected the Intervention Application on the ground that Applicant has no locus to file the Application. The Adjudicating Authority held

that Applicant has no locus in the matter nor any of its rights are infringed.

3. We have heard Shri Arun Kathpalia, learned Senior Counsel appearing for the Appellant; Shri Ramji Srinivasan, learned Senior Counsel appearing for RP; Shri Gopal Jain, learned Senior Counsel appearing for CoC and Shri Sajan Poovayya, learned Senior Counsel appearing for Respondent No.2.

4. Shri Kathpalia, learned Senior Counsel appearing for the Appellant submits that the Appellant having submitted three offers after issuance of Form-G and RFRP issued by RP, the Appellant was asked to revise/improve its offer after negotiation with RP and CoC. The Appellant has sufficient interest in the proceedings to resist the Application filed by RP for approval of offer of Respondent No.2. It is submitted that the Adjudicating Authority committed error in holding that the Appellant has no locus to file the Intervention Application. It is further submitted that the Adjudicating Authority without permitting the Appellant to intervene in the matter and to file any affidavit in opposition to IA 2787 of 2023 has proceeded to examine the various contentions on merits, which was uncalled for. The Appellant ought to have been permitted to intervene and after permitting the Appellant to file objections/ affidavit, the contention on merits ought to have been examined. The fact that Adjudicating Authority proceeded to examine the contention raised by the Appellant on merits itself indicates that Appellant has sufficient locus in the matter. It is submitted that the Application for approval of offer submitted by

Respondent No.2, who was not included in the list of prospective Resolution Applicant, is contrary to process under IBC and Regulations and the Appellant has every right to resist such proceedings.

5. Shri Ramji Srinivasan, learned Senior Counsel for the RP submits that the approval of offer by Respondent No.2 was in pursuance of the offer submitted by the Appellant on 12.11.2021, where the Appellant himself has offered the right of first refusal (“ROFR”) provided for in the Quotaholders’ Agreement. It is submitted that in accordance with the offer, the Appellant himself has stated that it is subject to BPRL’s ROFR, hence it is not open to Appellant to object to the proceedings, which were triggered on the basis of offer of the Appellant itself. It is submitted that the Appellant himself having participated in the process, cannot now turn round and say that proceedings are not in accordance with the process of the IBC. The learned Senior Counsel for the RP submits that the objections raised by the Appellant did not find favour with the Adjudicating Authority, hence, the Adjudicating Authority rightly held that the Appellant has no locus.

6. The learned Senior Counsel for Respondent Nos.2 and 3 also adopted the submission of learned Counsel for Respondent No.1 and in addition submitted that the Adjudicating Authority has rightly rejected the Application for Intervention filed by the Appellant. The Appellant having himself mentioned about the Right of First Refusal, it cannot now be allowed to turn round and say that process was not in accordance with law. The learned Senior Counsel for Respondent No.2 submits that the

Appellant, who has submitted EOI, has categorically stated that it shall not be deemed as an applicant of a Resolution Plan, nor a party to the Resolution Plan. When the Appellant has not submitted any Resolution Plan, he cannot object the process adopted by RP and CoC. The Appellant is neither necessary party, nor proper authority, hence, does not have any locus. The offer of the Appellant itself was contingent on BPRL's non-exercise of its ROFR. The offer of Respondent No.2 is equitable and leads to value maximization.

7. We have considered the submissions of learned Counsel for the parties and have perused the records.

8. The question which needs consideration is as to whether the Appellant had any locus to file the IA No.3363 of 2023 in IA No.2787 of 2023. The Adjudicating Authority after hearing the parties has opined that the Appellant has no locus in the matter nor any of its rights are infringed. The said observation has been made in paragraph 38 of the impugned order, which is as follows:

“38. We have considered the above contentions of the learned Counsel for the applicant but have found the same to be devoid of any force or substance. Regulation 37 of the CIRP Regulations clearly provide that a resolution plan can provide for measures for the insolvency resolution of the corporate debtor for maximization of value of its assets including sale of all or parts of the assets. How a sale is to be or can be effected would depend upon the facts and circumstances of each particular case and the same would also be subject to contractual rights and liabilities of all the stake holders involved. Therefore, there

cannot be a straight jacket formula which can be or has to be applied in each and every insolvency resolution. In extraordinary situations, CoC can always adapt to a given situation using its commercial wisdom. Therefore, it cannot be concluded that the whole process is violative of the Code as well as the Regulations. Besides, as earlier pointed out, the applicant has absolutely no locus in the matter nor any of its rights are being infringed as the applicant was conscious of the fact throughout that its offer was a contingent one.”

9. The impugned order of the Adjudicating Authority clearly indicates that Adjudicating Authority proceeded to consider the objections raised by the Appellant to the process under which RP and CoC has approved the offer submitted by Respondent No.2. The Adjudicating Authority proceeded to examine the said contention on merits and has rejected the same by the impugned order. The fact that Adjudicating Authority proceeded to examine the contentions raised by the Appellant on merits itself indicate that objections raised by the Appellant required consideration. The Adjudicating Authority proceeding to examine the objections on merits and thereafter saying that Appellant has no locus is a contradiction in itself.

10. Apart from above, when we look into the facts and sequence of events, the Appellant has submitted offer after receipt of EOI and RFRP for Resolution Plan. The Appellant also revised its offer and had negotiation with CoC and RP, which is a fact established from the record. The RP and CoC interacted with the Appellant in respect of its offer and it appears that on the basis of the offer submitted by the Appellant Right of First Refusal was exercised by Respondent No.2 and consequently offer was received

from Respondent No.2, which find favour by the CoC. The Appellant, who participated in the process cannot be said to be a person having no locus to object the Application filed by the RP for approval of offer submitted by Respondent No.2.

11. The Application filed by the Appellant is referable to Section 60, sub-section (5) (c), which is as follows:

“60(5) Notwithstanding anything to the contrary contained in any other law for the time being in force, the National Company Law Tribunal shall have jurisdiction to entertain or dispose of -

.....

(c) any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under this Code.

12. The intervention which was sought by the Appellant was intervention arising in relation to the Corporate Insolvency Resolution Process (“**CIRP**”) of the Corporate Debtor. The objections raised by the Appellant challenging the process and prayer for deciding the objection on merits, is entirely different from locus of the Appellant. In the facts of the present case and sequence of events, it cannot be said that the Appellant has no locus to file Intervention Application, in a Application, which was filed by the RP for approval of offer of Respondent No.2. The natural consequence of filing of the IA by RP was that offer of the Appellant was not acceptable and CoC approved the offer of Respondent No.2 and consequently, approval was sought from the Adjudicating Authority. The Appellant, who had

participated in the process has every right to raise question, which arise from CIRP of the Corporate Debtor. We, thus, are of the view that finding of the Adjudicating Authority that the Appellant has no locus, cannot be sustained.

13. The Appellant in his Application has made a prayer (d), i.e., Hon'ble Tribunal be pleased to permit the Applicant to file affidavits/ pleadings and make submissions at the time of hearing of IA No.2787 of 2023. We having found that the Appellant has locus in the matter, we are of the view that the Appellant should be given an opportunity to file objections by way of affidavits/ pleadings to the IA No.2787 of 2023.

14. The learned Counsel for the parties have informed that Adjudicating Authority has reserved the order on IA No.2787 of 2023 on 11.01.2024. The present Appeal was filed by the Appellant on 15.12.2023 and the Appeal was listed on several dates before this Tribunal, i.e., on 18.12.2023, 02.01.2024, 03.01.2024, 09.01.2024, 10.01.2024. Hearing on the Appeal commenced on 10.01.2024, while the Adjudicating Authority reserved the order on 11.01.2024.

15. We having held that the Appellant has locus in the matter and the Intervention Application filed by the Appellant, ought not to have been rejected, we are of the view that an opportunity be given to the Appellant to make his submissions on IA 2787 of 2023. We permit the Appellant to file Application along with copy of this order before the Adjudicating Authority within a week from today.

16. To obviate delay in disposal of IA No.2787 of 2023, we also permit the Appellant to file his objections/ affidavits along with the Application to be filed as indicated above. The Adjudicating Authority may fix a fresh date of hearing on IA No.2787 of 2023 and decide the Application after hearing, Appellant and all other concerned parties.

17. We having permitted the Appellant to file objection/ affidavit to IA No.2787 of 2023, we make it clear that observations made in the impugned order on the merits, be not treated as final expression of opinion and the Adjudicating Authority shall consider and decide the issue afresh, after hearing both the parties in accordance with law.

18. The Appeal is disposed of accordingly. We further observe that we have not expressed any opinion on merits of contention of either of the parties. It is for the Adjudicating Authority to consider and decide all the issues in accordance with law.

Justice Ashok Bhushan]
Chairperson

[Mr. Barun Mitra]
Member (Technical)

[Mr. Arun Baroka]
Member (Technical)

NEW DELHI

24th January, 2024

Ashwani