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SUPREME COURT PRONOUNCEMENTS

CIRP can be set aside if majority of the home buyers agree upon a settlement.

AMIT KATYAL V. MEERA AHUJA & ORS.

Court	Supreme Court
Judgement Dated	March 3, 2022
Bench	Justice M. R. Shah, Justice B. V. Nagarathna
Relevant Sections	Section 7, 12A of the Insolvency and Bankruptcy Code 2016 (hereinafter IBC); Rule 11 of the NCLT Rules, 2016; Article 142 of the Constitution.

Brief Background

The appellant, who is the corporate debtor, is a Gurgaon based real estate company named Jasmine Buildmart Pvt. Ltd., that failed to deliver its housing project, namely Krrish Provence Estate, to its home buyers even after 8 years. On 06.12.2018, three such home buyers filed for a. Section 7 application before the National Company Law Tribunal (hereinafter NCLT), Delhi seeking initiation of CIRP against the Corporate Debtor. In addition to that, they also sought a refund of an amount of Rs. 6,93,02,755/- on account of the inordinate delay in the completion of the project and failure to handover possession within the stipulated time. When the NCLT directed for the commencement of the CIRP, the order was appealed before the NCLAT. However, even the NCLAT upheld the order passed by the NCLT.

In 2020, the Supreme Court, while issuing notice in the appeal, stayed the operation and implementation of the impugned order, subject to the appellant depositing the amount of Rs.2,75,55,186/- plus interest at the rate of 6% per annum in the Registry of the Court within two weeks from that date. In the meanwhile, the Krrish Provence Flat Buyers Association had filed a caveat, apprehending that if any order is passed in the present proceedings, it may affect them as home buyers. Much recently, on 04.02.2022, it was brought to the Court's notice that the original applicants, as well as 79 other home buyers, have settled the dispute with the corporate debtor and a settlement has been entered into, under which it is agreed that the Corporate Debtor shall complete the entire project and hand over the possession to the home buyers (who want the possession) within a period of one year.

Issues

Whether the original applicants can be allowed to withdraw from the CIRP proceedings under Article 142 of the Constitution of India read with Rules 11 of the NCLT Rules 2016?

Decision

The Supreme Court noted that within ten days of the constitution of the committee of creditors (hereinafter COC), the CIRP proceeding was stayed. Not only this, but 70% of the COC are the members of the Flat Buyers Association who are willing to have the CIRP proceedings set aside, subject to the corporate debtor company honouring the settlement plan. While weighing the repercussions, the Apex Court observed that if the CIRP proceedings are continued, there would be a moratorium under Section 14 and there would be a stay of all pending proceedings, which would bar the institution of fresh proceedings against the builder, including proceedings by homebuyers for compensation due to delayed possession or refund, and if the CIRP is successfully completed, the home buyers like all other creditors, are subjected to the payouts provided in the resolution plan approved by the COC. Conversely, if the CIRP fails, then the builder-company has to go into liquidation as per Section 33, and the homebuyers, being unsecured creditors, would stand to lose all their hard-earned money for no fault of theirs.

Ultimately it was held that the settlement arrived at between the home buyers and the appellant/corporate debtor, will make the company cater to the larger interest of the home buyers. Thus, considering that 82 out of 128 home buyers

were promised to get the possession of property within a period of one year, and the fact that the original applicants had also settled the dispute with the corporate debtor, the Court was of the opinion that it was a fit case to exercise the powers under Article 142 of the Constitution of India read with Rule 11 of the NCLT rules, 2016 and to permit the original applicants to withdraw the CIRP proceedings.

Comments

With the increase in such residential projects and the plight of home buyers, this pronouncement comes out as a ray of hope towards safeguarding the interests of home buyers. By virtue of the 2017 amendment, the interests of home buyers are protected by restricting their ability to initiate CIRP against the builder only if 100 or 10% of the total allottees choose to do so, thus conferring upon them the status of financial creditors to enable them to participate in the COC in a representative capacity. Through this pronouncement, the Apex Court very succinctly explained the legislative intent behind the amendments to the IBC which is to secure, protect and balance the interests of all home buyers.

"DIYA DUTTA

HIGH COURT PRONOUNCEMENTS

The workman of the industry affected by lay-off are entitled to receive/recover their dues in accordance with the provisions of Section 53 of the Code.

M/S LML LIMITED V. STATE OF U.P. AND OTHERS

Court	High Court, Allahabad
Judgement Dated	25th January 2022
Bench	Justice Jayant Banerji
Relevant Sections	IBC, 2016– Section 53

Brief Background

The prayer in the petition is for quashing/setting aside the award dated 19.2.2020 published on 12.3.2020 made by the Industrial Tribunal.

The petitioner - the company was engaged in the business of manufacturing geared scooters and had an employee strength of more than 6,000 employees including staff and workers. In lieu of the repeated strikes and unrest created by the workmen as well as the losses suffered by the Company, rapid erosion of the Company's net wealth took place where after a reference was filed before the Board for Industrial and Financial Restructuring under the provisions of the Sick Industrial Companies (Special Provisions) Act, 1985 held on 8.5.2007, an operating agency was appointed to prepare a revival scheme, if possible. The workmen of the petitioner-Company resorted to strikes and demonstrations with effect from 27.2.2006, which paralyzed its functioning and a lockout was declared with effect from 7.3.2006.

The discussions between the Company and the registered union of the Company, LMLKS, before the Additional Labour Commissioner and the Conciliation Officer, resulted in a settlement on 13.4.2007, which was given effect. In terms of the aforesaid settlement, it was decided that the workmen would withdraw the strike and the lockout would be lifted with effect from 15.4.2007; that the petitioner-Company will take steps to revive the establishment and only such number of workmen shall be taken on work and employment in phases as per the requirement of work and production as far as on departmental seniority basis, and all other workmen, save and except those who were required to resume work and production, shall stand laid off. The settlement further provided that the laid-off workmen would be entitled to receive lay off compensation in the manner specified.

LML Mazdoor Union, which was neither a registered nor a recognized union, filed a Writ Petition No. 25445 of 2007 seeking to dissolve the settlement, whose petition was dismissed by this Court.

Then, the State Government *suo moto* referred an industrial dispute for adjudication to the Industrial Tribunal (respondent no. 2) on the following terms-

"Whether the lay-off done by the employers in the industry from 15.04.2007 is correct and/or legal? If not, then what benefits/relief are the workman of the industry affected by lay-off are entitled to and what other details."

The registration certificate issued to the respondent-Union was challenged before this Court by way of Writ Petition No. 5903 of 2008 and Writ Petition No. 13658 of 2008. The aforesaid petitions were allowed on 21.04.2008 holding that since all the members of the respondent-Union are laid off employees, therefore, the registration was granted dehors the statute.

Through Special Leave Petition, the judgement of the court regarding the status of registration of respondent union as *Dehore the Statute* is pending before the Supreme Court. Hence, the effect and operation of the order have stayed.

The NCLT issued consequential directions while passing an order of moratorium under Section 14 of the Code. Since, the resolution plan submitted by one Rimjhim Ispaat Limited was rejected by the Committee of Creditors in the meeting held on 21.1.2018, the NCLT, by means of its order dated 23.3.2018 ordered liquidation of the petitioner company in the manner laid down in Chapter III of the Code and passed consequential directions.

On perusal of the books of accounts and record, the Liquidator in accordance with the provisions of Regulation 19(4) of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 admitted claims of 6337 workmen/ employees. The petitioner-company started disbursing funds of the employees/workmen whose claims were admitted and till the date of filing of the petition, the Liquidator had disbursed funds amounting to Rs. 37,03,28,557/- to 2946 workmen/employees of the Corporate Debtor/petitioner-company.

By means of the impugned award dated 19.2.2020, the Industrial Tribunal answered the reference in favour of the workmen and held that the layoff of workmen on 15.4.2007 was illegal and for the period of lay off from 15.4.2007, the workmen are entitled to entire wages, allowances and benefits. It was further held that from 15.4.2007 till the closure of production of the unit of the factory or till the date of appointment of the Liquidator, the workmen who have received a layoff compensation, the same would be adjusted and the payable amount would be disbursed within 30 days of the award by the employer/Liquidator.

Thus, the prayer in the petition is for quashing/setting aside the award dated 19.2.2020 published on 12.3.2020 made by the Industrial Tribunal.

Issues

Whether the award made by the Industrial Tribunal was justified?

i. Representation of the workmen before the Industrial Tribunal.
ii. Consideration of the settlement by the Tribunal.
iii. Award of back, allowances and consequential benefits.

Decision

i. The Union, with which the petitioner-company entered into the settlement, does not represent the majority of the workmen.
ii. That in view of the interim order passed by the Supreme Court in a Special Leave Petition staying the operation of the order of the Division Bench of this Court passed in a Special Appeal, the registration of the respondent-Union stood revived.
iii. That even an unregistered Union is not debarred from representing the interest of a workman.

Representation of the workmen before the Industrial Tribunal

The validity of the registration granted in favour of the respondent-Union is subject to adjudication before the Supreme Court. It is iterated that the registration certificate granted on 18.01.2008 was quashed in a writ petition which order was upheld in the intra-court Special Appeal. Reliance was placed upon the Supreme court decision in *Shree Chamundi Mopeds Ltd. vs. Church or South India Trust Association* to reiterate that the order of cancellation of registration of the respondent-Union, remains in abeyance with effect from 21.02.2014 on which date the Supreme Court stayed the order dated 01.02.2013 passed by this Court in Special Appeal No.833 of 2008 and 834 of 2008.

Clause (i) of sub-rule (1) of Rule 40 of the U.P. Rules gives discretion to the workmen for opting for representation by the persons mentioned therein. It has not been stated in the petition who was the person authorized by the workmen to represent them and appear before the Industrial Tribunal. It is also not known on which date was the authority letter filed on behalf of the workmen before the Industrial Tribunal. In any view of the matter, an authority letter filed after the aforesaid interim order of the Supreme Court dated 21.02.2014, even by an officer of the respondent-Union would anyway enable him to represent the workmen. For that matter, even if such letter of authority was filed prior to the aforesaid interim order of the Supreme Court, such an officer would be enabled to represent after 21.02.2014 in view of the interim order of the Supreme Court. Therefore, the contention regarding non-entitlement of the

respondent-Union to represent the interest of the workmen before the Industrial Tribunal would not be acceptable.

ii. **Consideration of the settlement by the Tribunal**

Lay-off by the petitioner-Company formed part of the settlement. The issue regarding lay-off was the subject matter of the reference made suo moto by the State Government to the Industrial Tribunal, which, in turn, has answered the reference aforesaid in favour of the workmen. It is pertinent to mention here that the award of the Industrial Tribunal is in respect of the workers who were laid off by the petitioner-company on 15.4.2007, and not only in respect of workmen having membership of any particular Union. It is observed by the Industrial that Section 2(n) of the U.P. Act specifies

therefore, Exhibit D-19 is completely believable and during the period of lay off, the appointment of new workmen by the employer and not reemploying the laid-off workmen was unjustified and illegal. In the present case, the Industrial Tribunal has answered the reference, which pertained to the validity of the lay-off by means of the award and has recorded a definite finding of the lay-off being unjustified and illegal. The Tribunal has analysed the settlement only for consideration of the provisions and terms of lay-off.

The decision of the Industrial Tribunal is correct and deserves no interference. There is no such perversity or arbitrariness in the impugned award of the Industrial Tribunal, with regard to this aspect of the matter that would merit interference.

Award of back wages, allowances and consequential benefits

Under the facts and circumstances of the present case, the petitioner-company being under liquidation, the plea for the remission of the back wages for the reason of 'impossible burden on the employer' cannot be acceded to. It is for the Liquidator to assess the claims of the workmen also taking into account the impugned award of the Industrial Tribunal. Thereafter the proceeds from the sale of the liquidated assets can be distributed in accordance with the Code.

all conditions under which lay-off can be made, but the lay-off done by the employers was shown to be due to the crisis of working capital, which is contrary to the provisions of Section 2(n). The Industrial Tribunal further noticed that the partial payments of the compensation for the lay-off that was being made from the year 2017 were stopped from March 2017 and accordingly, it held that it cannot be assumed that by means of the settlement, approval had been given to the petitioner-company to keep the workmen laid off for an indefinite period of time and not make payment of the entire compensation.

The Industrial Tribunal has noticed that the aforesaid notice had not been disputed by the employers by any document nor on the basis of oral testimony and

Sub-section (4) of Section 14 of the Code provides the order of moratorium to have effect from the date of such order till the completion of the corporate insolvency resolution process provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under subsection (1) of Section 31 or passes an order for liquidation of the corporate debtor under Section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be. As such, in view of the liquidation order passed by the NCLT on 23.3.2018, the order of moratorium passed under Section 14 ceased to have an effect. Accordingly, further proceedings in the pending adjudicating case before the Industrial Tribunal was not barred after the order of liquidation passed by the NCLT.

Only workmen's dues for a period of 24 months preceding the liquidation commencement date are required to be distributed to the workmen in this priority. With regard to the other debts and dues pertaining to workmen, the sums would be required to be paid in the order of priority mentioned in clause (f) of sub-section (1) of Section 53 of the Code. In terms of clause (ii) of sub-section (3) of Section 53, the “workmen's dues” would have the same meaning as assigned to it in Section 326 of the Companies Act, 2013. Thus, the “workmen's dues” of the company in liquidation shall be made strictly in accordance with the priority, to the extent, and, in the manner provided in Section 53 of the Code.

The lay-off having been held to be unjustified and illegal by the Industrial Tribunal, what follows is that all the workmen who were not employed after lifting of the lock-out with effect from 15.04.2007 and were laid off, would be entitled to full wages, allowances and consequential benefits as directed by the Industrial Tribunal. Any amounts received by them towards lay-off compensation shall be adjusted. However, as observed above, the workmen would only be entitled to receive/recover their dues in accordance with the provisions of Section 53 of the Code.

Comments

This judgement is a welcome step regarding ambiguity under section 53 of the IBC, as there is no clear definition of the components that must be included under workmen's dues and wages, as well as any unpaid dues, under section 53. It should be stated whether or not such fees include a contractual bonus or not. In addition, this decision has followed the NCLAT's decision in Arcelor Mittal, which declared that Section 53 of the IBC only applies to the distribution of proceeds from liquidation, not to resolution bids.

"NIMISHA SHARMA

NCLAT PRONOUNCEMENTS

The Liquidator decides whether SoC is to be placed before the Tribunal by an Application or not.

RAMESH KUMAR CHAUDHARY & ANR. V. ANJU AGARWAL & ORS.

Court	NCLAT - Principal Bench, New Delhi
Judgement Dated	March 15, 2022
Bench	Justice Ashok Bhushan and Dr. Alok Srivastav, Member (Technical)
Relevant Sections	Companies Act, 2013 - Sec. 230, IBBI (Liquidation Process) Regulations, 2016 - Regulations 2B, 31A and 32

Brief Background

The present appeal was filed before the NCLAT challenging the order dated November 1, 2021, passed by NCLT, Allahabad. The said order directed the Liquidator to consider the Scheme of Compromise (hereinafter "the SoC") under Sec. 230 of the Companies Act, 2013, (hereinafter "the Act") submitted by the Respondent Nos. 2 & 3, as well as to not proceed with the auction of the assets of the Corporate Debtor, i.e., M/s. Shree Bhawani Paper Mills Limited.

The AA passed an order dated July 7, 2021 to start the liquidation process against the Corporate Debtor. The Ex-Managing Director of the Corporate Debtor died on July 12, 2021 and on September 18, 2021, Smt. Meenu Tandon, the wife of the Ex-Managing Director informed the liquidator that, as per the will of her husband, she has inherited all of his 14.6% shares, hereby becoming the largest shareholder of the Corporate Debtor. The liquidator was then requested to appoint Smt. Meenu Tandon as a member of the Stakeholders Consultation Committee (hereinafter "the SCC"). On September 20, 2021, the liquidator informed Smt. Meenu Tandon that her husband was holding 12.97% of shares in an individual capacity and 1.63% shares as part of the HUF. Therefore, Shri O.P. Goenka, holding 13.48% shares, was the largest shareholder to be included in the SCC.

On September 25, 2021, the liquidator issued an e-auction notice, and on September 30, 2021, he was informed by Respondent No. 2, i.e., Akshat Tondon, about the shareholders of the Corporate Debtor proposing a SoC under Sec. 230 of the Act, and requested to withdraw the said notice. Further, Respondent No. 2 stated that the Corporate Debtor is a Medium Enterprise under the Micro, Small & Medium Enterprises Development Act, 2016 making it eligible to submit such a scheme. On October 04, 2021, an SoC was submitted to the liquidator and Respondent Nos. 2 and 3 were provisionally declared ineligible to submit the scheme by the order dated October 14, 2021. This decision was challenged before the AA, wherein it was asked to consider the SoC submitted by the Respondent Nos. 2 and 3 and stop the auction. On October 21, 2021, the liquidator told Respondent Nos. 2 and 3 that they were declared to be eligible under Sec. 29A, and that a meeting of the SCC was being called on October, 22, 2021, for discussion on the SoC. On the same day, an urgent meeting of the SCC was convened for the next day. Respondent No. 2 sent an e-mail to the Liquidator, requesting that reasonable time be provided for clarifying the matters arising with respect to the SoC before taking any decision on the same. Moreover, the mail requested that, till the time the AA decides on the Application filed by the Respondent No. 2, the liquidator should not deal with the assets of the Corporate Debtor. In the SCC meeting that took place, the liquidator declared the eligibility of Respondent Nos. 2 and 3 to propose the SoC. 59.66% voted against the Scheme, thereby failing to meet the required approval threshold of 75% under Sec. 230(6) of the Act. Thereafter, the liquidator sought the permission of the SCC and called Respondent No. 2 for his presentation. After 91.35% voted against the presentation of the Scheme, the SCC decided to continue with the e-auction. According to the liquidator, only one person had given an Expression of Interest along with the EMD, and he accepted the bid of Rs. 45.30 crores.

On November 1, 2021, the AA decided on the application filed by Respondent Nos. 2 and 3, allowing them to file the SoC with the Liquidator by November 8, 2021 and staying the auction. This led to the present appeal.

Issue

Whether the SoC is to be placed before the tribunal by an application or not?

Decision

Firstly, the tribunal dealt with the authority to decide on the approval of the SoC. Referring to Regulation 2B of Liquidation Regulations, 2016, It noted that the SoC is to be completed within 90 days of the order of liquidation, which is not to be included in the liquidation period. It further relied on the judgement of *S.C. Sekaran v. Amit Gupta* and *Y. Shivram Prasad v. S. Dhanpal* in order to determine the duty of the Liquidator. The court in the said judgement had held that, before taking steps to sell the assets, the liquidator is obligated to take steps under Sec. 230 of the Act to ensure that the sale of assets is done only when there is a failure in the revival of the Corporate Debtor. Moreover, Regulations 31A and 32 of the Liquidation Regulations, 2016 state that the SCC functions in an advisory capacity, and the said advice is not binding on the liquidator. Therefore, the decision of the liquidator to place the SoC before the SCC to come to a decision was not in accordance with the provisions of the law. Sec. 230 of the Act, when read with Regulation 2B, bestows the liquidator with the authority to decide upon the question of whether the SoC is to be placed before the tribunal by an application or not.

Secondly, the tribunal observed that the liquidator acted under misconceptions about the whole statutory procedure. The minimum voting criteria provided under Sec. 230(6) is applicable only in the case of a meeting held in pursuance of Section 230(1), i.e., a meeting directed by the tribunal upon an application filed by the liquidator. The same remains inapplicable in the present case since the meeting had been convened under Section 230(1). Further, according to Regulation 31A(6), the advice of the SCC is to be taken when approved by at least 66% votes. In this case, the SCC had advised that the SoC should be rejected, and was met with only 59.66% of the votes, rendering the advice ineligible to be considered. Despite this, the liquidator acted on this advice, which, according to the court, amounted to abdication of the duty of the liquidator. Further, the liquidator failed to comply with Regulation 31A(9), which provides that the 66% voting requirement has to be computed based on the members of SCC present and voting, rather than the value of claims of the Financial Creditor.

Thirdly, the tribunal dealt with the minimum voting criteria of 75% under Sec. 230(2)(c) as a condition precedent for the consideration of the SoC. The order concluded that this provision is attracted only when there is a scheme of corporate debt restructuring wherein the lenders permit the borrowers to make payment of the debt in different time schedules, or different instalments, as per any Scheme. In the instant case, the SoC proposed by Respondent Nos. 2 and 3 is restructuring of debt. Therefore, it requires the consent of at least 75% of the Secured Creditors. However, the liquidator failed to intimate this fact to the Respondent Nos. 2 and 3. Initially, Respondent Nos. 2 and 3 had been declared ineligible to submit the SoC, thereby being denied the opportunity to present their case before the Financial Creditors. Moreover, the liquidator held that Respondent Nos. 2 and 3 were eligible to submit the SoC. In the meeting, the liquidator placed the agenda into consideration of the SoC and was met with disapproval. The liquidator submitted yet another proposal before the committee to allow Respondent Nos. 2 and 3 to present the SoC, only to be rejected by the SCC, having already met their disapproval. According to the tribunal, this indicated that the liquidator did not want to give any opportunity to Respondent No. 2 to explain to the SoC so that she could proceed with the auction. The liquidator failed to provide Respondent Nos. 2 and 3 with a reasonable opportunity to clarify their Scheme before the SCC or to approach the Financial Creditors.

Lastly, the NCLAT dealt with the appointment of Smt. Meenu Tandon as a member of the SCC. She had inherited 12.97% share and held 0.83% in personal capacity, amounting to a total holding of 13.70% share, excluding the shares held by HUF. This made her the largest stakeholder. The AA, in another application filed by Smt. Meenu Tandon, had accepted her claim. On the basis of this, the tribunal came to the conclusion that there was neither any consideration of the SoC, nor were there any valid reasons for rejecting the same given

by the liquidator. This consequently rendered the auction unsustainable. Accordingly, the tribunal affirmed the order dated November 1, 2021, and disposed of the appeal.

Comment

The tribunal's judgement is a step in the right direction. It was correctly directed that the liquidator applied the mentioned laws incorrectly, resulting in non-compliance with the legislative regulations governing the SCC. Through this decision, the tribunal reiterated the necessity of going concern sales prior to liquidation, since the latter would be the corporate death of a company. Cases like this help in clarifying the meaning of the IBC regime by removing doubts about the required implementation of the clauses. The intent of the IBC regime hereby becomes more evident and any confusion regarding the mandatory application of this provision is removed.

"ISHA AKAT

An investment by a profit-sharing partner cannot be considered to be a Corporate Debt

MUKESH N. DESAI V. PIYUSH PATEL AND ORS.

Court	National Company Law Appellate Tribunal, New Delhi Bench
Judgement Dated	February 24, 2022
Bench	Justice Anant Bijay Singh, Ms. Shreesha Merla [T]
Relevant Sections	The Insolvency and Bankruptcy Code, 2016 - Sec. 5, 7 and 9

Brief Background

The appeal has been filed in NCLAT by Mukesh N. Desai ("the Appellant") who was dissatisfied with the order of NCLT, Ahmedabad Bench dated July 10, 2020, an application under section 9 of the IBC, 2016 filed by M/s Nuvoco Vistas Corporation Limited. The Appellant was under an MoU with the Respondents in a real estate project under which the appellant was to make a payment of a sum of ₱12,57,42,071/- towards 25% ownership of the land in the project, thus making them partners. It is also important to note that the company has no other creditors in the market at the moment of this appeal and only the case of the Appellant was pending. The sum paid was under the heading of 'Long Term Borrowings'. Under the MoU, the appellant is a 25% partner in the project and entitled to 25% of the net profits.

The project went under CIRP and the IRP invited claims from the creditors through a public announcement (dated July 30, 2019) under section 15 of the code. The claims of the appellant to the tune of ₱4,41,82,701/- as part of the money already paid under the MoU, was admitted. In addition to that, the claims of three operational creditors, Nuvoco Vistas Corporation Limited, Kunjan Dalal and Income Tax Officer, Surat were also included. The claim of the IT department amounting to ₱1,45,00,000/- was transferred to them, while the other withdrew their claim on March 24, 2020, under section 12A of the Code. At the end of this process, only the appellant's claim was left pending. This made him the sole remaining member of CoC. The Adjudicating Authority observed that the appellant cannot be taken as a financial creditor and thus the CoC constituted by the RP is *void ab intio*.

Issues

Whether the Adjudicating Authority can close the CIRP proceeding, admitted under section 7, on the grounds that the member(s) of the CoC does not fall within the ambit of 'Financial Creditor' as defined under the Code.

Decision

The hon'ble nclat observed that under the mou, the appellant is entitled to 25% of the net profit under the project. A second agreement dated may 26, 2014, further reinforced the above. While relying upon the supreme court judgement of *orator marketing private limited v. Samtex desinz private limited*, the tribunal observed that the person who gives a loan to a 'corporate person' free of interest cannot be considered to be a 'financial creditor' since there was no 'default' on the part of the corporate debtor. Further, the appellant is a profit-sharing co-owner who gains 25% profit if the project succeeds. The amount is an investment and not financial debt as per the code, thus, making them 'joint development partners' of the project. Thus, the amount paid cannot be considered as financial debt under section 5(8) since there is no sum that is owed, assigned or transferred as per the code. The tribunal concluded that such a person will automatically in the eyes of law will be incompetent to initiate a cirp as a financial creditor, and thus, section 7 application by them shall not be maintainable.

Comments

One of the major distinguishing factors between an operational debt and a financial debt is the fact that the latter has a time value of money attached to it. The tribunal made a very vital note of the point in the instant case that the mou has no provision of payment of interest that was owed to the appellant, and via catena of judgments it's an established fact that if the term loan is free of interest on account of its working capital requirement, then it will not

be a financial debt. It also noted the absence of any documents that indicate that the amount given under the mou is for time value of money. Moreover, while clarifying further, the tribunal also rightly observed that both the parties, being a profit share owner, who in the event of the success of the project would receive the residual gain, the amount invested in the land cannot be said to be a 'financial debt' as defined under section 5(8) of the code.

"ROHIT DHANPOLE

The liquidator cannot brush aside the decisions arrived at by the Interim Resolution Professional/ 'Resolution Professional' except for any subsequent development as arisen in respect of the claims

AXIS BANK LTD. VS. SAMRUDDHI REALTY LTD.

Court	National Company Law Appellate Tribunal Chennai Bench, Chennai
Judgement Dated	February 22, 2022
Bench	Justice M.Venugopal
Relevant Sections	Section 42 read with Section 60(5) of the I&B Code, 2016

Brief Background

The Appeal has been filed by Axis Bank Pvt. Ltd. against the decision of Adjudicating Authority. The Appellant states that although its claim was rejected during the stage of CIRP itself, it has the right to submit its claim again before the Liquidator because Liquidation is a separate proceeding. As per the agreement executed between the parties, it gives a right to the Bank to claim out of the Liquidation cost of the Corporate Debtor instead of from the Home Buyers. The Bank has disbursed the money to the Corporate Debtor. Therefore, relief must be given.

The Appellant further argues that it has a claim to recover from the 'Corporate Debtor' as the definition of a claim under Section 3(6) of the Code is inclusive of a right to payment, whether or not such rights are reduced to judgement, fixed, disputed, undisputed, legal, equitable, secured/unsecured right to remedy for breach of contract under any other law for time being in force if such breach gives rise to a right to payment irrespective of condition or status attending it. As 'liquidation' is an extraordinary event and under liquidation, the assets of the would be auctioned.

The counsel for the Liquidator (Respondent) contends that the appellant cannot file a claim again during the Liquidation process, as its claim was considered and rejected during the CIRP Process. The appeal is not maintainable.

According to the Respondent, CIRP Process/Liquidation process is to be done in a time-bound manner as per the provisions of the Code. The contention of the Applicant that it can avail opportunity with reference to Public Notification issued by Liquidator, even though its claim was rejected during CIRP is incorrect. Liquidation proceedings are part of insolvency proceedings initiated under the Provisions of Code and it is the second stage of CIRP in respect of Corporate Debtor. Moreover, the Liquidator cannot ignore the decisions taken by IRP/'Resolution Professional' and reverse them.

Issues

Can the Liquidator brush aside the decisions arrived at by the Interim Resolution Professional/'Resolution Professional'?

Can two claims be preferred with regard to the same 'Debt' in law?

Decision

The court said that the CIRP and the 'Liquidation Process' are to be completed within the specified time period. The Liquidator had accepted the Allottees claim and in such an event, the Appellant/Applicant is not entitled to vary/modify the same. In Law the Liquidator cannot brush aside the decisions arrived at by the Interim Resolution Professional/'Resolution Professional' except for any subsequent development as arisen in respect of the claims.

The Appellant has not subjectively satisfied this Tribunal that the money which it is claiming was disbursed to the 'Corporate Debtor' for the time value of money as per Section 5(8) of the I&B Code.

Therefore, the appeal fails and is dismissed.

Comments

The decision of the court is correct since the enactment of the Insolvency and Bankruptcy Code, 2016 (IBC) is for giving effect towards a highly time-bound process for resolution of insolvency of partnership firms, corporate persons and

individuals. Speedy resolution and to maximise recovery for lenders is its objective.

The core reason that the Insolvency and Bankruptcy Code or the IBC exists is to introduce a streamlined, faster and fairer process of insolvency resolution. The success of CIRPs lies in the time-bound disposal of insolvency proceedings. A very long insolvency period is likely to push the corporate towards liquidation while reducing its liquidation value. As more resolutions go through the processes would be standardized.

"RADHIKA VERMA

A resolution plan which is consistent with present laws and regulations shall be complied with for efficient CIRP

NEERAJ SINGAL AND ANOTHER V. TATA STEEL LIMITED AND ANOTHER

Court	National Company Law Appellate Tribunal, Principal Bench, New Delhi
Judgement Dated	March 7, 2022
Bench	Justice Ashok Bhushan, Dr. Ashok Kumar Mishra (T), Dr. Alok Srivastava (T)
Relevant Sections	Sections 30(2)(e), 31, 31(1), 31A(7)(b), 60(5), Insolvency and Bankruptcy Code, 2016, Regulations 31A(5), 31A(7)(b), 31A(9), SEBI (Listing Obligations and Disclosure Requirement) Regulations, 2015, Rule 19A, Securities Contracts (Regulation) Rules, 1957

Brief Background

M/s Bhushan Steel Limited owed its creditors Rs. 59,000 crores. The CIRP began in 2017 as a result of an application filed by the State Bank of India.

M/s. Tata Steel Limited (Respondent No.1) submitted a Resolution Plan proposing an upfront payment of Rs. 35,000 crores. On May 15, 2018, the Adjudicating Authority approved M/s. Tata Steel Limited's Resolution Plan. M/s. Tata Steel Limited carried out the Plan on May 18, 2018, by making payments to creditors and appointing the necessary managerial officials. On May 18, 2018, Bamnipal Steel Ltd., a subsidiary of M/s. Tata Steel Limited wrote to the Promoters including the Appellants to transfer all of their unpaid equity shares of the Company held by them to Bamnipal Steel Ltd. for consideration @ INR 2/- per share. The Appellants did not reply to the letter nor sold their shares as requested.

On May 26, 2018, Bhushan Steel Limited sent a letter to the National Stock Exchange (NSE) and the Bombay Stock Exchange informing them that, following the Adjudicating Authority's approval of the Resolution Plan on May 15, 2018, the same is being implemented and requesting reclassification under Regulation 31A, sub-clause (5) of SEBI (Listing Obligations and Disclosure Requirements).

The suspended Director of Bhushan Steel Limited challenged the order dated May 15, 2018, by filing an appeal with this Appellate Tribunal, which was dismissed by this Tribunal's judgement dated 10th August 2018. A Civil Appeal was filed before the Hon'ble Supreme Court by Neeraj Singal and others, challenging the judgement of this Appellate Tribunal dated August 10, 2018. The Civil Appeal was dismissed as withdrawn by order of the Hon'ble Supreme Court dated February 22, 2021 granting leave to withdraw the appeal while reserving the right to pursue appropriate remedies with regard to other grievances, if at all.

M/s Tata Steel Limited filed an Interim Application on September 12, 2018, requesting that Respondent Nos. 1 and 2 (Appellant herein) transfer 2,56,53,813 equity shares of Bhushan Steel Ltd. held by them to Bamnipal Steels Ltd. in accordance with the Resolution Plan approved on May 15, 2018. After hearing the parties, the Adjudicating Authority issued an order dated October 29, 2021, granting the Application while ordering the Respondents (Appellants herein) to sell their shares to the Applicant at INR 2/- per share. Former Promoters of Bhushan Steel Ltd. filed this appeal after being dissatisfied with the Adjudicating Authority's order.

Issues

Whether the resolution plan and the observation provided by the Adjudicating Authority in the order correct?

Decision

In the instant case, the Appellate Authority completely backed the AA's findings while allowing the Respondent's Application seeking direction to the Appellants to sell their Promoter group shares at INR 2/- per equity share.

The Appellate Authority determined that the Resolution Plan, as required by Section 30(2)(e) of the Code, must be in compliance with the law in effect at the time. Section 30(2) sub-clause (e) requires that it "*does not contravene any of the provisions of the law in force at the time*." The

Resolution Plan must thus be implemented in accordance with existing law, and the Respondent could not have implemented the Plan in accordance with Structure one in para-3 which provides that as per the first structure (method) Resolution Applicant has to subscribe 75% of equity shares that is 89,70,44,238. The Existing Promoter Group equity share is 2.14% that is 256,53,813 was to be in rest 25% shareholding. The first structure was to take place in event erstwhile Existing Promoter Group shareholding is not counted towards promoter shareholding for the purposes of Regulation 2015 , this could have violated Regulation 31A(7)(b) of the SEBI (Listing Obligations and Disclosure Requirement) Regulations, 2015. As the regulation prohibits public shareholding of Promoter pursuant to reclassification to be counted towards achieving compliance with minimum public shareholding requirement under Rule 19A as noted above. Thus, shareholding of 2.14%, which was held by erstwhile Promoter Group, even if they were treated as public shareholding cannot be counted towards 25% shareholding, which is a statutory requirement to be maintained. The Appellants cannot claim an exception when they were asked to sell their equity shares in accordance with the Resolution Plan as it was lawful. The Appellate Authority found no error in the AA's decision to grant the Respondent's Application while ordering the former Promoters to sell their shares to the Applicant (Tata Steel) for INR 2/- per share.

As a result, the Appellate Authority did not find any merit in the Appeal and the Appeal was dismissed.

Comments

The order upheld by the appellate authority is in the right direction as it takes into cognizance all the relevant regulations and laws which come into picture in this case. Once a resolution plan is approved, the scope for judicial interference under the IBC regime is extremely low. Therefore, it is important for courts dealing with such situations to exercise as much restraint as possible. Unless there is a clear violation of Section 30 of the IBC, courts should not intervene.

In this case, the adjudicating authority correctly upheld the execution of the resolution plan. In the entire process of CIRP, structure 2 was lawful and was a better option when compared to structure 1. In the present order, a crucial aspect also was that there were many other laws parallelly used in the present case and it was interpreted rightfully. Thus, this order is good in law.

"SAMARTH GARG

NCLT PRONOUNCEMENTS

The only way we can infuse the meaning to section 29A is to have the eligibility of the resolution applicant be tested when the plan is ripe for consideration by the CoC.

FLSMIDTH PRIVATE LIMITED V. RP OF JHABUA POWER PVT. LTD.

Court	National Company Law Tribunal, Kolkata Bench
Judgement Dated	March 8, 2021
Bench	Justice Shri Rajasekhar V.K. (J), Justice Shri Harish Chander Suri (T)
Relevant Sections	IBC, 2016- Sec. 12A, 29A(c) and 60(5)(C)

Brief Background

The applicant, Avantha Holdings Limited, had submitted a settlement offer to the RP between December 21, 2020 and January 25, 2021 to be placed before the CoC for consideration. It was the applicant's case that unfair consideration had been given to the plan submitted by National Thermal Power Corporation Limited (hereinafter the "NTPC"), despite being allegedly ineligible to submit the plan under Sec. 29A(c) of the IBC. The NTPC was the promoter of, and held equity shares in, Ratnagiri Gas and Power Private Limited (hereinafter "RGPPL") to the extent of 25.51% and Konkan LNG Limited (hereinafter "KLL") to the extent of 20.23%. Moreover, it was in control and management of both RGPPL and KLL. Both RGPPL and KLL's accounts were classified as Non-Performing Assets (hereinafter "NPAs") prior to the insolvency commencement date. It was alleged by the applicants that, as on the date of submission of the first plan by NTPC, i.e., December 30, 2019, they were ineligible as the accounts of RGPPL and KLL were classified as NPAs and a period of one year had not passed from the date of their qualification as NPAs. It was also the case of the applicants that this fact had not been disclosed to the RP when the first plan was submitted. Rather, it was disclosed later, vide a letter.

Thereafter, KLL had entered into a tripartite settlement agreement and a deed of novation on March 23, 2020 with Gail Limited (hereinafter "GAIL") for the restructuring of debt. Similarly, RGPPL had entered into a Term Debt Settlement Agreement dated December 31, 2020, Deed of Novation dated October 31, 2020, amendment of Compulsorily Redeemable Preference Shares (hereinafter "CRPS") Agreement dated December 31, 2020, and Share Purchase Agreement dated December 31, 2020 with the NTPC for a one-time settlement of dues. Subsequently, the balance debt was novated to the NTPC.

It was also the case of the applicants that there was no evidence that the accounts of RGPPL and KLL were upgraded from the status of NPAs when the revised plans were submitted. The submission of the applicants was two-fold. Firstly, on the basis of ineligibility under Sec. 29A for the plan submitted by the NTPC. And secondly, on the decision of the CoC which did not give due consideration to the proposal submitted by the applicants. RGPPL and KLL were subsidiaries of the NTPC as could be established by the financial statements of March 31, 2020. The applicants submitted that, if on the date of submission of the first plan, there was disqualification on the basis of ineligibility under Section 29A, even if this ineligibility is solved on a later date, the resolution applicant still remains disqualified. To further buttress their submissions, the counsel for applicants relied on the financial statements and the affidavit that was submitted by the NTPC on October 22, 2019, that were contrary to each other. While the financial statements made it clear that there was an NPA in the NTPC's subsidiaries, a false declaration of the same was given by the resolution applicants, i.e., the NTPC. There were various notices issued by Canara Bank, IDBI bank, SBI bank, ICICI bank, and IFCI in 2019, qualifying RGPPL and KLL as NPAs. However, it is worth noting that on February 10, 2020, SBI issued a No Dues Certificate (hereinafter "NDCs") for the instalments due as on December 31, 2019. Further, it mentioned that this still did not stop the account from being an NPA. While NDCs were issued by other banks, this statement that RGPPL and KLL

were still NPAs, found no mention in their letter. The applicants submitted that it did not matter if NDCs had been issued by banks if their accounts were still classified as NPA because Sec. 29A(c) considers both - classification and period.

As mentioned before, both RGPPL and KLL had entered into a settlement agreement much after the submission of the first resolution plan. Even in this settlement agreement, only a part of the debt was paid; the remaining was taken over by a third entity, which doesn't really satisfy the debt per se, it merely restructures it. Time and again, the NTPC had always asked the RP and the CoC for extension of time for resolving this disqualification under Sec. 29A. The RP and the CoC received letters from two different creditors raising objections for ineligibility. The applicants drew notice to the various mentions of the issues raised in the committee meetings. Finally, to conclude, the applicants placed reliance on the case of *Arcelor Mittal India Private Limited v. Satish Kumar Gupta ((2019) 2 SCC 1)* stating that ineligibility under Sec. 29A(c) could be removed if the person submitting the resolution plan made payments for overdue amounts before the submission of the resolution plan.

As for the CoC's decision to not entertain the Sec. 12A proposal, the applicants put forth that their proposal had not been given due consideration, unlike that of NTPC's proposal, and that, as per CIRP Regulation 39(3), the viability and feasibility of the plan had to be decided by the CoC itself, rather than being outsourced to a third party. Further, no comparable evaluation had been undertaken to justify the conclusion that the NTPC's plan was better than that of the applicants. Applicants also supported their submissions by relying on the *Swiss Ribbons Pvt. Ltd. v. the Union of India ((2019) 4 SCC 17)* judgement, in which it was held that the NCLT and the NCLAT could set aside a decision taken by the CoC if it is arbitrary. Further, they also relied on *Hammond Power Solutions Pvt. Ltd. v. Sanjit Kumar Nayak & Ors. (2020 SCC OnLine NCLAT 199)* wherein it was held that, the court can intervene only when no reasons are given by the CoC or that it failed to take care of all stakeholders. Relying on this, the applicants also submitted that the CoC did not show any willingness to negotiate, or had the proposal evaluated by an independent agency like they had done in the case of the NTPC, hence, the CoC's decision was not unimpeachable.

In response to those submissions, the counsels appearing on behalf of the CoC, the RP and the resolution applicant contended that, with respect to the rejection of the proposal under Sec. 12A, at the meeting conducted on April 21, 2021, the CoC had taken due note of the applicant's proposal and found it to be unacceptable since the upfront payment was only of Rs. 100 crore, which was at a later date revised to Rs. 200 crores; this was far less than what the NTPC had been offering. Not only this, the Corporate Debtor had not received any formal request under Sec. 12A. Henceforth, the CoC had decided not to pursue the plan submitted by the applicant. Further, it had been held in a judgement by the Supreme Court that commercial wisdom of the CoC must be given paramount status without any judicial intervention, and the judicial review available in this aspect is limited only to the fact that the Corporate Debtor needs to be kept as a going concern during the insolvency resolution process and the value of its assets needs to be maximised. Lastly, a Sec. 12A proposal is not a resolution plan per se, and it does not need to be vetted in the same manner as a resolution plan. Further, the counsel for the NTPC drew a table for comparison between the plans submitted by the applicants and the NTPC, which makes it clear that the plan submitted by NTPC was far better for the Corporate Debtor to keep it as a going concern. This is why the CoC had rejected the 12A proposal submitted by the applicants.

On the question of ineligibility under Sec. 29A, it was submitted that there were a total of 4 plans submitted by the NTPC. The first affidavit had been given on October 22, 2019, and the last affidavit had been given on June 14, 2021, which was also the date for the submission of the last and the final plan. It was their case that even though constant revision of plans had not originally been stated in the IBC, the same had been introduced by Regulations 36A and 36B of the CIRP regulations. Further, with respect to the ineligibility under Sec. 29A, an important question that had been raised by the NTPC was - at what time would the ineligibility be considered, during the first plan or the subsequent plans? The bench was urged to consider this in both letter and spirit of the law, and in a manner where the object of the statute is followed.

Further buttressing the question on ineligibility, the NTPC submitted that the law only laid down that "at the time of submission of the resolution plan", it did not envisage whether it would be during the first plan or the last plan when this had to be considered. Under Regulation 36A(7)(e) of the CIRP regulations, if the resolution applicant becomes ineligible, he is to inform the RP. However, if the converse happens, the NTPC submitted that a person who is otherwise disqualified by virtue of Sec. 29A(c), could become eligible by paying the overdue amounts. Moreover, it argued that a person who had submitted a plan earlier, and was disqualified, could cure his defect and submit another resolution plan, and the RP had to place it before the CoC for consideration. Between November 30, 2020, and April 16, 2021, the NTPC had paid off the entire dues on account of both of its subsidiaries before the submission of the final plan, which was approved by the CoC. The rebuttal of the applicant stated that under Sec. 29A, the provision applied the same to all, irrespective of the fact that they are government entities, and when the need for an exception is so required, the same had been specified under the section. Hence, the defence taken by the counsel for the NTPC was not valid. Further, they placed emphasis on the judgement of *Arcelor Mittal,* which had explained the legislative intent behind Sec. 29A, and it was very clear that one had to look at 29A and see whether they fell under it, and if so, they would be ineligible irrespective of their status.

Issues

1. Whether the NTPC is ineligible under Sec. 29A, and what would be the crucial date for determining the eligibility of a resolution applicant?

2. Whether sufficient consideration was accorded by the CoC to the Sec. 12A proposal?

Decision

With regards to the first issue, the bench drew notice to the statement of objects and reasons as introduced by the 2017 and 2018 Amendments, with particular reference to the prohibition imposed upon certain persons from submitting a resolution plan, who, on account of their antecedents, may adversely impact the credibility of the processes under the IBC. Further, in order to check that the undesirable persons who may have submitted their resolution plans in the absence of such a provision, responsibility was entrusted to the CoC for providing a reasonable period for repaying the overdue amounts and becoming eligible. Thus, the tribunal held that, when the final plan was considered, all NPAs of the NTPC were cleared and that it had become eligible, so the NTPC was a successful resolution applicant. It also held that, on account of the time period concerning the ineligibility under Sec. 29A, the Hon'ble Supreme Court has time and again directed that provision needs to be read with a purposive interpretation, rather than a literal interpretation. The intention could never have been to disqualify a resolution applicant permanently if there is an initial disqualification. If there is a resolution applicant whose disqualification can be cured prior to the final consideration of the resolution plan or plans, then such person must be encouraged and permitted to do so. This can only result in the betterment of value for the corporate debtor, and never to its detriment. Therefore, the eligibility of the resolution applicant will have to be tested at a meaningful stage, i.e., when the plan is ripe for consideration by the CoC. That is the only way we can infuse life and meaning to Sec. 29A.

As for the second issue, the bench gave due consideration to the submission by both sides, and answered the question in affirmative. The bench noted that, on the question of whether or not due consideration had been given to the 12A proposal, it could not intervene since it was the commercial wisdom of the CoC and the same has been justified by various judgments cited above. Secondly, the submission of the 12A proposal in comparison to the NTPC's proposal was considered to be a non-starter.

Comments

Time and again the courts have considered the manner in which Sec. 29A has to be interpreted. The whole concept of restriction under Sec. 29A is that persons responsible for running the company to the ground should not be allowed entry through the backdoor. The tribunal succinctly noted how persons who, with their misconduct, contributed to the defaults of companies, or are otherwise undesirable, may misuse this situation due to the lack of prohibition or restrictions upon participation in the resolution or liquidation process, and thereby gain or regain control of the Corporate Debtor. This may lead to undermining of the processes laid down in the IBC, as the unscrupulous person would be seen to be rewarded at the expense of creditors.

The bench also upheld the submission that the provision has to be read with a purposive interpretation, while keeping in mind the objects of the code. In this decision, the NCLT has clarified a rather important provision regarding the stage or time of considering the ineligibility under Sec. 29A. and has rightly held that, only when the plan is ripe for consideration, does the ineligibility under Sec. 29A apply.

"JYOTIKA RAICHANDANI

Applicant is entitled to know the financial impact of the alleged fraud reported, along with the records prayed for.

RELIANCE PROJECTS & PROPERTY MANAGEMENT SERVICES LIMITED V. COMMITTEE OF CREDITORS OF RELIANCE INFRATEL LIMITED

Court	National Company Law Tribunal, Mumbai Bench-I
Judgement Dated	March 16, 2021
Bench	Justice P. N. Deshmukh, Sh. Kapal Kumar Vohra
Relevant Sections	IBC, 2016 – Sec. 29, Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 – Regulation 36(2)(h) & (l)

Brief Background

The present application was filed by Reliance Projects & Property Management Services Limited (the "Applicant"), who had been the successful resolution applicant in the CIRP of Reliance Infratel Ltd. (the "Corporate Debtor" or the "Respondent"). Relying on Sec. 29 of the IBC and Regulations 36(2)(h) and (l) of the CIRP Regulations, the Applicant sought the court to direct the respondents to provide to the Applicant, copies of the entire forensic audit report on the basis of which the respondent's account was declared as "fraud" under the RBI circular titled "Master Directions on Frauds – Classification and Reporting by Commercial banks and select FI's", (the "RBI Master Directions") dated July 1, 2016. Additionally, they also sought copies of the communication to the RBI declaring the account as fraud, as well as copies of any or all complaints filed by the respondents with the Central Bureau of Investigation, Enforcement Directorate, or any other investigating or regulatory agencies in respect of the same. In addition, it sought the court to direct the Respondent's Nos. 3 to 5 to provide any and all information relating to the declaration of fraud.

It was submitted that the applicant was not reneging on implementation of the Resolution Plan and was seeking the information and documents to which it was rightfully entitled. There had been no delay on the part of the applicant in the implementation of the resolution and it was taking steps to implement the resolution plan. Further, it was submitted that the entire statutory scheme under IBC (including Section 29) and the Regulations thereunder (including Regulation 36 (2) (h) and (l) of the CIRP Regulations) is premised on ensuring complete transparency with the Resolution Applicant who agrees to take over the Corporate Debtor. Moreover, the Applicant had and continues to have a long-term contractual relationship with the Corporate Debtor since much before the commencement of CIRP, and the continued engagement and knowledge of the business of the corporate debtor was the primary reason for the Applicant's choosing to become a resolution applicant and continuing to engage with the COC.

Respondent No. 1 submitted that the applicant had been taking contradictory stands whereby it stated that it was committed to implementing the Resolution Plan and, at the same time, said that it would not pay the amounts committed under the Resolution Plan unless it was satisfied with the findings contained in the Forensic Report. Such action was in complete violation of the principles of the IBC, which had been enacted for the effective and timely resolution of an entity under the CIRP. Moreover, it went against the settled position of law set out by the Hon'ble Supreme Court in the case of *Ebix Singapore Private Limited vs. Committee of Creditors of Educomp Solutions Limited & Anr. (2021 SCC OnLine SC 707),* wherein it was held that once a resolution plan has been approved by the AA, it is not open to any subsequent modifications or amendments, nor can it be withdrawn.

According to Respondent No. 2, the role of the RP was limited only to facilitating the transmission of the information between the corporate debtor and the forensic auditor at the specific request of certain CoC members. The compliance of Sec. 29 of the IBC, read with Regulation 36 of the CIRP Regulations, is premised on a fundamental understanding that the information or document is available to the Resolution Professional. In the

absence of the availability of such information or documents, it would be incongruous to expect the same to be included in the information memorandum. Not only were the documents or information pertaining to the forensic audit report unavailable, the resolution professional was also not aware of the purpose of the forensic audit exercise. Thus, under the provisions of the IBC, he was not bound or required to disclose the forensic audit report in the information memorandum.
with a financial burden of approximately Rs 42 crores per month by virtue of honouring its contractual obligations, while, on the other hand, the applicant was not facing any prejudice and had not fulfilled its obligations of paying the amounts committed under the Resolution Plan. Its affiliate/group company, namely Reliance Jio Infocomm Limited, continued to occupy and utilise around 30,000 of the identified towers, on terms which were commercially prejudicial to the interests of the corporate debtor.

Issue

Whether the Applicant is entitled to the forensic audit report along with the other records sought?

Decision

The NCLT, while referring to the Ebix judgement, noted that it is not open for the applicant to either seek any modification or amendment of the Resolution Plan or the withdrawal of the Resolution Plan. Acknowledging the fact that the process under the RBI Master Directions and the implementation of the Resolution Plan under the IBC are two entirely different and independent streams, it stated that the Applicant could not delay the implementation of the Resolution Plan under the pretext of the non-disclosure of the Forensic Audit Report under the RBI Master Directions.

After distinguishing the present case from the Ebix judgement, the tribunal noted that, after the approval of the Resolution Plan on December 3, 2020, there had been discussions on the sharing of the contents of the Forensic Audit Report concerning the Corporate Debtor by Respondent No.3 with the Applicant. Moreover, Respondent No.3 had sent an email to the Applicant indicating its willingness to share the information to facilitate effective implementation of the Resolution Plan, subject to the Applicant entering into the "Non-Disclosure Agreement" with Respondent No.3. The tribunal also took note of the fact that the resolution professional had not provided any legal basis for not providing copies of the document sought by the applicant, or any relevant circulars preventing the provision of such information to a successful resolution applicant.In addition, it was noted that the information concerning the affairs of the corporate debtor would certainly help in implementing the resolution plan, and that the forensic audit report, which serves as the basis for the determination of accounts as fraud, as well as complaints by such financial institutions to the investigating agencies and findings therein, are important for a successful resolution applicant in order to ensure successful implementation of the CIRP.
Thus, the tribunal held that the applicant is entitled to know the financial impact of the alleged fraud reported along with the records prayed for. Although it was not entitled to receive such records as a matter of right, in the present case, the development occurred after the applicant had been declared a successful resolution applicant and was deprived of such information. After considering these facts and in the interest of justice, the present application was allowed.

Respondent No. 3 contended that a period of 13 months had elapsed since the approval of the Resolution Plan, and yet, there had been no intent from the applicant to implement the Resolution Plan. Furthermore, due to certain contractual obligations, the corporate debtor had been required to maintain identified towers for the benefit of the applicant. Consequently, it was being hit

Comment

The judgement is well balanced insofar as it provides equal weightage to the right of a successful resolution applicant to receive all details about the business of the corporate debtor and the duty of the same applicant to ensure that it performs its obligations under a Resolution Plan.

In this case, it appears that the resolution applicant was stalling the discharge of duties under the pretext of an absence of information. However, the resolution professional was not aware of this information, which means that there was no statutory lapse of duties on his part. Thus, the

tribunal correctly noted that although modifications would not be allowed, the applicant had a right to know about the said fraud committed by the corporate debtor.

"RIA GOYAL

The AA can reject a fraudulent transaction application on the basis of a lack of necessary details.

SATYA PRAKASH V. Y M FOODWAYS AND ORS.

Court	National Company Law Tribunal, New Delhi - Bench V
Judgement Dated	February 21, 2022
Bench	Mr. Abni Rajan Kumar Sinha, Member (T) & Mr. Avinash Srivastava, Member(T)
Relevant Sections	Section 12, 25(2)(j) and 66; IBBI (Insolvency Resolution Process For Corporate Persons) Regulations, 2016 - Regulation 35A and 40 of the IBC, 2016

Brief Background

The present application was filed by Mr. Satya Prakash, the resolution professional (hereinafter, "RP") of Y M Foodways Pvt. Ltd. (hereinafter, "corporate debtor") against the directors of the corporate debtor [hereinafter, "Respondent No. 1 and 2"]. The RP filed an application under Sec. 25(2)(j) of the IBC to declare the transactions carried out by the corporate debtor and its directors as wrongful or fraudulent, as per Sec. 66 of the IBC, asking the AA to direct them to compensate the creditors.

The factual background was that the RP was appointed by the CoC and the AA to replace a previously appointed RP. Furthermore, a chartered accountancy firm was selected as the transactional auditor to review the transactions undertaken by the corporate debtor. Their report was submitted to the RP and forwarded to the committee of creditors (hereinafter CoC). In light of that report, the RP discussed the possibility of an application for fraudulent trading with the CoC and subsequently filed the aforementioned application.

The RP contended that the majority of the receipts for sales and payments for purchases amounting to Rs. 1123.86 crores had not been realised or paid through the bank account of the corporate debtor. Since such receipts and payments were credited against Uncleared Cheque/Payment Clearing Accounts, the RP contended that a case under Sec. 66 of the IBC could be made out. Relying on the Transactional Audit Report, the RP highlighted 17 instances where excess money was received, payment for a purchase was not made/was only partly made, payment due had been written off, etc. Further, there was also an instance of an alleged false claim of input tax credit (i.e., a reduction of tax as it was already paid on input) by the corporate debtor. The RP also contended that the nature of that account clearly indicates that the ledger entry of receipts against sale recorded and payment against the purchase recorded were being netted off against each other. Further, the RP stated that in a similar application filed by the RP of Kwality Ltd. concerning Sec. 25(2)(j), 43, 44, and 66 of the IBC, the corporate debtor was named as a respondent and was alleged to have made net off payment transactions, amounting to Rs. 488.15 crores. Finally, the Transaction Audit Report in itself had established that the transactions had been carried out with the intent to defraud the creditors, and the RP did not need to do so.

It was the Respondent No. 1 and 2's contention that since Regulation 35A of the IBBI (Insolvency Resolution Process For Corporate Persons) Regulations, 2016 (hereinafter, "Insolvency Resolution Process For Corporate Persons Regulations, 2016") prescribed a 75 day time limit for filing an application covering transactions under Sec. 66 of the IBC, which had not been followed by the RP, the application should be rejected. Further, they contended that the application filed by the RP was a reiteration of the Transactional Auditor's Report and wasn't a complete application as per Sec. 66 of the IBC. Referring to Sec. 66, they contended that the application did not specify either their "intent to defraud their creditors" or their "knowledge of the transactions."

Respondents No. 1 and 2 contended that allegations of fraud needed to be specifically pleaded, established, and proved beyond doubt from the material on record, which was not done by the RP or its counsel in this case. Further, Respondent No. 1 was appointed as a director on 07.09.18 and Respondent No. 2 was appointed as a director on 20.02.18. However, the period of alleged fraudulent trading as considered by the

transactional auditors was between 2017 to 2019. Therefore, no details about the possible responsibility of ex-directors (before 20.02.18) or bifurcation of the liability of the Respondents were provided, and due to this, it was contended to be dismissed.

Finally, the respondents also gave details about their nature of business, trying to clarify their financials. They contended that being milk collection agents, the corporate debtor billed all the milk collected from the suppliers as its purchases and the supply of milk to the milk plants as sale in its books. Further, all their transactions had also been accepted by the Income Tax Department. As for the disparity between actual sale and purchases and what was reflected in their bank account, they submitted that Kwality Ltd., one of the major companies they dealt with had their account frozen by the Income Tax Department, and thus they had come to an agreement with Kwality Ltd. to accept cash directly from its customers. This was the reason why it showed receipts of sale and payments of purchase against Uncleared Cheque/Payment Clearing Accounts. Further, they gave an example of receiving money in their bank account from Anandh Food Agencies, at the direction of Kwality Ltd, even though they had not made a sale to the said company, and contended that such transactions happened regularly, due to which there were disparities of payment.

Issues

i. Whether the timeline under Regulation 35A of the Insolvency Resolution Process for Corporate Persons Regulations, 2016 is mandatory?
ii. Whether such an application can be rejected on the basis of lack of necessary details like bifurcation of liability of directors, absence of details in the application regarding non-liability of the respondents towards transactions made before their date of appointment, etc?
iii. Whether lack of establishment of the Respondent's intent to defraud their creditors in the application renders it non-maintainable?
iv. Whether an application under Sec. 43, 44 and 66 be considered together?

Decision

The application was dismissed by the AA. 4 issues came up through the averments and submissions of both the sides and deliberation of the AA. Following is an issue-wise rationale given by the AA:

Regarding the respondents' plea of the application being filed after a period of 75 days, i.e., not in consonance with Regulation 35A of the Insolvency Resolution Process for corporate person Regulations, 2016, the AA held that the Regulation 35A is a directory and not mandatory. To arrive at such a stance, the AA relied on the judgment of *Brilliant Alloys Private Limited v. Mr. S. Rajagopal & Ors* and *Surendra Trading Company v. Juggilal Kamlapat Jute Mills Co. Ltd.*, where the Supreme Court [hereinafter, "SC"] held that regulations are directory and not mandatory in nature. Further, the AA relied heavily on *AC Goel Distributing Company Pvt. Ltd. v. Web Tech Packagings (INDIA) Pvt. Ltd.*, [hereinafter, "AC Goel"] as pronounced by NCLT, Delhi.

As per the AC Goel judgement, Regulation 35A and regulation 40 (which prescribes the model timeline for CIRP) should be read in tandem. Both these regulations should also be read with Sec. 12 of the IBC, which prescribes a time limit for the completion of the CIRP. As per the model timeline, the CIRP should end in 180 days, as was also specified under Sec. 12 earlier. However, a provision under Sec. 12 extended the total period of CIRP to 330 days. This proviso was added in 2019, and Regulation 35A and 40 were added in 2018. Therefore, the judgement highlighted that even though the legislature had been amended, the subsequent regulations were not amended by the IBBI, which it is required to do as per Sec. 240 of the IBC. Due to this, regulations were held to be directory and not mandatory in nature.

As for the issue, if an application under Sec. 25(j)(2) can be rejected on the basis of lack of necessary details, the AA ruled positive. The AA noted that the respondents' contention that the application being a reproduction of the Transactional Auditor Report was correct, and the RP had failed to specify the bifurcation of liability and the period in which the directors were liable. Therefore, since the details were vague and unclear, the AA held that it

was difficult to establish the liability of the respondents under Sec. 66 of the IBC. However, the AA allowed the RP to file a fresh application specifying the necessary details.

Regarding the issue, if the lack of establishment of the Respondents intent to defraud their creditors in the application renders it non-maintainable, the AA did not address this issue at all.

Finally, with respect to whether an application under Sec. 43, 44 and 66 be considered together, (as was a prayer in the application) the AA ruled in negative. It upheld the law stated in *Anuj Jain v. Axis Bank Limited & Ors*, in which the SC held that an application under Sec. 43 and 44 cannot be clubbed with an application under Sec. 66 of the IBC.

Comments

Applicants to rectify the defects in their application before rejecting it, A residual equity-based jurisdiction does not exist. The aforementioned judgments also held that the Indian legislature, unlike other jurisdictions like the UK, which provide for an equity-based jurisdiction, appears to have made a conscious decision not to confer any independent equity-based jurisdiction on the AA. Further, it could be argued that the AA could use its inherent powers under Sec. 11 of the National Company Law Tribunal Rules, 2016 and correct such technical defects. However, that would lead to scattered judgments with each bench of the AA deciding as per their wisdom, leading to a haphazard jurisprudence on this issue. Further, since the intention of the legislature has also been analysed by the SC, it would be wise to wait and see if the legislature deems it fit to make changes to correct such technical defects, instead of the AA making use of its inherent powers.

"SHUBHAM DHAMNASKAR

In the following case, the AA has followed the law to the letter. Although it may seem like it has ignored the objectives of the IBC, since the AA could have directed the RP at any point to furnish the necessary details so that the application is not rejected on technical grounds, that is not the case here. The SC, in various judgments like *Pratap Technocrats Pvt. Ltd. v. Monitoring Committee of Reliance Infratel Ltd.*, *K Sashidhar v. India Overseas Bank*, *Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta* has clarified that the AA does not have an equity-based jurisdiction. It has only been given limited jurisdiction as specified in the IBC. Further, a residual equity-based jurisdiction also does not exist unless it conforms with the provisions of the IBC and the Regulations framed. However, in the present case, there exists no provision under Sec. 25 or Sec. 66 (unlike Sec.7, 9 and 10) for the AA to allow the

Excluded Securities may not be extinguished by the Resolution Plan if expressly mentioned.

COMMITTEE OF CREDITORS OF USHDEV INTERNATIONAL LIMITED THROUGH STATE BANK OF INDIA, VS. MR. SUBODH KUMAR AGRAWAL, RESOLUTION PROFESSIONAL

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COMMITTEE OF CREDITORS OF USHDEV INTERNATIONAL LIMITED THROUGH STATE BANK OF INDIA, VS. MR. SUBODH KUMAR AGRAWAL, RESOLUTION PROFESSIONAL

Court	National Company Law Tribunal Principal Bench; New Delhi
Judgement Dated	March 11, 2022
Bench	Ashok Bhushan, J.
Relevant Sections	IBC, 2016– Sec. 30(6) and Sec. 31 of the Insolvency and Bankruptcy Code, 2016 read with Regulation 39(4) of the Insolvency and Bankruptcy Board of India Regulations

Brief Background

In the present case, the tribunal decided to combine two cases which were different although belonging to the same issue. Both the cases were disposed of in the judgement of the NCLAT New Delhi. CIRP was initiated by the CD Ushdev and approved on June 25, 2021. Generally speaking, on passing of the resolution plan; all of the previously existing liabilities of the corporate debtor are extinguished. The excluded securities in this case included a corporate guarantee; which would not be extinguished after the Resolution plan was passed. The RP filed an application for approval of the above-mentioned plan. ICICI Bank filed for clarifications on enforcement of the excluded securities under the resolution plan, because the NCLT while approving this plan had mentioned that all previous existing liabilities were to be extinguished, implying the corporate guarantees which ICICI bank had interest in would be extinguished too . The adjudicating authority dismissed this application for clarification. The counsel for the COC submitted that the RP approved by the COC provided that excluded securities shall not be extinguished by the approval of the resolution plan referring to a paragraph in the RP. Counsel argued that the adjudicating authority has erroneously directed that excluded securities are no longer enforceable as defined under the RP, which never explicitly claimed that excluded securities be extinguished and not enforceable. Learned senior counsel for the resolution applicant submitted that the RP never provided for the extinguishment of the excluded securities. Learned senior counsel for ICICI bank who is also the appellant, claimed that ICICI Bank had filed an Application for clarification, for they feared that the RP is capable of misinterpretation that excluded securities are extinguished.

Issue

Whether expressly mentioned excluded securities were automatically extinguished after the passing of the resolution plan.

Decision

The court looked at the portions of the Resolution Plan which is approved by the Committee of Creditors; viz. Schedule I of the Resolution Plan deals with 'Definitions' and Clause 21 of the Schedule I which deals with 'Excluded Securities' in following words: "Excluded Securities shall mean the Promoter Guarantee, corporate guarantee dated 10th August, 2016 given by Ushdev Engitech Limited to ICICI Bank, and the Encumbrances created on the following immovable properties by the Promoters or third parties in favour of the Financial Creditors; (i) Basement No. 8, Apeeyjay House, Mumbai; (ii) Unit 1,2,&3 2nd floor, Old Harileela House, Mumbai; (iii) Villa no 92&94 at Lavasa; and (iv) Shop no 8,9,10 Tiara Complex, Thane (exclusively charged to Bank of Maharashtra)." The court then looked at Sub-

Clause 3.3(v) and Sub-Clause 3.3.iii. (H) and (I) that also make it clear that excluded securities shall continue to survive in the manner set out in the Resolution Plan. The court also referred to the adjudicating authority's decision approving the adjudicating plan; under the heading 'Reliefs, Concessions and Dispensations', where it was explicitly stated that the Hon'ble Supreme Court in Ghanshyam Mishra and Sons Vs. Edelweiss Asset Reconstruction Company Limited, at para 95(i) it was held that once a resolution plan was approved a creditor cannot initiate proceedings for recovery of the claim which are not part of the Resolution Plan.

The Adjudicating Authority had previously held that excluded securities are subsumed under Clause 3.3.(iii, referring to Paragraph 3.3. (e) (H) which if balance Financial Debt forming part of the Admitted Debt, it shall stand converted into non-convertible redeemable preference shares of the company which shall be issued to the Financial Creditors upon conversion of the unpaid debt. This has no bearing on specific provisions in the plan by 3.3.(iii)(g) which clearly provided that excluded securities shall not be extinguished or waived under this Resolution Plan. When the Resolution Plan itself states that excluded securities shall not be extinguished under the Resolution Plan which are the provisions in the plan made in 3.3.(iii)(h).

Comments

The NCLT, while passing the resolution plan, had indicated that all of the previously existing liabilities of the corporate debtor were extinguished. The NCLAT clarified that if expressly mentioned; excluded securities are not extinguished automatically by the passing of the resolution plan. Generally, once the resolution plan is passed, it extinguishes the previous liabilities of the Corporate Debtor. Furthermore, no party appearing before NCLAT objected to the exclusion of the securities, as the exclusion was approved by the CoC.

"ROHAN PHADKE

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