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SUPREME COURT PRONOUNCEMENTS

If homebuyers prefer completion of housing project over refund of advance paid and the promoter is willing to complete the construction as per the timelines, it would be in the interest of the homebuyers to allow the housing project to be completed.

ANAND MURTI V. SONI INFRATECH PVT. LTD. & ANR.

Court	Supreme Court of India
Judgement Dated	April 27, 2021
Bench	Justice L. Nageswara Rao and Justice Bhushan Ramkrishna Gavai
Relevant Sections	IBC, 2016 – Sec. 7, Sec. 12(A)

Brief Background

An appeal was filed challenging the decision pronounced by the NCLAT, thus rejecting the modification application filed by the suspended director of the corporate debtor. The NCLAT observed that, in the meantime, if settlement takes place between the parties for completion of the housing project, the same can be filed under Section 12A of the IBC before the AA. The NCLAT also directed the IRP to hold the meeting of the CoC within ten days from the date of order and decide the future course of action about a resolution for completion of the CIRP of the respondent company.

Previously in this case, the second respondent had booked a flat in the housing project launched by the corporate debtor. Later, he cancelled the booking and demanded refund of Rs 32,27,591 from the corporate debtor. Consequent to the appellant failing to do so, the second respondent filed an application under Section 7 of the IBC against the corporate debtor for initiation of CIRP before the NCLT, New Delhi. The NCLT admitted the said application and the IRP was directed to initiate the CIRP of the corporate debtor.

The appellant, aggrieved by this order, filed an appeal before the NCLAT, after which an interim order was passed directing the IRP not to constitute CoC. Consequently, the appellant submitted the proposed settlement terms and the IRP submitted that most of the allottees decided to have possession of the flats. In the meantime, the appellant settled the matter with the second respondent. Despite this, the NCLAT directed the IRP to carry forward the CIRP. The said order was passed on the condition that the settlement arrived at by the appellant was only with the second respondent and the settlement plan did not include all the allottees. Pursuant to this court's order, when the appellant filed the modification application, the NCLAT rejected the same and hence, this appeal was filed.

Issues

Whether it would be in the interest of the homebuyers if the corporate debtor is allowed to complete the housing project?

Decision

The Hon'ble Supreme Court observed that the promoter had also filed an undertaking, thereby undertaking to return the money with interest at the rate of 6% per annum of seven applicants (for impleadment) in this appeal, who were objecting to the Settlement Plan submitted by the appellant. The Court held that it will be in the interest of the homebuyers if the appellant/promoter is permitted to complete the housing project.

In light of the relevant features of the undertaking given on affidavit by the promoter and the fact that there were only seven out of the 452 homebuyers, who opposed the settlement plan, the Court found that it would fairly be in the interest of the home-buyers that the appellant/promoter is allowed to accomplish the project as taken up by him. More importantly, he had agreed that the cost of the flat would not be heightened. He had also provided the time line within which the project would be concluded. For that matter, he had also undertaken

to refund the amount paid by the seven objectors. Moreover, he had agreed that there should be a team of 5 persons, 2 from the homebuyer's side and 2 from the management side and that the whole process should be supervised by the IRP.

The Court also found that there is a likelihood that if the CIRP is allowed, the cost that the homebuyers will have to pay, would be much more, inasmuch as the proposal made by the resolution applicants could be after considering the price of escalation, etc. Relative to this, the promoter had filed a specific undertaking laying down that the cost of the flat would not be increased and that he would obey the BBA signed by the former management. In view of the same, the Court allowed the appeal, quashed the NCLAT order dated 22.11.2022 and permitted the appellant to complete the project.

Comments

This is a welcome decision, as the real estate developer had completed a substantial portion of the housing project and had secured funds for completing the rest of the project before insolvency proceedings were initiated. Since the real estate developer submitted a settlement proposal and was further willing to refund the money along with interest at the rate of 6% per annum to homebuyers objecting to the settlement proposal, it would indeed be in the interest of the homebuyers that the developer is permitted to complete the project.

"MANISHA SARADE

Wages/salaries can be included in CIRP costs only if it's established that the Resolution Professional managed the Corporate Debtor as a going concern

SUNIL KUMAR JAIN AND OTHERS V. SUNDARESH BHATT AND OTHERS

Court	Supreme Court of India
Judgement Dated	April 19, 2022
Bench	Justice M.R. Shah, Justice Aniruddha Bose
Relevant Sections	Insolvency and Bankruptcy Code, 2016- Section 5(13), Section 19, Section 36(4)

Brief Background

The Appeal in this case was filed by the workmen/employees of M/s ABG Shipyard Limited (hereinafter Appellants), being dissatisfied by the NCLAT Order dated 31.05.2019. The Corporate Debtor was engaged in the business of building and repairing ships, and was ordered to be liquidated.

The Appellants herein are the 272 employees and workmen, who were employed at the Dahej Yard and at the Head Office in Mumbai. The Adjudicating Authority had earlier, i.e. prior to the Liquidation Order, directed to deposit a sum of ₱ 2,75,00,000 with the Registry of the NCLT in order to satisfy the outstanding salaries/wages for the period before the CIRP, subject to the outcome of IA No. 348/2017. At the time of the Liquidation Order, IA No. 348/2017 was also disposed and hence the earlier relief of ₱ 2,75,00,000 was also not available to the Appellants in the case. This decision of the Adjudicating Authority was then presented before the NCLAT by way of Appeal. The NCLAT refused to go against the decision of the Adjudicating Authority, but allowed the Appellants to file their claims in their individual capacity.

Aggrieved by the Order of the NCLAT, the Appellants have moved the Supreme Court with this Appeal.

Issue

Whether salaries/wages of the workmen/employees during the duration of the CIRP are to be given priority in case of liquidation of the Corporate Debtor

Decision

It was submitted by the Appellants that the employees/workmen of the Dahej Yard were directed to assemble at ABG Enclave, and the same was done throughout the CIRP period. The Appellants claim to have attended work regularly, with digital evidence of the same and also relied upon certain documents to prove that the workmen/employees were engaged in some work.

Reliance was also placed on a Circular dated 12.06.2018 by the Resolution Professional, which had provided the costs on account of employees and workmen under the head of "other services in a running business". Citing the aforementioned Circular, the Appellants have contended that the outstanding dues in favour of the employees/workmen qualify as CIRP costs as provided for under Sec. 5(13) and hence ought to be paid before disbursal under Sec. 53 of the IBC.

The Respondent has stated that workers/employees who weren't engaged in any work and have not assisted the RP/Liquidation during the CIRP, cannot claim that the dues owed to them are CIRP costs under Section 5(13)(c) of the Code. It was submitted that a total of only 8 employees/workmen at the Head Office in Mumbai and Surat assisted the RP for a period of eight months during the CIRP. Hence, it was submitted that the Committee of Creditors rightly did not approve any payments as CIRP costs and claimed that these wages/salaries must be claimed under Sec. 53(1)(b) and Sec. 53(1)(c) of the IBC.

It was also submitted before the Court that the Dahej Yard had ceased operations since 2015 and the Yard at Surat had shut in 2017, and hence it cannot be claimed that the Corporate Debtor was a going concern during the CIRP. And hence, the claim by the Appellants that all the employees/workmen must be treated as those who assisted the Resolution Professional to run the Corporate Debtor as a going concern is inaccurate.

To conclude, it was submitted that the employees/workmen did not help the Corporate Debtor to continue operations as a going concern as there was never a going concern and also because the operations at the Yards had ceased prior to the CIRP. Hence, other than the eight employees at the Mumbai office, all other claims would be settled as per the waterfall mechanism provided under Sec. 53(1) of the IBC.

The Court clearly stated that even though the RP is under an obligation to maintain the Corporate Debtor as a going concern, it can't be believed that the Corporate Debtor at the time of the CIRP was a going concern, which means that the Appellant's claim of the Corporate Debtor being a going concern by default cannot be accepted without actually enquiring about the facts and the status of the Corporate Debtor. Stating that such a presumption of the Corporate Debtor being a going concern cannot be made, the Court decided that the claims of the workmen/employees can be included as CIRP costs only if it can be verified that the Corporate Debtor was indeed operating as a going concern and that the workers/employees actually worked during the CIRP. The amount outstanding in favour of the workers/employees prior to the CIRP shall be dealt with as per Sec. 53(1)(a) of the IBC and it was directed that the Appellants must file their claims before the Liquidator and prove that the Corporate Debtor operated as a going concern and that they actually worked. Independent adjudication of these claims by the Liquidator was ordered by the Court and it was said that if the aforementioned is proved by the claiming Appellants, then the same must be settled in full before disbursal under Sec. 53 of the IBC.

Comment

This decision of the Supreme Court is well-balanced and sheds light on a very important factor while dealing with amounts payable as CIRP costs. It was stated by the Court that it is necessary to determine whether the Corporate Debtor in the case was being managed as a going concern and then to determine whether the employees/workmen actually worked or not. It was put in clear words by the Supreme Court, that a presumption of the Corporate Debtor being a going concern cannot be made merely because the RP is under a mandate to manage the Corporate Debtor as a going concern.

The Supreme Court at the same time, provided the workmen/employees with an interim remedy by directing the Liquidator to keep aside the amount exclusively to be used for the outstanding amount owed to the workers/employees. The Court balanced the interests of the workmen/employees and the Corporate Debtor by ensuring that no frivolous claims are made by the workmen/employees and at the same time providing interim remedy to the workmen/employees.

"ISHAAN WAKHLOO

NCLAT PRONOUNCEMENTS

It is not under the jurisdiction of the Adjudicating Authority to interpret and comment on issues of commercial interest without ascertaining the approval of the CoC

SANTANU T. RAY, RESOLUTION PROFESSIONAL OF ZICOM SAAS PVT LTD V TATA CAPITAL FINANCIAL SERVICES LTD.

Court	National Company Law Appellate Tribunal, Principal Bench, New Delhi
Judgement Dated	March 25, 2022
Bench	Justice Ashok Bhushan and Dr. Ashok Kumar Mishra
Relevant Sections	Insolvency and Bankruptcy Code, 2016 – Section 5(13), Section 14, Section 20, Section 25 Section 30 IBBI CIRP Regulations, 2016 - Regulation 31, Regulation 32, Regulation 33 and Regulation 34

Brief Background

The Corporate Insolvency Resolution Process (CIRP) of the corporate debtor Zicom SAAS Pvt. Ltd. was initiated vide the order of the NCLT dated 18.03.2020. The Appellant had been duly confirmed as the resolution professional by the CoC.

A public announcement was made by the RP on 13.08.2020 whereby the creditors of the corporate debtor were asked to submit their claims with proof on or before 25.08.2020. The time period of 90 days as stipulated in the CIRP regulations expired on 09.11.2020. However, the respondent submitted its claim only on 17.11.2020 as a financial creditor. The RP informed Respondent No.1 that their claim fell under the category of Operational Creditors, following which Respondent No.1 submitted its revised claim of Rs. 1.05 Crores on 13.01.2021. The RP admitted a claim of Rs. 95 lacs and informed the Respondent No.1 accordingly.

The resolution plans received by the RP were placed before the CoC for its consideration on 06.02.2021 and was approved on 11.06.2021. A second additional claim of Rs. 11.79 Crore was filed by the Respondent No.1 on 23 April 2021 i.e., after a delay of 256 days. The RP vide his email dated 26.04.2021 conveyed to the Respondent No.1 that since their claim was filed at a belated stage when the resolution plan had been finalized and was pending approval, the claim was time barred and could not be considered. The Respondent No.1 filed an application bearing IA No. 1511 of 2021 on 05.07.2021 for its claim to be considered.

The NCLT vide its order dated 20.09.2021 allowed an amount of Rs. 3,1481,158/- as claimed by Respondent No.1 to be included in the CIRP costs. The NCLT had referred to the Master Lease Agreement dated 14.05.2015 whereby security systems and related assets manufactured by Honeywell were leased to the corporate debtor. It divided the claim of Rs. 11.79 Crores into two parts of Rs. 8.65 Crores as arrears as on insolvency commencement date (out of which Rs. 95 lacs had already been admitted) and Rs. 3,14,81,158/- towards the charges incurred during the CIRP period for running the business of the corporate debtor as a going concern. The RP filed an appeal against this order on 20.10.2021.

Issue

Whether the NCLT could allow the amount of Rs. 3,14,81,158/- to be admitted as CIRP costs without verification of costs and other details by RP and without the recommendation of the CoC?

Decision

The NCLAT allowed the appeal and noted that the claim of Rs. 3.14 crores arising out of the Master Lease Agreement could be divided into two parts i.e. claim towards fair market value of Rs. 43.54 lacs and claim towards extension rental of Rs. 2.71 crore. It observed that the amount of Rs. 43.5 lacs towards the fair market value was already included in the figure of Rs. 95 lacs admitted as the claim and hence could not be included as an additional claim. For the remaining claim of Rs. 2.71 crores towards extension claim, the NCLAT held that since the fair market value of the equipment had already been claimed, the additional extension rental claim

could not be made. It further held that since no invoices had been raised for such a claim the same could not be admitted.

The NCLAT observed that a combined reading of Sections 5(13), 14 20, 25 and 30 of the IBC and Regulations 31, 32, 33 and 34 of the IBBI CIRP Regulations, 2016 provides that the resolution professional is only required to provide for essential supplies including electricity, water, telecommunication services and information technology services which are to be considered in CIRP costs and any other costs are required to be approved by the CoC. The NCLAT relied on the judgment of the Apex Court in the case of *Alok Kaushik v. Bhuvaneshwari Ramanathan*, (2021) 5 SCC 787 wherein it was held that where interpretation of contractual clauses is involved then it is not under the jurisdiction of the Adjudicating Authority to interpret and comment without ascertaining the approval of the CoC as their commercial wisdom on commercial issues or terms cannot be undermined or taken away by the NCLT or NCLAT.

Comment

The supremacy of commercial wisdom of the CoC has been reaffirmed time and again by the NCLT, the NCLAT and the Supreme Court. The NCLAT in the instant case has given due consideration to the commercial wisdom of the CoC and the requirement of their approval in taking decisions related to commercial issues or the interpretation of contractual clauses. The NCLAT has also provided a clear distinction between the CIRP costs arising out of essential supplies which are required to be approved by the Resolution Professional and such other costs which require the approval of the CoC.

It has thus upheld that the NCLT or NCLAT cannot interfere with the decisions taken by the CoC on issues of commercial interest, recognising the importance to be given to the opinion of the CoC in commercial decisions during the CIRP.

"YASHASWI PANDE

The liabilities of the corporate debtor and the co-borrower companies are joint and co-extensive in nature and that claims of similar amounts could be submitted by the financial creditor in all the CIRPs.

MR. SANDEEP GARG DIRECTOR, M/S ABLOOM INFOTECH PVT. LTD. VS. M/S DMI FINANCE PVT. LTD.

Court	National Company Law Appellant Tribunal, Principal Bench, New Delhi
Judgement Dated	March 24, 2019
Bench	Dr. Alok Srivastava, Member (Technical)
Relevant Sections	Section, 95 of the of the Insolvency and Bankruptcy Code, 2016.

Brief Background

This Appeal is preferred by the Appellants who are aggrieved by the order dated 11.03.2021 (hereafter called 'impugned order') of the Adjudicating Authority (National Company Law Tribunal, New Delhi) in CP (IB) No. 2115(ND)/2019 filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 (in short 'IBC').

The Appellants are ex-directors of the Corporate Debtor-M/s Abloom InfoTech Pvt. Ltd., which is an associate company of Ninex Group of Companies. The four companies in Ninex Group entered into a common loan agreement dated 27.4.2016 for availing a total loan of Rs. 69,51,00,000/- from the Respondent No. 1.

In order to appropriate, a valuable land plot held by the Appellants, Respondent No. 1 brought in a related company M/s Pardos Realtors Pvt. Ltd. and entered into a tripartite agreement dated 28.09.2018 between M/s Pardos Realtors, the Appellants and the Respondent No. 1 for purchase of the land plot situated in Sector 132, Noida (U.P.). In accordance with this agreement, the first two payments of Rs. 3,91,78,073/- and Rs. 1,71,95,717/- was made by M/s Pardos Realtors (the 'buyer') to the corporate debtor which was transferred by the corporate debtor to Respondent No. 1. M/s Pardos Realtors sent a legal notice dated 27.08.2019 for termination of the tripartite agreement. M/s Pardos Realtors also asked for returning their security deposit of Rs. 10,88,73,790/- with interest at the rate of 30% from the corporate debtor.

Respondent No. 1 also filed the application for personal Insolvency against the personal guarantor (Appellant No. 2) under section 95 of the IBC. During consideration of section 7 application, the Resolution Professional (in short 'RP') of Ninex Group filed an impleadment application as it is a co-borrower with the Corporate Debtor but this application for impleadment was rejected by the Adjudicating Authority.

Issue

i) Whether any amount was due and payable by the Corporate Debtor Abloom InfoTech Pvt. Ltd./Corporate Debtor to the Financial Creditor (Respondent No. 1);

ii) Whether the financial creditor can invoke multiple remedies by filing claims of the same amount in some other Corporate Insolvency Resolution Processes (in short 'CIRP') going on against other companies of the Ninex Group; and

iii) Whether the claim of Respondent No. 1 which is being considered in the CIRP of the Corporate Debtor/Abloom InfoTech Pvt. Ltd. does not preclude him from filing an application for initiating CIRP against the personal guarantor (Appellant No. 2).

Decision

Simultaneous proceedings are possible against the Corporate Debtor and the Personal Guarantor who has stood surety through a valid deed of guarantee. In the present case, Mr. RM Garg and Mr. Sandeep Garg have stood guarantee of the Loan Facility advanced by the Financial Creditor to the Corporate Debtor vide Loan Agreement dated 27.04.2016 and through the deed of guarantee dated 27.04.2016 and hence can be moved against

under the IBC while CIRP proceedings are going on against the Corporate Debtor.

Ingredients of section 7 application are satisfied and the Adjudicating Authority has correctly admitted the section 7 application, thereby initiating CIRP against the Corporate Debtor.

Comment

The following decision is in the line with the Supreme Court decision in Lalit Kumar Judgement wherein it was held that approval of a resolution plan does not ipso facto discharge a personal guarantor (of a corporate debtor) of her or his liabilities under the contract of guarantee. As held by this Court, the release or discharge of a principal borrower from the debt owed by it to its creditor, by an involuntary process, i.e. by operation of law, or due to liquidation or insolvency proceeding, does not absolve the surely/guarantor of his or her liability, which arises out of an independent contract.

"NIMISHA SHARMA

The timeline prescribed in Regulation 35A of CIRP Regulations is directory and not mandatory.

ADITYA KUMAR TIBREWAL VS. OM PRAKASH PANDEY & ORS.

Court	National Company Law Appellate Tribunal Principal Bench, New Delhi
Judgement Dated	April 6, 2022
Bench	Justice Ashok Bhushan, Dr. Alok Srivastava and Ms. Shreesha Merla
Relevant Sections	Section 43, 45, 49 and 66 of the Insolvency and Bankruptcy Code 2016; Regulation 32A of CIRP Regulations

Brief Background

Corporate Insolvency Resolution Process was initiated against the Corporate Debtor M/s. Sri Balaji Forest Products Private Limited. Even after multiple requests and reminders issued by the Appellant, the Corporate Debtor neither cooperated nor provided the relevant documents. The Adjudicating Authority directed the suspended directors of the Corporate Debtor to extend cooperation in the CIRP. The Resolution Professional initiated 'Contempt Proceedings' against the suspended directors as they caused multiple hindrances in conducting the successful CIRP.

Later the suspended directors shared the Lease Deed dated 30th November, 2016 executed by the Corporate Debtor in favor of Respondent according to which all land, plot and machinery have been leased by the Corporate Debtor to the Respondent for a period of 29 years. After which the transaction audit report was finalized based on the Audited Balance Sheet of the Corporate Debtor. The Resolution Professional after the transaction audit report filed an Interlocutory Application under Secs. 43 and 45 read with Sec. 49 and Secs. 66 and 60(5) of the IBC seeking various reliefs under Sec. 49 and Sec. 66 of the IBC.

The Adjudicating Authority issued notice to the suspended directors and other Respondents however no one filed any reply to the Application. The Adjudicating Authority rejected the application of the Resolution Professional stating that it is hit by Regulation 35A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons), Regulations, 2016. Being aggrieved by the Order the Resolution Professional filed this Appeal.

Issue

i. Whether an Application by the Resolution Professional relating to a Transaction covered under Secs. 43, 45, 49 and 66 is mandatory to be filed within the period of 135th Day of the Insolvency Commencement Date and in event the Application is filed beyond such period, the same is liable to be rejected due to non-compliance of Regulation 35A of CIRP Regulations, 2016?

ii. Whether time period prescribed under Regulation 35A of the CIRP Regulations, 2016 is mandatory or directory?

iii. Whether Transaction claimed to be defrauding the Creditor under section 49 and fraudulent trading or wrongful trading within meaning of Section 66 can be questioned only within time period as prescribed under Section 46 i.e. one year or 2 years respectively and Application alleging defrauding the Creditors and transaction to be fraudulent trading or wrongful trading is liable to be rejected if it is filed beyond the period prescribed under Section 46 of the Code?

iv. Whether in the Application filed by the Appellant, there were any pleadings of fraud as contemplated by Section 49 and 66 of the Code?

v. Whether the Adjudicating Authority committed error in rejecting the Application?

Decision

The Appellate Authority on the first and second issue jointly held that Regulation 35A of the CIRP Regulations imposes a duty on the RP to take measure within the timeline as prescribed. Any action taken by RP beyond the time prescribed in Regulation 35A of the CIRP Regulations is

prohibited, as it may cause serious general inconvenience or injustice to the Corporate Debtor. It is one of the objectives of the Code to maximize the assets of the Corporate Debtor.

Hence, the timeline prescribed in Regulation 35A of the CIRP Regulations is only directory and any action taken by the RP beyond the time prescribed under Regulation 35A of the CIRP Regulations cannot be held to be void only on the ground that it is beyond the period prescribed under Regulation 35A of the CIRP Regulations. There may be genuine and valid reasons for RP not to file application for avoiding the transactions within time prescribed which are question relating to each case and has to be examined on case-to-case basis and if there are reasons due to which Resolution Professional could not file the Application within time the same has to be examined on merit. The Appellate Authority followed the rationale of Supreme Court laid down in *Smt. Rani Kusum vs Smt. Kanchan Devi (2005)* and held that the timeline prescribed in Regulation 35A of CIRP Regulations is directory and not mandatory.

Comment

The Appellate Authority correctly held that the timeline prescribed in Regulation 35A of the CIRP Regulations is only directory. It is true that there can be genuine and valid reasons for RP not to file application for avoiding the transactions within time prescribed. Such cases should determined on case-to-case basis. This judgment rightly reaffirmed one of the objectives of the Code which is to maximize the assets of the Corporate Debtor. If in any case there are reasons due to which Resolution Professional could not file the Application within time the same has to be examined on merit.

"MEGHA KAMBOJ

Chairman of the Monitoring Committee has the locus standi to file the Interlocutory Application.

BENI GOPAL SINGHI V. EMC LIMITED

Court	National Company Law Appellant Tribunal, Kolkata Bench - 1
Judgement Dated	April 22, 2021
Bench	Justice Rajasekhar V.K. (J); Mr. Balraj Joshi (T)
Relevant Sections	IBC, 2016 – Sec. 9; Sec. 60(5); Sec. 33(3); Sec 33(4).

Brief Background

An application under Sec. 9 of the IBC was filed by Mr. Beni Gopal Singhi (Operational Creditor) against EMC Limited (Corporate Debtor). The said application was admitted into the Corporate Insolvency Resolution Process (CIRP) by this Adjudicating Authority and Interim Resolution Professional (IRP) was appointed. Further, this Adjudicating Authority appointed the Resolution Professional (RP).

Subsequently, the RP received four Expressions of Interest (EoIs), out of which only one Resolution Plan was approved by the CoC. Post approval of the Resolution Plan by this Adjudicating Authority, the Monitoring Committee was constituted in terms of the approved Resolution plan, with the erstwhile RP as the Chairman of the Committee.

An interlocutory application was filed section 60(5) of the IBC, by the Chairman of the Monitoring Committee. Submissions on behalf of the Respondent were such that, the applicant, i.e., the Chairman of the Monitoring Committee has no locus standi to make this application and claim for reliefs in terms of sections 33(3) and 33(4) of the IBC. Stating that the application is also barred by estoppel, and hence is liable to be dismissed.

Issues

Whether the Adjudicating Authority can entertain an application filed by the Chairman of the Monitoring Committee to give a fresh lease of life to the CIRP?

Decision

The tribunal noted that the primary issue that needs to be delved into is whether the Applicant, i.e., the Chairman of the Monitoring Committee, has any *locus standi* to file the IA. The legislative framework in which this question must be decided, is given in section 33(3)25 of the IBC. This provision speaks of contravention of the approved Resolution Plan. It stipulates that in the event of contravention of such approved Resolution Plan, any person other than the Corporate Debtor, whose interests are prejudicially affected by such contravention, may make an application to the Adjudicating Authority for a liquidation order. The use of the phrase, 'any person other than the Corporate Debtor' clearly indicates the will of the legislature that except the Corporate Debtor itself, any person whose interests are being prejudicially affected from the breach of the Resolution Plan could file the application for liquidation. When a Resolution Plan is approved, the CoC stands dissolved and a new committee, i.e., the Monitoring Committee is formed for implementation of the approved Resolution Plan. In a scenario where the 'Successful Resolution Applicant' has failed to implement the Resolution Plan within a stipulated time, the Monitoring Committee has a duty to ensure that the interests of the stakeholders are safeguarded.

As a matter of fact, the Chairman of the Monitoring Committee is in the best possible position to determine whether there has been a contravention of the approved Resolution Plan. Therefore, the Chairman of the Monitoring Committee has the locus to maintain the present application, with or without a resolution to this effect being passed by the Monitoring Committee. In the light of the same, the tribunal stated that, the arguments of the 'Successful Resolution Applicant' in this regard that the Chairman could not maintain the present application for liquidation in the absence of any resolution passed by the Monitoring Committee, is rejected as a non- sustainable.

Comments

In this case, the AA has followed the law to the letter and there is no fallacy in the judgment. The

case reaffirms the procedural framework of IBC under which, if the 'Successful Resolution Applicant' fails to implement the Resolution Plan within a stipulated time, the Monitoring Committee has a duty to ensure that the interests of the stakeholders are safeguarded, as per Sec. 33(3) of the IBC.

"ANUSHKA FUKE

NCLT PRONOUNCEMENTS

The principal of finality of litigation cannot be stretched to the extent of an absurdity that it can be utilised as an engine of oppression by dishonest and fraudulent litigants.

M/S EMAAR HILLS TOWNSHIP PRIVATE LIMITED V. MR. SRINIVAS MANTHENA & ANR.

Court	National Company Law Tribunal Division Bench-II, Chennai
Judgement Dated	February 13, 2019
Bench	Justice (Retd.) S.Ramathilagam
Relevant Sections	Section 60(5) read with sections 43 and 66 of the Insolvency and Bankruptcy Code, 2016.

Brief Background

The first application has been filed by the Resolution Professional (Hereinafter RP) of the corporate debtor (Green Gardens Pvt. Ltd.) According to the RP, the respondents are a family and related to each other; therefore, they act as a group. The mortgage deed executed in favour of the first respondent is a preferential transaction since the same is within a period of two years from the CIRP Commencement date. Since, according to the Insolvency and Bankruptcy Code (Hereinafter IBC), the lookback period is two years for a preferential transaction, it puts the first respondent (K.Bharathi) in a preferential position over other creditors. There is the absence of bonafide in the creation of mortgages in favour of the first respondent. An agreement had been signed between the 1st Respondent, the corporate debtor and a group called Gemini Arts Pvt. Ltd. The 1st respondent entered into a loan agreement with the corporate debtor and Gemini Arts Pvt. Ltd. In respect of loss suffered on account of alleged wrongful sale of shares of 1st respondent in the discharge of loan. Therefore, the respondent had initiated arbitration against the Gemini Group for a claim of Rs.589,84,26,197. It is submitted that suddenly after 8 years of the alleged Loan Agreement, a disclosure is made for the first time and that absence of a mortgage deed creating security in favour of the respondent after 8 years shows that the entire transaction had been conjured up for the purpose of this case. Therefore, the application has been filed for setting aside a preferential mortgage in favour of the first respondent.

The same has also emboldened the filing of the 2nd Application by the sole financial creditor in the CoC -Kotak Mahindra Bank who claims that the very initiation of CIRP is bad and hit by section 65 of the IBC, 2016. In it, it is contended that the parties had failed to disclose the loan agreement with the first respondent. Further, the financial statements of the company and the fifth respondent did not indicate the existence of any such material liability owed to the first respondent for several years and it was only in the financial statements, that this liability miraculously seemed to have appeared.

The other applications have been filed by Kotak Mahindra Bank Limited assailing the very initiation of the CIRP at the behest of the 1st respondent. Apart from the 1st respondent, the other respondents are the corporate debtors and RPs of the corporate debtors. Only one erstwhile director-A.Manohar Prasad who is an adjudicated insolvent is the 6th respondent. It has been contended by the applicants that the illegal acts of the suspended directors of the corporate debtors have prevented the recovery of the legitimate dues of the bank. The promoter director of the corporate debtor and its family members have deep routed intent to defraud the creditors. The respondent and their family members have misrepresented facts before NCLT and obtained CIRP Orders only to defraud the Applicants. In the last application, the forensic report has been called a sham.

Whereas, 1st respondent contends that she is a financial creditor of Gemini Green Gardens by sheer operation of law and has been entitled to the properties due to pledge of shares, and not because they are related. The arbitral award was also confirmed by the Hon'ble Madras High Court. Further, the sale of shares owned by the first respondent towards repayment of the loan taken by the corporate debtor is not disputed by the present RP. According to the respondent, her actions are being doubted only because of the related party angle and related parties are not required in law to write off their claims nor they are barred from approaching the Adjudicating Authority. According to the respondent, allegations of fraud cannot simply be made.

Issue

1.Whether the 1st Respondent a financial creditor within the meaning of Section 5(7) of IBC, 2016?
2.Whether the Loan Agreement between the corporate debtor and 1st Respondent can be treated as fraudulent, nominal and a sham?
3.Whether the initiation of CIRP by the 1st Respondent is hit by Section 65 of IBC, 2016?

Decision

The AA decided on all these applications together. It said that the question of whether K.Bharathi is a financial creditor is not required to be decided at this stage at all. This is because the matter is present in the stage of CIRP. But going by the present scenario, it was concluded that K.Bharathi is a financial creditor within section 5(7) of the code.

The liability of the Pledgor remained co-extensive with the liability of the borrower towards satisfaction of the debt of the lender. Thus, applicant K.Bharathi was entitled to all the securities that were provided at the time when the guarantee was extended and there is an implied promise on the part of the corporate debtor to repay the amounts paid by the applicant.

The authority concluded that only because the loan agreement was not disclosed in the arbitral proceedings does not mean that it was a sham or nominal.

The court also denied that the CIRP is hit by Section 65 of the IBC. The court found unsavoury allegations being levelled against all professionals be it the previous IRP, the present IRP, the forensic auditor and even certain counsels. The contention that the RP is victimising the suspended directors only because a police complaint had been given against the RP is wrong because the RP went to third party premises only on the instructions of the previous IRP. The court rejected the forensic audit reporp altogether.

Therefore, all the applications were dismissed and only the rejection of the Forensic report was accepted.

Comment

The tribunal gave due consideration to the facts of the case. The tribunal referred to relevant statutory provisions, previous case laws, the communication between the parties and the terms of the pledge agreement to rightly conclude that the 1st respondent is the FC.

It has rightly concluded that the agreement is not a sham. And the validity of the same cannot be decided due to the declaration of Madras HC. The matter is estopped and the tribunal cannot adjudicate upon the same. The tribunal rightly recognised the jurisdiction of the district court to decide on the dispute irrespective of the fact that the court was on vacation or not.

The tribunal noted that the lookback period, in this case, is not reasonable and considered it to be an afterthought to sensationalize the report and that it has gone beyond its purpose which is unacceptable.

The tribunal rightly relied on the law to conclude that the challenge to the mortgage deed as a preferential transaction is unsustainable. The tribunal refrained from directing the SFIO to conduct an investigation as the same is not under its authority.

"RADHIKA VERMA

The Corporate Debtor should not be sent to liquidation only because the liquidation value exceeds the enterprise value.

RAMSARUP INDUSTRIES LIMITED & ANR. V. S. S. NATURAL RESOURCES PRIVATE LIMITED & ANR.

Court	National Company Law Tribunal, Kolkata Bench
Judgement Dated	April 7, 2022
Bench	Justice Rajasekhar V.K., Balraj Joshi (T)
Relevant Sections	IBC, 2016 – Sec. 60 (5), Sec. 10, Sec. 33(3), Sec. 33(4), Sec. 62

Brief Background

The corporate applicant, Ramsarup Industries Limited, had been admitted into the CIRP under Sec. 10 of the IBC. After this, a resolution plan was successfully introduced by S. S. Natural Resources Private Limited and approved by the CoC. Subsequently, the resolution plan was also approved by the AA. However, an appeal was preferred by the resolution applicant, contending that the AA had materially altered the resolution plan and by imposing additional financial obligations. This appeal was dismissed by the NCLAT, which further directed the resolution applicant to implement the plan. The resolution applicant subsequently expressed its willingness to implement the said plan, subject to certain conditions - including the non-release of upfront payment to the monitoring agency in order to meet the CIRP costs. These conditions were rejected by the monitoring agency.

The second application had been filed by the resolution professional along with a financial creditor, seeking directions to ensure cooperation of the resolution applicant. The third and last application had been filed by one of the financial creditors, CFM ARC, for the payment of interest by the resolution applicant from the date of approval of the resolution plan until its implementation. Furthermore, CFM ARC had objected to the subsequent schedule of implementation and contended that the assets of the corporate debtor should be liquidated owing to contravention of the resolution plan.

Issue

1. Whether the resolution applicant had breached the resolution plan.

2. Whether the corporate debtor could be directed to undergo liquidation on account of such breach, if any.

Decision

The NCLT ordered the resolution applicant to complete the process of distributing the amount in accordance with the resolution plan. The delay in implementation of resolution plan had been caused due to the pending application by the corporate guarantor regarding a piece of land that could have been sold by the bank unilaterally, without giving any notice to the guarantor. However, the Supreme Court dismissed this application. The resolution plan provides for a mechanism to transfer security interest in the guarantor's land and the NCLT had directed its execution. Despite CFM ARC's objections to the schedule of implementation, it was approved by a majority of the creditors. The resolution applicant took a number of steps towards the implementation of the resolution plan. It disbursed a total amount of INR 59.85 cr., including earnest money deposits and the performance security amount. The preamble of the IBC lays emphasis on insolvency resolution within the prescribed timelines. Liquidation should only be considered as the last resort, when everything else has already been attempted and failed.

In the present case, the resolution applicant had agreed to implement the approved resolution plan. Even though there were some delays in the insolvency resolution process of the corporate applicant, this delay could be attributed to the many appeals that had been filed before the Supreme Court. Although the liquidation value was greater than the enterprise value in this case, it was noted that the resolution applicant should proceed with the implementation of the resolution plan. Sec. 33(4) of the IBC stipulates that the AA shall

pass a liquidation order in case the provisions of the resolution plan are contravened. However, this "shall" can be read as "may", and the AA is thereby empowered to exercise discretion in this regard. The resolution applicant had parked the entire amount mentioned in the resolution plan in a separate account earmarked for this purpose. This amount could be utilised by the various stakeholders.

Comment

The NCLT rightly directed the resolution applicant to continue with the implementation of the resolution plan. One of the financial creditors, i.e., CFM-ARC, had also alternatively prayed for liquidation, due to higher realisable value. In contrast to this, the AA underscored the primary objectives of IBC, i.e., timely resolution of the debt and balancing of the interests of all stakeholders. In the long term, running an enterprise would bring in more value addition to the economy as well as to various stakeholders as it would also avoid the knock-on effect.

"RENUKA NEVGI

CIFL NEWSLETTER

MAHARASHTRA NATIONAL LAW UNIVERSITY MUMBAI

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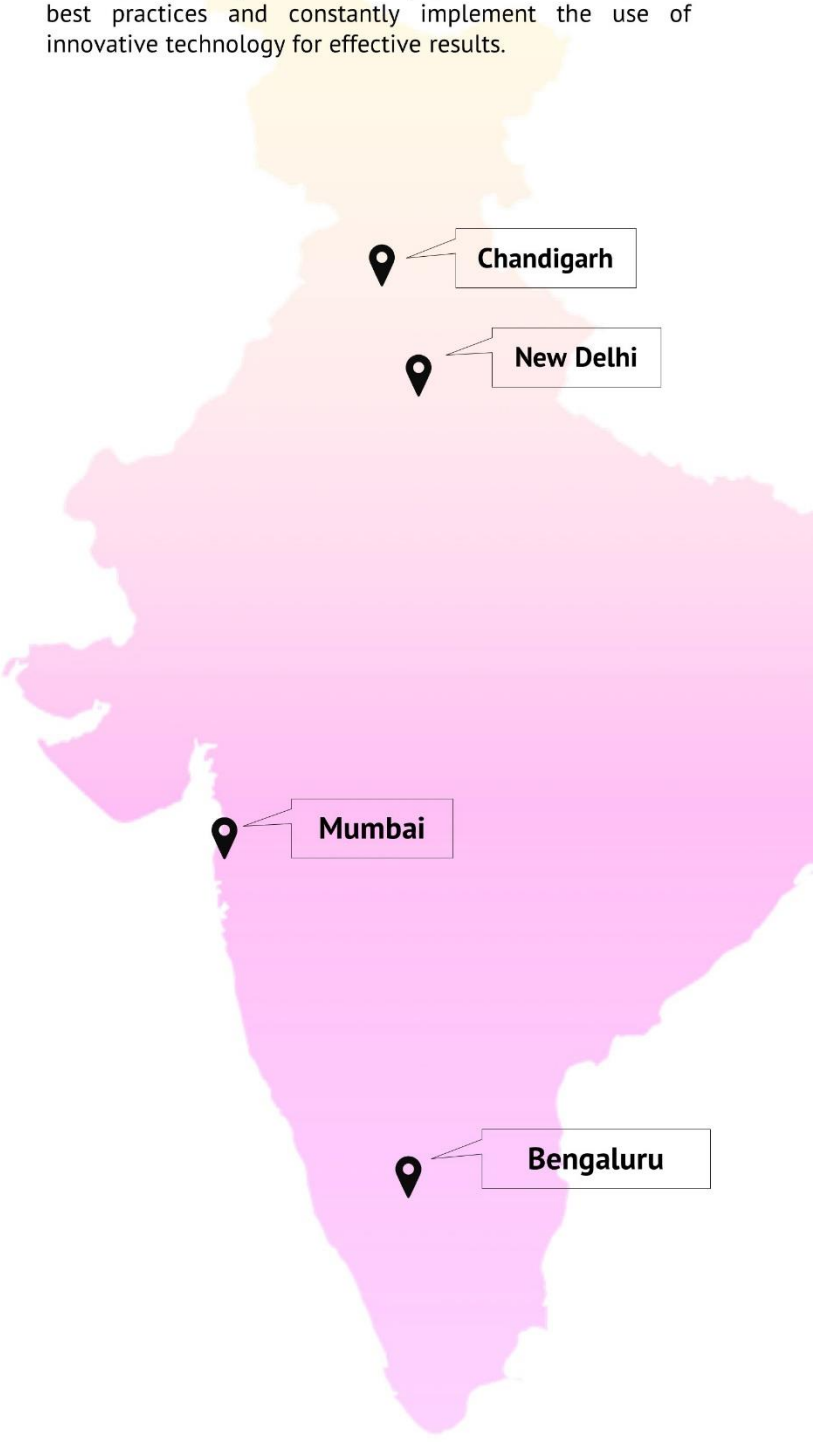

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