

ASHOK G. RAJANI

A

v.

BEACON TRUSTEESHIP LTD. & ORS.

(Civil Appeal No. 4911 of 2021)

SEPTEMBER 22, 2022

B

[INDIRA BANERJEE AND J.K. MAHESHWARI JJ.]

Insolvency and Bankruptcy Code, 2016 - Ss. 7, 12A, 62 – Arbitration proceedings between corporate debtor and respondent no. 1 to 3 were pending – Respondent nos. 1 to 3 filed application u/s. 7 of IBC before the NCLT – Arbitrator passed award directing corporate debtor to make payment – Parties arrived at a settlement – NCLAT considering settlement granted interim stay of publication u/s. 13 of the IBC – Parties filed application u/s. 12A of IBC before the NCLT with the consent of IRP and the same was pending – However, NCLAT staying the formation of CoC, permitted the IRP to issue publication and also to handover all assets and proceed with CIRP even though matter was settled between the parties – On appeal, held: Section 12A of the IBC clearly permits withdrawal of an application u/s. 7 of the IBC that has been admitted on an application made by the applicant – Before the Committee of Creditors is constituted, there is no bar to withdrawal by the applicant of an application admitted u/s. 7 of the IBC – Settlement cannot be stifled before the constitution of the CoC in anticipation of claims against the corporate debtor from third persons – There is no reason why the applicant for CIRP, should not be allowed to withdraw its application once disputes have been settled – NCLT directed to take up the settlement application.

C

D

E

F

Dismissing the appeal, the Court

HELD: 1. Section 12A of the IBC clearly permits withdrawal of an application under Section 7 of the IBC that has been admitted on an application made by the applicant. The question of approval of the Committee of Creditors by the requisite percentage of votes, can only arise after the Committee of Creditors is constituted. Before the Committee of Creditors is constituted,

G

H

- A there is no bar to withdrawal by the applicant of an application admitted under Section 7 of the IBC. [Para 24][139-D-E]

2. The object of the IBC is to consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximisation of value of assets of such persons, to promote entrepreneurship, availability of credit and balance of interests of all stakeholders including alteration in the order of priority of payment of Government dues and to establish an Insolvency and Bankruptcy Board of India and matters connected therewith or thereto. An effective legal framework for timely resolution of insolvency and bankruptcy would support development of credit markets, encourage entrepreneurship, improve business and facilitate more investments leading to higher economic growth and development. [Para 26 & 27] [139-H; 140-A-C]
- B
- C

3. A reading of the statement of objects and reasons with the statutory Rule 11 of the NCLT Rules enables the NCLT to pass orders for the ends of justice including order permitting an applicant for CIRP to withdraw its application and to enable a corporate body to carry on business with ease, free of any impediment. Considering the investments made by the Corporate Debtor and considering the number of people dependant on the Corporate Debtor for their survival and livelihood, there is no reason why the applicant for the CIRP, should not be allowed to withdraw its application once its disputes have been settled. [Para 28 & 29][140-C-E]
- D
- E

4. The settlement cannot be stifled before the constitution of the Committee of Creditors in anticipation of claims against the Corporate Debtor from third persons. The withdrawal of an application for CIRP by the applicant would not prevent any other financial creditor from taking recourse to a proceeding under IBC. The urgency to abide by the timelines for completion of the resolution process is not a reason to stifle the settlement. [Para 30][140-E-F]
- F
- G

H

5. The application for settlement under Section 12A of the IBC is pending before the Adjudicating Authority (NCLT). The NCLAT has stayed the constitution of the Committee of Creditors. The order impugned is only an interim order which does not call for interference. In an appeal under Section 62 of the IBC, there is no question of law which requires determination by this Court. The appeal is, accordingly, dismissed. The NCLT is directed to take up the settlement application and decide the same in the light of the observations made above. [Para 32][142-B-C]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4911 of 2021.

From the Judgment and Order dated 18.08.2021 of the National Company Law Appellate Tribunal, Principal Bench at New Delhi in Company Appeal (AT) (Ins) No.598 of 2021.

Mukul Rohtagi, Huzefa Ahmadi, Sr. Advs., Abhijeet Sinha, Puneet Jain, Harsh Jain, Harshit Khanduja, Ms. Yashika Sharma, Ms. Christi Jain, Ravi Raghunath, Ms. Rathina Maravarman, Ms. Aakash Lodha, Sanyat Lodha, Mahesh Agarwal, Himanshu Satija, Divyang Chandiramani, Ms. Komal Khushalani, Shadab S. Jan, Ms. Prerana Wagh, Yash Tembe, E. C. Agrawala, Advs. for the appearing parties.

The Judgment of the Court was delivered by

INDIRA BANERJEE, J.

This Appeal under Section 62 of the Insolvency and Bankruptcy Code, 2016 (IBC) is against an interim order dated 18th August 2021 passed by the National Company Law Appellate Tribunal (NCLAT), Principal Bench at New Delhi in Company Appeal (AT) (Insolvency) No. 598 of 2021, filed by the Appellant, whereby the NCLAT issued notice of the Appeal, but did not restrain the Interim Resolution Professional (IRP) from proceeding with Corporate Insolvency Resolution Process (CIRP) of M/s Seya Industries Limited (hereinafter referred to as “Corporate Debtor”). The NCLAT, however, restrained the IRP from constituting a Committee of Creditors (CoC) till the next date of hearing. In the meanwhile, the Appellant and the Respondents were given the opportunity to settle their disputes before the Adjudicating Authority (NCLT) in terms of Section 12A of the IBC read with Rule 11

A of the National Company Law Tribunal Rules, 2016 (NCLT Rules). The appeal was directed to be listed for hearing on 13th September 2021.

2. The Appellant is an erstwhile Director of Respondent No. 4, that is the Corporate Debtor. The Corporate Debtor, a company incorporated under the Companies Act, 1956 has been carrying on
B business, *inter alia*, of manufacture of benzene based Speciality Chemicals since 1990. It is stated that the Corporate Debtor had invested about Rs.400 Crores in its existing manufacturing facilities and had further invested about Rs.900 Crores in an integrated Greenfield Mega Project for Speciality Chemicals.

C 3. According to the Appellant, the Corporate Debtor is the source of livelihood for about 150 workmen, 40 unskilled workers and 75 employees on its payroll and is engaged with more than 200 Customers/Vendors. It is claimed that the Corporate Debtor has a net worth of Rs. 972 Crores and fixed assets worth more than Rs.1500 Crores.

D 4. In order to expand its chemical manufacturing plant at Tarapur, Palghar (Maharashtra), the Corporate Debtor raised capital and the Respondent No.1 - M/s Beacon Trusteeship Limited (hereinafter referred to as “Beacon Trusteeship”) committed to invest Rs. 100 Crores in the said integrated Greenfield Mega Project, in the form of Rs.20 Crores, towards Compulsorily Convertible Preference Shares (CCPS) and Rs.
E 80 Crores, by way of Non-Convertible Debentures (NCDs). Thereafter the Appellant, the Corporate Debtor and Respondent-Beacon Trusteeship executed a Debenture Trust Deed (DTD), *inter-alia*, recording the terms and conditions of the issue of said NCDs. The Respondent No. 1 was appointed, the Debenture Trustee as recorded in the DTD. The
F DTD laid down the obligations of the Corporate Debtor towards the NCDs.

5. On or about 11th March 2019, Beacon Trusteeship released a sum of Rs.72,00,00,000/- (INR Seventy Two Crores) toward subscriptions of 360 Series A debentures and 360 Series B Debentures (“First tranche
G Debentures”). The aforesaid amount was to be invested in capacity expansion of the company and hence not available as cashflow. The service of interest for the first tranche had to be met out of the second tranche of Rs. 8 Crores to be invested by the Beacon Trusteeship which would have created the cash flow for the same and the remaining amount

H

was to be invested for Capex investment. Beacon Trusteeship, however, defaulted in making payment of the second tranche of Rs. 8 Crores. A

6. In addition to the DTD dated 8th March 2019, the parties entered into a Supplemental Deed dated 14th March 2019 revising certain terms set out in DTD including the timelines and schedule for the Interest Payment Dates. B

7. On 31st May 2019, the Corporate Debtor sent an email to the Respondent Nos. 1 to 3, requesting payment of the second tranche of Rs.8 Crores in terms of the DTD. The Corporate Debtor also issued notice to the Respondent Nos.1 to 3 to make payment of second tranche of Rs. 8 Crores. C

8. On 12th September 2019, the Corporate Debtor took recourse to Arbitration Proceedings against the other Respondents. Beacon Trusteeship issued a notice to the Corporate Debtor regarding non-payment of interest amount of Rs.2,18,95,890.41/-. Beacon Trusteeship also issued an Enforcement Notice accelerating payment of the full investment amount i.e. Rs.77,94,92,513/- as due on 17th October 2019 on account of non-payment of Rs.2,18,95,890.41/- being interest coupon amount. D

9. On 18th October 2019, the Respondent Nos. 1 to 3 invoked Clause 6.1 of the share pledge agreement and transferred 26.60 lakh shares worth Rs 91.78 Crores into the DEMAT Account(s) of the Respondents. E

10. Between 18th-20th October 2019, the Corporate Debtor initiated Arbitration Proceedings before the High Court of Bombay. While the Arbitral Proceedings, to which the Respondent Nos. 1 to 3 had themselves agreed and consented to, were pending, they filed an application under Section 7 of the IBC before the National Company Law Tribunal (NCLT), Mumbai Bench. F

11. On 15th January 2020, the Corporate Debtor filed its statement of claim seeking an award aggregating to Rs.848,75,30,000/- for losses and damages suffered by it. G

12. On 26th February 2020, the Respondents filed statement of defence and counter claim seeking an award for payment of its claim amounting to Rs.73,56,59,238/-.

H

A 13. On 24th March 2021, the Arbitrator passed an interim award in favour of Beacon Trusteeship and other Respondents and directed the Corporate Debtor to make payment of Rs. 72,06,99,244/- along with interest.

B 14. On 21st April 2021, being aggrieved by the order of the Arbitrator, the Appellant and Corporate Debtor preferred an arbitration petition under Section 34 of the Arbitration and Conciliation Act, 1996 before the High Court of Bombay which is still pending.

C 15. The NCLT, Mumbai Bench heard the matter and reserved its order on 13th May 2021. On 1st July 2021, the Corporate Debtor and the Respondents Nos. 1 to 3 filed a joint application before the NCLT, Mumbai Bench requesting to defer the order as the parties were in the process of arriving at a settlement and sought time till 10th July 2021.

D 16. On 12th July 2021, the Corporate Debtor and the Respondents Nos. 1 to 3 again filed a joint application before the NCLT, Mumbai Bench seeking further time till 23rd July 2021 for arriving at a settlement. Thereafter, on 26th July 2021, they again sought time for settlement till 12th August 2021.

E 17. On 3rd August 2021, the NCLT, Mumbai Bench, rejected the request of the parties for further deferment of orders for arriving at a settlement and admitted and allowed the application under Section 7 of the IBC preferred by Respondent Nos. 1 to 3 against Corporate Debtor.

F 18. Being aggrieved by the order dated 3rd August 2021 passed by the NCLT, Mumbai Bench, admitting and allowing application for initiating CIRP against the Corporate Debtor, the Appellant who is Director of the Corporate Debtor filed an appeal being Company Appeal (AT)(Insolvency) No. 598 of 2022 in the NCLAT, New Delhi.

G 19. On 8th August 2021, the parties had amicably settled their disputes and entered into a formal settlement, a copy of which is annexed to the paper book as annexure A-25.

H 20. On 10th August 2021, the NCLAT considering the settlement arrived at between the parties, granted interim stay of publication under Section 13 of the IBC and further gave liberty to the parties to adopt procedure under Section 12A of IBC.

21. On 12th August 2021, the parties with the consent of the IRP filed an application under Section 12A of the IBC before the NCLT, Mumbai. However, the same has not been listed till date. A

22. On 18th August 2021, the NCLAT stayed the formation of CoC, but declined to exercise its power under Rule 11 of the NCLAT Rules to take on record the settlement and dispose of the matter. Further, the NCLAT permitted the IRP to issue publication and also handover all assets and proceed with the CIRP even though the matter had been settled between the parties. Being dissatisfied by the order dated 18th August 2021 of the NCLAT, the Appellant has preferred the present Civil Appeal. B
C

23. Section 12A of the IBC enables the Adjudicating Authority to allow the withdrawal of an application admitted under Section 7 or Section 9 or Section 10, on an application made by the applicant with the approval of 90% voting shares of the Committee of Creditors in such a manner as may be specified. D

24. Section 12A of the IBC clearly permits withdrawal of an application under Section 7 of the IBC that has been admitted on an application made by the applicant. The question of approval of the Committee of Creditors by the requisite percentage of votes, can only arise after the Committee of Creditors is constituted. Before the Committee of Creditors is constituted, there is, in our view, no bar to withdrawal by the applicant of an application admitted under Section 7 of the IBC. E

25. In exercise of power conferred by Section 469 of the Companies Act, 2013, the Central Government has made the National Company Law Tribunal Rules, 2016, hereinafter, referred to as the “NCLT Rules”. Rule 11 of the NCLT Rules reads as :- F

“11. Inherent Powers.- Nothing in these rules shall be deemed to limit or otherwise affect the inherent powers of the Tribunal to make such orders as may be necessary for meeting the ends of justice or to prevent abuse of the process of the Tribunal.” G

26. As stated in its statement of objects and reasons, the object of the IBC is to consolidate and amend the laws relating to re-organisation and insolvency resolution of corporate persons, partnership firms and H

A individuals in a time bound manner for maximisation of value of assets of such persons, to promote entrepreneurship, availability of credit and balance of interests of all stakeholders including alteration in the order of priority of payment of Government dues and to establish an Insolvency and Bankruptcy Board of India and matters connected therewith or thereto.

B
27. The statement says that an effective legal framework for timely resolution of insolvency and bankruptcy would support development of credit markets, encourage entrepreneurship, improve business and facilitate more investments leading to higher economic growth and development.

C
28. A reading of the statement of objects and reasons with the statutory Rule 11 of the NCLT Rules enables the NCLT to pass orders for the ends of justice including order permitting an applicant for CIRP to withdraw its application and to enable a corporate body to carry on business with ease, free of any impediment.

D
29. Considering the investments made by the Corporate Debtor and considering the number of people dependant on the Corporate Debtor for their survival and livelihood, there is no reason why the applicant for the CIRP, should not be allowed to withdraw its application once its disputes have been settled.

E
30. The settlement cannot be stifled before the constitution of the Committee of Creditors in anticipation of claims against the Corporate Debtor from third persons. The withdrawal of an application for CIRP by the applicant would not prevent any other financial creditor from taking recourse to a proceeding under IBC. The urgency to abide by the timelines for completion of the resolution process is not a reason to stifle the settlement.

F
31. Mr. Mukul Rohtagi, learned Senior Counsel appearing on behalf of the Appellant drew our attention to an order dated 25th August 2021, passed by a Bench of coordinate strength comprising S. Abdul Nazeer and Krishna Murari, J.J. in Civil Appeal No. 4993 of 2021, the relevant part whereof is extracted hereinbelow:

G
“(3) We have heard learned counsel for the parties. It is not in dispute that CoC has not been constituted so far. This Court in Swiss Ribbons Private Limited and Anr. v.

H

Union of India and others- (2019) 4 SCC 17 has held that at any stage, before a Committee of Creditors is constituted, a party can approach National Company Law Tribunal (NCLT) directly and that the Tribunal may, in exercise of its inherent powers under Rule 11 of NCLT Rules, allow or disallow an application for withdrawal or settlement. It was held thus: A B

82. It is clear that once the Code gets triggered by admission of a creditor's petition under Sections 7 to 9, the proceeding that is before the adjudicating authority, being a collective proceeding, is a proceeding in rem. Being a proceeding in rem, it is necessary that the body which is to oversee the resolution process must be consulted before any individual corporate debtor is allowed to settle its claim. A question arises as to what is to happen before a Committee of Creditors is constituted (as per the timelines that are specified, a Committee of Creditors can be appointed at any time within 30 days from the date of appointment of the interim resolution professional). We make it clear that at any stage where the Committee of Creditors is not yet constituted, a party can approach NCLT directly, which Tribunal may, in exercise of its inherent powers under Rule 11 of NCLT Rules, 2016, allow or disallow an application for withdrawal or settlement. This will be decided after hearing all the parties concerned and considering all relevant factors on the facts of each case." C D E F

(emphasis supplied)

(4) In the instant case, as noticed earlier, the applicant-respondent no.1 had made an application before the NCLT, Mumbai Bench, under Rule 11 of the NCLT Rules for withdrawal of company petition filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 (IBC) on the ground that the matter has been settled between the Corporate debtor and the applicant-respondent no.1. G

H

- A *(5) Having heard learned counsel for the parties and having regard to the facts and circumstances of the case, we are of the view that the applicant-respondent no.1 was justified in filing the application under Rule 11 of the NCLT Rules for withdrawal of the company petition on the ground that the matter has been settled between the parties.”*
- B

- C 32. The application for settlement under Section 12A of the IBC is pending before the Adjudicating Authority (NCLT). The NCLAT has stayed the constitution of the Committee of Creditors. The order impugned is only an interim order which does not call for interference. In an appeal under Section 62 of the IBC, there is no question of law which requires determination by this Court. The appeal is, accordingly, dismissed. The NCLT is directed to take up the settlement application and decide the same in the light of the observations made above.

Ankit Gyan and Anurag Bhaskar
(Assisted by : Rahul Kumar, LCRA)

Appeal dismissed.