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AJAY GUPTA

v.

PRAMOD KUMAR SHARMA

(Civil Appeal No. 1385 of 2022)

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FEBRUARY 25, 2022

[DINESH MAHESHWARI AND VIKRAM NATH, JJ]

- Insolvency and Bankruptcy Code, 2016: s. 62 – Appellant was one of the resolution applicants in the corporate insolvency resolution process concerning the corporate debtor – Deliberation took place between the appellant, the other applicant and the Committee of Creditors (CoC) over the resolution plan submitted and as a result of which the appellant and the other applicant were asked to remove defects from the resolution plan so submitted – Appellant proposed for modification/amendment of the resolution plan but the same was declined by the resolution professional – Aggrieved by it, the appellant approached the Adjudicatory Authority, which allowed the appellant's prayer of modification of resolution plan but at the same time, to provide level playing field, allowed the other resolution applicant also to make modification in its resolution plan which was submitted to the CoC – Pursuant to the order of the Adjudicating Authority, the CoC considered the resolutions plans of appellant and the other resolution applicant and approved the resolution plan of the other resolution applicant – Appellant questioned the order of the Adjudicating Authority before the Appellate Tribunal on the ground that since the resolution plan of the appellant was known to everyone hence no opportunity should have been given to the resolution applicant for modification – Appellate Tribunal dismissed the appeal – On appeal, held: The modification was permitted at the request of the appellant himself hence Adjudicating Authority, so as to provide level playing field, was justified for granting permission to other resolution applicant to place its modification for consideration of CoC – Since the appellant had chosen to disclose the terms of its resolution plan before the Adjudicating Authority, there was no fault on the part of the resolution professional or CoC or other resolution applicant – The view taken by the Adjudicating Authority as also by the Appellate Tribunal H appeared to be reasonable and sound, calling for no interference.*

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 1385 A
of 2022.

From the Judgment and Order dated 13.01.2022 of the National Company Law Appellate Tribunal, New Delhi in Company Appeal (AT) (Insolvency) No.35 of 2022.

Nakul Dewan, Sidhartha Dave, Siddharth Bhatnagar, Sr. Advs., Shikhar Khare, M/s Kings and Alliance LLP, Nilotpal Shyam, Gaurav Srivastava, Sudhanshu Prakash, Mrs. Babita Jain, Ms. Aarushi Singh, Aditya Singh, Mahesh Thakur, Ms. Shailija Das, Abhishek Kumar, Ashutosh Kumar Sharma, Pracheta Kar, Aditya Sidhra, Nadeem Afroz, Advs. for the appearing parties.

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The Order of the Court was passed by

DINESH MAHESHWARI, J.

Having heard learned senior counsel for the appellant at sufficient length and having perused the material placed on record, we do not feel persuaded to entertain this appeal under Section 62 of Insolvency and Bankruptcy Code, 2016¹ by one of the resolution applicants² in the corporate insolvency resolution process³ concerning the corporate debtor-B.B. Foods Pvt. Ltd.

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The appellant seeks to question the judgment and order dated 13.01.2022 as passed by the National Company Law Appellate Tribunal, Principal Bench, New Delhi⁴ in Company Appeal (AT) Insolvency No. 35 of 2022 whereby, the Appellate Tribunal declined to interfere in the order dated 13.12.2021 passed in I.A. No. 367 of 2021 in CP No.(IB)349/ALD/2018 by the National Company Law Tribunal, Allahabad Bench, Allahabad⁵ by which, the Tribunal granted the prayer of the appellant to amend his resolution plan dated 22.10.2021 but, at the same time, also allowed the other resolution applicant to place any modification in their resolution plan before the Committee of Creditors⁶.

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¹ Hereinafter also referred to as “the Code”.

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² A consortium led by the appellant (comprising of a private limited company and the appellant himself) has been the resolution applicant.

³ ‘CIRP’, for short.

⁴ Hereinafter also referred to as ‘the NCLAT’ or ‘the Appellate Tribunal’.

⁵ Hereinafter also referred to as ‘the NCLT’ or ‘the Adjudicating Authority’.

⁶ ‘CoC’, for short.

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- A Shorn of unnecessary details, the relevant background aspects for the present purpose are that as regards the CIRP in question, there had been two resolution applicants, the consortium led by appellant being one of them. It appears that there had been deliberations in the CoC over the resolution plans submitted by the appellant and other resolution applicant; and in the minutes of eighth meeting dated 02.11.2021, the CoC indicated its deliberations/observations concerning the two resolution plans in the following terms:
- B “At this stage, the representative of Resolution Applicant, namely, Sirius Foods Private Limited was invited to have detailed deliberations on the Resolution Plan submitted by Sirius Foods Private Limited and during the course of deliberations, defects/technical difficulty was pointed out and thereafter, representative of Resolution Applicant, namely, Sirius Foods Private Limited assured that all defects would be removed to the extent possible and to the satisfaction of the COC and Resolution Professional.
- C No further objections/issues were raised by any other participant of the meeting and accordingly, representative of Resolution Applicant, namely, Sirius Foods Private Limited left the meeting thereafter.
- D At this stage, the representative of Resolution Applicant, namely, consortium of Prabhat Warehouse and Cold Storage Limited and Mr. Ajay Gupta was invited to have detailed deliberations on the Resolution Plan submitted by, consortium of Prabhat Warehouse and Cold Storage Limited & Mr. Ajay Gupta and during the course of deliberations, defects/technical difficulty were pointed out and thereafter, representative of Resolution Applicant, namely, consortium of Prabhat Warehouse and Cold Storage Limited and Mr. Ajay Gupta assured that all defects will be removed to the extent possible and to the satisfaction of the COC and Resolution Professional and left the meeting room. No further objections/issues were raised by any other participant of the meeting and accordingly, representative of the said Resolution Applicant, left the meeting thereafter.”
- E After the aforesaid deliberations/observations of CoC, the appellant sent a communication dated 18.11.2021 and annexed therewith his affidavit dated 17.11.2021 in the so-called ‘clarification in respect of the resolution plan’. The contents of this affidavit dated 17.11.2021 read as under: -

“AFFIDAVIT

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I, Ajay Gupta, a director in Prabhat Warehouse Cold Storage Private Limited and on behalf of Ajay Gupta individual, which form a consortium and being the lead member of the said consortium, do hereby affirm as follows:

1. The consortium of Prabhat Warehouse Cold Storage Private Limited and Ajay Gupta have submitted a resolution plan dated 27th September, 2021 which was further amended vide Resolution Plan dated 22nd October, 2021. In the amended resolution plan, payment schedule and the resolution of the corporate debtor has been mentioned, which we would be honouring at the earliest.

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2. That while submitting the amended resolution plan, I was under certain apprehensions regarding litigations being involved in the process of resolution of the corporate debtor, but now after seeking legal advice on behalf of the consortium, state that the amount of payment to be made under the resolution plan of Rs. 16.10 crores will remain the same and is not being modified, however I'm putting forth my gesture of making the payment upfront, if the bank allows the same within 90 days of the receipt of the order of Hon'ble NCLT approving our resolution plan, as I would be taking the possession of the corporate debtor on the payment of upfront amount of resolution amount i.e. Rs.16.10 crore.

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3. Our payment of upfront amount under the resolution plan is in no way going to modify the plan and I am submitting this affidavit so to clear my point.”

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It appears that the appellant's proposal for such modification/amendment of the resolution plan was declined by the resolution professional. Thereupon, the appellant approached the Adjudicating Authority by filing I.A. No. 367 of 21 in C.P. No. (IB) 349/ALD/2018. The Adjudicating Authority took note of the submissions made on behalf of the appellant and passed the order dated 13.12.2021 granting the prayer of the appellant but, at the same time, correspondingly allowed the other resolution applicant to place any modification in their submitted resolution plan before CoC so as to provide level playing field. The order dated 13.12.2021 so passed by the Adjudicating Authority reads as under:-

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A I.A. No. 367/2021

Ld. Counsel for the applicant present. Ld. Counsel for the CoC present. Ld. Counsel for the RP present. Ld. Senior Counsel for the other Resolution Applicant whose plan is also being considered by the CoC present.

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This is an application filed by one of the Resolution Applicant seeking to amend the final Resolution Plan dated 22.10.2021 submitted by the applicant to make the following amendments:-

(a) *To uncaps the CIRP costs on conditions stated therein;*

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(b) *To reduce term of the plan from 180 days to 90 days.*

At this point of time, we are conscious of the fact that the CIRP period will come to end on 06.01.2022 and a decision on the resolution plans will have to be taken first by the CoC and, thereafter by this Adjudicating Authority.

Therefore, the ends of justice will be met if we direct the applicant herein to place the affidavits at Page Nos. 290 to 298 alongwith the covering letter addressed to the sole member of the CoC for consideration. Since we do not wish to disturb level playing field, the other resolution applicants whose plans are also being considered will also be permitted to place any modification in their submitted resolution plan before the CoC for its consideration.

Such modifications shall be communicated to the CoC, no later than 48 hours from now.

F Accordingly, IA No. 367/2021 is disposed of.”

Thereafter, the resolution plans were considered by the CoC on 21/22.12.2021 and the plan of the other resolution applicant was approved.

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The appellant, on the other hand, attempted to question the said order dated 13.12.2021 before the Appellate Tribunal. The Appellate Tribunal took note of the grievance of the appellant that its resolution plan came to be known to everyone and hence, no opportunity should have been given to the others to modify.

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The Appellate Tribunal found no substance in those submissions while taking the view that the Adjudicating Authority had passed the impugned order so as to maintain the level playing field. The Appellate

Tribunal also took note of the fact that the resolution plans had already been considered by CoC on 21.12.2021. A

We may also indicate that earlier, the said order dated 13.01.2022 as passed by the Appellate Tribunal was sought to be questioned before us by the erstwhile director of the corporate debtor but, we declined to accede locus to the said appellant and hence, the said appeal [@ Dy. No. 2729 of 2022] was dismissed, while rejecting the application seeking permission to file appeal, by our order dated 07.02.2022. B

Now, the said order dated 13.01.2022 of the Appellate Tribunal is sought to be questioned by the unsuccessful resolution applicant. C

The learned senior counsel has painstakingly taken us through the relevant contents of the Request for Resolution Plan⁷ as issued by the Resolution Professional as also the minutes of the meeting of CoC and the affidavit filed by the appellant. Learned counsel would strenuously contend that so far as the appellant is concerned, it had not been a case of modification of the resolution plan because modification as such was not even permissible under the conditions of RFRP; and the submissions of the appellant by way of the affidavit dated 17.11.2021 had only been to meet with the requirements of the COC, as reflected in the minutes of the meeting dated 02.11.2021 and for such a proposition, there was no justification in granting any liberty to the other resolution applicant to modify its resolution plan. Learned senior counsel has also contended that appellant had been rather prejudiced in the matter for the reason that the terms of its resolution plan became known to the other resolution applicant when the matter was examined by the Adjudicating Authority while passing order dated 13.12.2021. D E

We do not find the submissions aforesaid making out a case for interference. This is for the simple reason that on a perusal of the order dated 13.12.2021, this much is clear that certain key features/stipulations of the resolution plan were sought to be amended by the appellant. Whether it was done in response to the requirement of the CoC or otherwise, the fact of the matter remains that there was going to be modification of the relevant terms of the resolution plan of the appellant. When that was being permitted at the request of the appellant himself, we cannot find fault in the Adjudicating Authority having passed an order so as to balance the position of the respective parties and to provide F G

⁷ ‘RFRP’, for short. H

- A level playing field by granting corresponding permission to the other resolution applicant to place its modification for consideration of CoC.

So far as affidavit dated 17.11.2021 is concerned, though the appellant stated in paragraph 3 thereof that the payment of upfront amount under the resolution plan was in no way going to modify the plan but,

- B that had only been an expression of the understanding of the appellant about the legal effect of the propositions put forward by him, which included the modification of the term of plan from 180 days to 90 days. Such a proposition could not have been treated as formal or innocuous or of no material bearing.

- C So far as the factor relating to divulging of the contents of the plan is concerned, the same had been of the making of the appellant himself. If the appellant had chosen to divulge/disclose the terms of its resolution plan before the Adjudicating Authority, there had not been any fault on the part of the resolution professional or the CoC or the other resolution applicant.

- D Thus, the view taken by the Adjudicating Authority as also by the Appellate Tribunal appears to be reasonable and sound, calling for no interference.

- E Before concluding on the matter, we need to indicate two other relevant factors concerning this matter. One is that the other resolution applicant, whose resolution plan has been accepted by the Committee of Creditors, is not before us and has not been impleaded as a party respondent in this appeal. Hence, no order prejudicial to the interest of the successful resolution applicant could be passed in this appeal. Secondly, the matter would nevertheless require further processing before
- F the Adjudicating Authority; and for that matter, we are informed that the approval of the Committee of Creditors has already been placed before the Adjudicating Authority.

- G Taking note of all the facts and circumstances of the case, while declining to interfere in this appeal, we leave all the relevant aspects of the matter open for examination by the Adjudicating Authority but, strictly in accordance with law.

Subject to the observations foregoing, this appeal stands dismissed.