

A KRIDHAN INFRASTRUCTURE PVT. LTD.
(NOW KNOWN AS KRISH STEEL AND TRADING PVT LTD)

v.

VENKATESAN SANKARANARAYAN & ORS.

B (Civil Appeal No. 3299 of 2020)

MARCH 01, 2021

**[DR. DHANANJAYA Y CHANDRACHUD AND
M.R. SHAH, JJ.]**

- C *Insolvency and Bankruptcy Code, 2016 – The appellant submitted a resolution plan for a company which was undergoing the Corporate Insolvency Resolution Process (CIRP) under the 2016 Code – The Resolution Plan was approved by the Committee of Creditors (CoC) and National Company Law Tribunal (NCLT) – Accordingly, the appellant deposited an amount of Rs.5 crores in an escrow account of the corporate debtor – However, further obligations were not fulfilled by the appellant under the Resolution Plan despite numerous opportunities – As a result on 11.11.2019, the CoC voted for the liquidation of the corporate debtor – The same was allowed by the NCLT – In appeal, the NCLAT permitted appellant to deposit Rs.15 crores in the escrow account and appellant agreed to the stipulation that the amount of Rs.15 crores would be forfeited if it failed to deposit the payment of Rs. 50 crores – On 08.09.2020, the appeal was dismissed and NCLAT upheld the order of liquidation – Before the Supreme Court on 09.10.2020, the appellant stated that an amount of Rs.50 crores would be deposited on or before 10.01.2021 – The appellant was specifically informed that if it failed to do so in whole or in part, the entire amount of Rs.20 crores deposited earlier would be forfeited – Thereafter, the time for making the deposit was extended until 25.02.2021 – However, several months elapsed after extension of time and no payments were made – Appellant submitted that it has moved to term lenders for finance – However, before finance can be made available to the appellant, the term lenders insisted that the status of the company must be altered from that of a company under liquidation, to an active company – Held : The appellant was unable to raise the funds – The fact of the matter emerges that the*
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appellant will be unable to raise funds from the term lenders, who were insisting on changing the status of company from under liquidation to an active status – The order of liquidation was not set aside – What the request of the appellant reduces itself to, is that it would raise funds on a mortgage of assets of the company and unless the company is bought out of liquidation, it would not be in a position to raise the funds – This cannot be accepted – The order of liquidation was stayed and a final view is yet to be taken – Sufficient opportunities were granted to the appellant and it was not able to deposit Rs.50 crores – The appellant has failed to abide by its obligations – The consequence envisaged under the order of the Supreme Court accordingly ensue the forfeiture of the amount of Rs.20 crores – As a consequence, the management directed to revert to the liquidator for taking steps in accordance with law.

Dismissing the Civil Appeal, the Court

HELD: 1. The appellant has been unable to raise the funds. The fact of the matter, as it emerges from appellant's submission, is that the appellant will be unable to raise funds from the Term Lenders who are insisting that the status of the Company should change from a company under liquidation to an active status. The order of liquidation has not been set aside. Ultimately, what the request of the appellant reduces itself to, is that it would raise funds on a mortgage of the assets of the Company and unless the Company is brought out of liquidation, it would not be in a position to raise the funds. This is unacceptable. At this stage, the order of liquidation has only been stayed, but a final view was, thus, to be taken by this Court. Sufficient opportunities were granted to the appellant earlier during the pendency of the proceedings both before the NCLT and NCLAT. The orders of the NCLT and NCLAT make it abundantly clear that despite the grant of sufficient time, the appellant has not been able to comply with the terms of the Resolution Plan. Since 9 October 2020, despite the passage of almost five months, the appellant has not been able to deposit an amount of Rs 50 crores. Time is a crucial facet of the scheme under the IBC. To allow such proceedings to lapse into an indefinite delay will plainly defeat the object of the statute. A good faith effort to resolve a corporate insolvency is a preferred

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- A course. However, a resolution applicant must be fair in its dealings as well. The appellant has failed to abide by its obligations. In that view of the matter, we see no reason or justification to entertain the Civil Appeal any further. The consequence envisaged under the order of this Court shall accordingly ensue in terms of the forfeiture of the amount of Rs 20 crores. As a consequence of this order, the management shall revert to the liquidator for taking steps in accordance with law. [Para 11][528-A-F]

Innoventive Industries Ltd. v ICICI Bank (2018) 1 SCC 407:[2017] 8 SCR 33 – referred to.

- C **Case Law Reference**
[2017] 8 SCR 33 referred to para 11

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 3299 of 2020

- D From the Judgment and Order dated 08.09.2020 of the National Company Law Appellate Tribunal at New Delhi in Company Appeal (AT) (Insolvency) No. 202 of 2020.

K. V. Vishwanathan, Sr. Adv., Gaurav Varma, Adv. for the Appellant.

- E Ms. Meenakshi Arora, Sr. Adv., Ms. Misha, Ms. Charu Bansal, Ms. Prabh Simran Kaur, S. S. Shroff, Ashish Makhija, Ms. Shagun Matta, Abhijit Sengupta, Dibyadyuti Banerjee, Srideep Chatterjee, Anand Dey, Ms. Sumedha Banerjee, Advs. for the Respondents.

DR. DHANANJAYA Y CHANDRACHUD, J.

- F 1 This appeal arises from an order of the National Company Law Appellate Tribunal¹ dated 8 September 2020.
2 The appellant submitted a Resolution Plan for a company by the name of Tecpro Systems Limited² which was undergoing the Corporate insolvency Resolution Process under the Insolvency and Bankruptcy Code 2016³. The Resolution Plan was approved by the Committee of

¹ “NCLAT”

² “Corporate Debtor”

H ³ “IBC”

Creditors⁴ on 8 March 2019 with a majority of 89.92%. The Resolution Plan was approved by the National Company Law Tribunal⁵ on 15 May 2019. The appellant accordingly deposited an amount of Rs 5 Crores in an Escrow Account of the Corporate Debtor. However, the appellant did not fulfil its further obligations, including equity infusion, under the Resolution Plan despite numerous opportunities over a period of six months. On 11 November 2019, the CoC voted, by a majority of 99.28%, for the liquidation of the Corporate Debtor as a result of the failure of the appellant to implement the Resolution Plan. On 16 January 2020, the NCLT allowed the liquidation of the Corporate Debtor to proceed. The order of the NCLT was upheld by the NCLAT. Among other things, the NCLAT noted that the appellant had failed to implement the Resolution Plan for a period of over eight months and, hence, declined to exercise its jurisdiction pursuant to its inherent power under Rule 11 of the NCLAT Rules, 2016.

3 When the appeal came before this Court on 9 October 2020, a statement was made on behalf of the appellant that an amount of Rs 50 crores would be deposited on or before 10 January 2021. Liquidation under the IBC is a matter of last resort. Bearing this in mind, and in view of the solemn statement made by Senior Counsel for the appellant, an opportunity was granted to the appellant. Accordingly, the following order was passed:

- “1 Admit.
- 2 We have heard Dr Abhishek Manu Singhvi, Senior counsel in support of the appeal. Ms Meenakshi Arora, Senior counsel appears on behalf of Edelweiss Asset Reconstruction Company Limited (EARC), a financial creditor, who had appeared before the National Company Law Appellant Tribunal. EARC has supported the appellant. Mr Ashish Makhija, learned counsel appears on behalf of the liquidator to oppose the appeal and support the order of the National Company Law Appellate Tribunal.
- 3 The corporate insolvency resolution process (CIR process) was initiated against the Corporate Debtor on 7 August 2017. The Resolution Plan submitted by the appellant was approved on 30 April 2018 by the Committee of Creditors (CoC). The

⁴ “CoC”

⁵ “NCLT”

- A Resolution Plan was approved by the NCLT on 15 May 2019. The NCLT was thereafter moved on the ground that the Resolution Plan had not been implemented by the appellant. Hence an application was filed under Section 33 of the Insolvency and Bankruptcy Code 2016 seeking liquidation of the Corporate Debtor. This was allowed by the NCLT by its order dated 16 January 2020.
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- 4 After the appellant filed an appeal before the NCLAT on 3 February 2020, an opportunity was granted to them to file an affidavit indicating the time frame for compliance of the Resolution Plan. On 25 February 2020, a meeting took place between the member of the erstwhile CoC, the appellant and the liquidator. A revised time line was agreed upon, under which the appellant was to make a payment upfront of Rs 15 crores within seven days of the order of the NCLAT, which was liable to be forfeited if the appellant failed to make the balance upfront payment of Rs 50 crores within three months thereafter.
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- 5 The appellant filed an affidavit before the NCLAT on 2 March 2020 apprising it of the understanding which had been arrived at on the above terms. On 29 July 2020, the NCLAT permitted the appellant to deposit Rs 15 crores in an escrow account to be specified by the lenders of the erstwhile CoC, within ten days. It is not in dispute that the appellant has in compliance with the order of the NCLAT, deposited Rs 15 crores. The appellant filed an undertaking on affidavit on 18 August 2020, accepting its obligation to make an upfront payment of Rs 50 crores within three months from the date of the reversal of the liquidation order. The appellant agreed to the stipulation that the amount of Rs 15 crores deposited by it in escrow would stand forfeited if it failed to deposit the payment of Rs 50 crores. NCLAT by its order dated 8 September 2020, dismissed the appeal and upheld the order of liquidation.
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- 6 Dr Abhishek Manu Singhvi, Senior counsel appearing on behalf of the appellant submits that liquidation of the undertaking should be a matter of last resort and, consistent
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with the understanding which was arrived at on 25 February 2020, the appellant is willing to abide by the terms as agreed. He has submitted that within a period of three months, the appellant would bring in the upfront payment of Rs 50 crores, failing which the amount of Rs 15 crores which has already been deposited in escrow would stand forfeited together with the amount of Rs 5 crores that was deposited following the approval of the Resolution Plan.

- 7 Ms Meenakshi Arora, Senior counsel appearing on behalf of EARC supports the proposal which has been submitted by the appellant on the ground that the erstwhile members of the CoC have in their commercial decision found it in their best interest to allow the Resolution Plan to be implemented.
- 8 Mr Ashish Makhija, learned counsel appearing on behalf of the liquidator has while opposing the appeal submitted that while the liquidator does not in principle oppose the request, as an officer of the Court, he would wish to apprise the Court of the fact that the appellant did not take steps following the approval of the Resolution Plan in May 2019 for complying with its obligations.
- 9 **Liquidation of the Corporate Debtor should be a matter of last resort. The IBC recognizes a wider public interest in resolving corporate insolvencies and its object is not the mere recovery of monies due and outstanding. The appellant has indicated its bona fides, at least *prima facie* at the present stage, by unconditionally agreeing to subject itself to the forfeiture of an amount of Rs 20 crores, which has been deposited by it, in the event that it fails to comply with the requirement of depositing an additional amount of Rs 50 crores within a period of three months in terms of the understanding that was arrived at on 25 February 2020. In order to enable the appellant to have one final opportunity to do so, we direct that the appellant shall, in order to demonstrate its bona fides deposit an amount of Rs 50 crores upfront in terms of the understanding which was arrived at on 25 February 2020. The appellant is specifically placed on notice of**

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- A **the fact that should it fail to do so in whole or in part, the entire amount of Rs 20 crores which has been deposited thus far, shall stand forfeited without any further recourse to the appellant.** Accordingly, the following interim directions are issued:
- B (i) The operation of the impugned order of the NCLAT dated 8 September 2020, is stayed;
- (ii) The appellant shall, in order to demonstrate its ability to implement the Resolution Plan and in compliance with the understanding arrived at on 25 February 2020 deposit an amount of Rs 50 crores, on or before 10 January 2021; and
- (iii) The auction of the properties of the Corporate Debtor shall remain stayed in the meantime.
- 10 The appeal shall be listed on 12 January 2021.”
- D **(emphasis supplied)**
4. Subsequently, on 25 November 2020, the above order was clarified by this Court and time for making the deposit was extended until 25 February 2021.
- E 5. Though nearly five months have elapsed since the first order, no payment has been made. Even after second order granting the extension of time, three months have elapsed. The appellant took over the Corporate Debtor after the order of stay. Though given charge, the appellant has not fulfilled its reciprocal obligations. IA 22633 of 2021 has been filed in the Civil Appeal, seeking a direction to the Ministry of Corporate Affairs, the Registrar of Companies and the Insolvency and Bankruptcy Board of India⁶ to take on record the newly appointed directors and signatories of the Corporate Debtor; to accept the Corporate Debtor as an active company and change its status from “under liquidation” to “active” and generally to take all actions in compliance of the previous orders of this Court.
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- H 6. Mr K V Vishwanathan, learned Senior Counsel appearing on behalf of the appellant, submits that pursuant to the earlier orders dated 9 October 2020 and 25 November 2020, the appellant had moved the Term Lenders for finance. However, the appellant submits that before

⁶ “IBBI”

finance can be made available to the appellant, the Term Lenders have insisted that the status of the Company must be altered from that of a company under liquidation, to an active company. A copy of the email addressed by the Insolvency and Bankruptcy Board of India on 15 January 2021 has been annexed to the aforesaid IA. Mr Vishwanathan submits that the previous orders of this Court recognize that the appellant was required to deposit an amount of Rs 50 crores in terms of the understanding which was arrived at with the CoC on 25 February 2020. It has been submitted that the appellant would hence raise the funds after securing a mortgage on the assets of the Corporate Debtor. However, the Term Lenders are not ready and willing to make funds available unless the status of the Company is altered.

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7. Ms Meenakshi Arora, learned Senior Counsel appearing on behalf of Edelweiss Asset Reconstruction Company Limited⁷, submits that EARC has the largest stake in respect of the Corporate Debtor. Ms Arora has submitted that EARC, as recorded in the earlier orders, supported the appellant in its efforts to comply with the Resolution Plan and, accordingly, suitable orders may be passed by this Court so as to facilitate the appellant in raising the necessary funds.

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8. On the other hand, Mr Ashish Makhija, learned counsel, who had appeared on behalf of the Liquidator, submits that though the management was handed over to the appellant, the appellant has proceeded to take action towards settling various disputes, including arbitration matters and despite various opportunities having been granted to it, the appellant has been unable to raise funds, as stated before this Court. Hence, Mr Makhija submits that an appropriate view may be taken by this Court on the default by the appellant.

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9. The above submission of Mr Makhija has been controverted by Mr Vishwanathan who denies that arbitration claims have been settled.

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10. By the order of the court dated 9 October 2020, which was passed on the statement which was made by Senior Counsel, an amount of Rs 50 crores was required to be deposited before 10 January 2021. On 25 November 2020, while clarifying the earlier order by which the order of NCLAT was stayed, time for the deposit of Rs 50 crores was extended until 25 February 2021. The appellant was clearly put on notice that the amount of Rs. 20 crores already deposited would stand forfeited in the event the appellant fails to comply with the terms of the order.

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⁷ "EARC"

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- A 11. The appellant has been unable to raise the funds. The fact of the matter, as it emerges from Mr Vishwanathan's submissions, is that the appellant will be unable to raise funds from the Term Lenders who are insisting that the status of the Company should change from a company under liquidation to an active status. The order of liquidation has not been set aside. Ultimately, what the request of the appellant reduces itself to, is that it would raise funds on a mortgage of the assets of the Company and unless the Company is brought out of liquidation, it would not be in a position to raise the funds. This is unacceptable. At this stage, the order of liquidation has only been stayed, but a final view was, thus, to be taken by this Court. Sufficient opportunities were granted to the appellant earlier during the pendency of the proceedings both before the NCLT and NCLAT. The orders of the NCLT and NCLAT make it abundantly clear that despite the grant of sufficient time, the appellant has not been able to comply with the terms of the Resolution Plan. Since 9 October 2020, despite the passage of almost five months, the appellant has not been able to deposit an amount of Rs 50 crores. Time is a crucial facet of the scheme under the IBC.⁸ To allow such proceedings to lapse into an indefinite delay will plainly defeat the object of the statute. A good faith effort to resolve a corporate insolvency is a preferred course. However a resolution applicant must be fair in its dealings as well. The appellant has failed to abide by its obligations. In that view of the matter, we see no reason or justification to entertain the Civil Appeal any further. The consequence envisaged under the order of this Court shall accordingly ensue in terms of the forfeiture of the amount of Rs 20 crores. As a consequence of this order, the management shall revert to the liquidator for taking steps in accordance with law. The Civil Appeal is accordingly dismissed.
- F 12. Pending applications, including the application for impleadment, stand disposed of.

Ankit Gyan

Appeal dismissed.

⁸ *Innoventive Industries Ltd. v ICICI Bank*, (2018) 1 SCC 407, paras 12-16