R. Raghavendran vs C. Raja John on 13 September, 2023

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Bench: Sudhanshu Dhulia, Sanjay Kishan Kaul

2023INSC849

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

Civil Appeal No.2552/2022

R. RAGHAVENDRAN

VERSUS

C. RAJA JOHN & ORS.

J U D G M E N T

SANJAY KISHAN KAUL, J.

1. The present appeal has been preferred against the impugned judgment of NCLAT dated 01.12.2021 on a limited aspect. It is not necessary for us to delve into all the factual scenario which gave rise to these proceedings. Suffice to say that there is no controversy before us that the respondent No.1 is the promoter of the Micro, Small & Medium Enterprises (for short 'MSME') -Springfield Shelters Pvt. Ltd. The proceedings against the said entity are pending under the Insolvency and Bankruptcy Code, 2016 (for short "the Code") initiated on 12.2.2020 and the appellant before us is the Resolution Professional.

2. It is sufficient to note that the NCLAT had put a question mark on the status of the entity as MSME on account of the certificate being procured after the process had began but in appeal as per the impugned order, the factual finding is that it was an MSME before the process began and thus the benefit of the MSME Act would be available to the said entity.

3. We may also note that the plan submitted by the respondent No.1 was held by the NCLT to be ineligible for consideration on account of the status of the respondent No.1 as a promoter as the entity was not an MSME and thus incurred the disqualification under Section 29(A)(e) of the said Code and an exception for MSME would not be carved out in the facts of the present case. However, on the finding being reached by the NCLAT that the entity is an MSME and had that status prior to the proceedings, the scenario changed and there is no quibble with the proposition. The plan submitted by respondent No.1 is liable to be considered. It is in pursuance of the aforesaid position

that the Resolution Professional sought to act.

4. The reason why the Resolution Professional has come up before this Court is that the respondent No.1 filed a contempt proceeding before the NCLAT alleging that the Resolution Professional was not acting in terms of the order dated 01.12.2021. This was in view of the observations made in paragraph Nos.32 & 34 of the impugned order which read as under:-

> "32) In any event, it is unequivocal that the Corporate Debtor is an MSME and as held by this Tribunal that it is not necessary for the Promoters to compete with other Resolution Applicants to regain the control of the Corporate Debtor.
>
> 34) Further, this Tribunal, keeping in view of the object of the Code that the Maximization of the Value of the Assets of Corporate Debtor is to be kept in mind in achieving its object. To give an opportunity to regain the control of the Corporate Debtor, the Management/Promoters/Erstwhile Directors of the Corporate Debtor being an MSME, not necessary to compete with other Resolution Applicants."

5. The aforesaid observations have been made in the context of the judgment of the Tribunal in Company Appeal (AT) (Insol.) No. 203 of 2019 titled as "Saravana Global Holdings Ltd. & Anr. Vs. Bafna Pharmaceuticals Ltd. & Ors.".

6. The appellant sought to invite other plans and thereafter e-voting took place. On the anvil of the results of e-voting to be declared, contempt proceedings were filed by respondent No.1 and the result of the e-voting process was stayed. The real controversy thus is whether the observations made in the paragraph Nos.32 and 34 of the impugned judgment can be sustained or not in the conspectus of the observations in Bafna's case (Supra) which is stated to have received imprimatur of this Court by the following order:-

> "1. No case is made out so as to interfere with the impugned order passed by the Tribunal. The appeal is, accordingly, dismissed.
>
> 2. Pending application(s), if any, shall stands disposed of."

7. We have been taken through the judgment in Bafna's case (supra). It is the say of learned counsel for respondent No.1 that in view of the order of this Court in C.A. No.5344 of 2019, extracted aforesaid, the principles of merger of the order as enunciated in "Kunhayammed & Ors vs State Of Kerala & Anr."reported as (2000)6 SCC 359 would apply. In this behalf, we may observe that all that has been done by this Court vide order dated 15.7.2019 is to simply uphold the order of the Tribunal by observing that no case for interference is made out-nothing more and nothing less.

8. We, thus, turn to the relevant portion of the judgment in Bafna's case passed by the Tribunal as to really appreciate the context in which the observations were made in paragraph 22 of that judgment, it is necessary to see how that judgment proceeded from paragraph 18 to 22;

“18. Therefore, it is clear that ‘I&B Code' envisages maximization of value of the assets of the 'Corporate Debtor' so that they are efficiently run as going concerns and in turn, will promote entrepreneurship. The preamble does not, in any manner, refer to liquidation, which is only availed of as a last resort if there is either no ‘Resolution Plan' or the ‘Resolution Plan's submitted are not up to the mark.

19. Admittedly, the 'Corporate Debtor' is a 'MSME' and the promoters are not ineligible in terms of Section 29A of the ‘I&B Code’. Therefore, it is not necessary for the ‘Committee of Creditors’ to find out whether the ‘Resolution Applicant' is ineligible in terms of Section 29A or not.

20. The 'Committee of Creditors' is to consider the feasibility, viability and such other requirements as has been specified by the Board. If it proposes maximisation of the assets and is found to be feasible, viable and fulfil all other requirements as specified by the Board, the company being MSME, it is not necessary for the 'Committee of Creditors' to follow all the procedures under the 'Corporate Insolvency Resolution Process’. For example, if case is settled before, the constitution of the ‘Committee of Creditors' or in terms of Section 12A on the basis of offer given by Promoter, in such case, all other procedure for calling of application of ‘Resolution Applicant' etc. are not followed. If the Promoter satisfy all the creditors and is in a position to keep the 'Corporate Debtor' as a going concern, it is always open to ‘Committee of Creditors' to accept the terms of settlement and approve it by 90% of the voting shares. The same principle can be followed in the case of MSME.

21. The Parliament with specific intention amended the provisions of the ‘I&B Code' by allowing the Promoters of ‘MSME’ to file ‘Resolution Plan’. The intention of the legislature shows that the Promoters of ‘MSME’ should be encouraged to pay back the amount with the satisfaction of the 'Committee of Creditors' to regain the control of the 'Corporate Debtor’ and entrepreneurship by filing ‘Resolution Plan’ which is viable, feasible and fulfils other criteria as laid down by the ‘Insolvency and Bankruptcy Board of India'.

22. Therefore, we hold that in exceptional circumstances, if the 'Corporate Debtor' is MSME, it is not necessary for the Promoters to compete with other ‘Resolution Applicants’ to regain the control of the 'Corporate Debtor'.”

9. A reading of the aforesaid shows that it begins with the fundamental principle that the Court envisages maximization of value of assets of the corporate debtor. Thereafter, it proceeds to discuss the scenario of a corporate debtor, which is an MSME, qua the ineligibility in terms of the inapplicability of Section 29A (c) & (h) of the Code to a promoter.

10. The discussion proceeds to the aspect of Committee of Creditors (for short ‘CoCs’) considering the feasibility, viability and such other requirements as have been specified by the Code and observes that if it proposes maximization of assets as feasible, viable and fulfills all requirements as specified by the Code, it is not necessary for the CoCs to follow all the procedures under the Corporate Insolvency Resolution process. The example given thereafter is, if a case has been settled before the Constitution of a CoCs or in terms of Section 12A of the Code on the basis of an offer

given by the promoter, in such a case, the procedure for calling of applications of the resolution applicants etc. are not followed and they would be in a position to keep the concern as a going concern and the CoCs would accept the terms of settlement and approve it by 90%. This, as one may say, is a special privilege for MSMEs. It is, thereafter, in paragraph 22, penned down, that in "exceptional circumstances" if a corporate debtor is an MSME, it is not necessary for promoters to compete with other resolution applicants to retain control of the corporate debtor.

11. In the impugned judgment, it can hardly be disputed that there is no discussion on the special circumstances other than the reference to judgment in Bafna's case. The impugned judgment is predicated on a broad reasoning as if ipso facto there is no need to call other proposals if it is an MSME. In view of the larger context it would have, we clearly observe and hold that this is not the correct position of law.

12. This is more so as in the factual scenario of Bafna's case, the observations were made in the context of (a) before the constitution of CoCs or

(b) in terms of Section 12A of the Code on the basis of an offer given by the promoter in such a case.

13. This is to clarify the legal principles so that there is no confusion in future in appreciating the context of the observations made in Bafna's Case.

14. We are, thus, clearly of the view that the appellant cannot be faulted for calling for other proposals in which the proposal given by respondent No.1 was also to be examined, put them to voting before the CoCs and declare the results.

15. To that extent, the impugned order is set aside.

16. Needless to say all proceedings emanating from the premise of the aforesaid observations in paragraph Nos. 32 and 34, whether in the contempt proceedings or any other proceedings would dissolve and be set aside.

17. We could have put an end to the matter by the aforesaid order but having been persuaded by learned counsel for the respondent No.1 to give some hiatus time to the said respondent on account of the fact that he has submitted an OTS (One Time Settlement) proposal to the financial creditors and are hopeful of the acceptance of the same. It is also his say that the flat buyers are also on board but are only 15% of the CoCs.

18. We are inclined to give that chance to the respondent No.1 in the given facts of the case but would not like the proceedings to drag on under the pretext of the OTS given by the respondent No.1., as it would be the objective of the Court to have a quick resolution with the aspect of insolvency or revival. On our query, learned counsel submits, on instructions, that a two months window may be granted to persuade the financial creditors.

19. We are inclined to accept the request, making it clear that in case the financial creditors are not inclined to do so, if any further proceedings are initiated by the respondent(s) in that behalf, that would not impede the process to be dragged on by the respondent No.1. It is a one time window given to the respondent No.1. This is also as according to the learned counsel for respondent No.1. if the financial creditors accept the proposal and the flat buyers are involved, the process started would itself dissolve.

20. In view of the aforesaid terms while enunciating the legal proposition, we, thus, allow the appeal and set aside paragraph Nos.32 and 34 of the impugned judgment.

21. Needless to say that beyond the window of two months, if the OTS is not accepted, the appellant will be free to declare the results of the e-voting qua all the proposals.

22. The appeal stands allowed leaving parties to bear their own costs.

... ... J. (SANJAY KISHAN KAUL)
.....J. (SUDHANSHU DHULIA) NEW DELHI;

September 13, 2023