



* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% ***Judgment Reserved on: 31st August, 2022***
Judgment Delivered on: 13th September, 2022

+ **CS(COMM) 151/2017 & I.A. 2496/2017 (O-XXXIX R-1 & 2 of CPC), I.A. 5067/2017 (O-I R-10 of CPC), I.A. 9257/2017 (O-XXXIX R-4 of CPC), I.A. 10220/2017 (O-VIII R-10 of CPC) & I.A. 9280/2018 (for modification of order dated 27.02.2017)**

ELECON ENGINEERING COMPANY LIMITED Plaintiff

Through: Mr. Akshay Makhija, Senior Advocate with Mr. Sanjeev K. Sharma, Mr. Rajiv Dalal, Mr. K.V. Krishna, Mr. Vikas Bhardwaj, Ms. Dipti Singh and Mr. Kamal Dalal, Advocates.

versus

ENERGO ENGINEERING PROJECTS LIMITED& ORS

..... Defendants

Through: Mr. Kamal Mehta with Mr. Arun Upadhyay and Mr. Abhishek Chauhan, Advocates for D-1 along with Liquidator.

Ms. Meghna Mishra with Mr. Arjit Benjamin, Ms. Lakshay Mehta and Mr. Meeran Maqbool, Advocates for Adani Power Rajasthan Limited.

CORAM:
HON'BLE MR. JUSTICE AMIT BANSAL

JUDGMENT

1. The issue which arises for consideration in the present suit is whether upon commencement of liquidation proceedings against the defendant no.1 company under the provisions of the Insolvency and Bankruptcy Code, 2016



(IBC) and Liquidator being appointed, the present suit can proceed or not. The said issue was noted in the order dated 17th October, 2019 passed by this Court. Written submissions have been filed on behalf of the plaintiff as well as the defendant no.1 company. Oral submissions on behalf of the counsels have been heard on 23rd May, 2022, 30th May, 2022, 18th August, 2022 and 31st August, 2022.

2. The present suit was filed seeking relief of permanent injunction restraining the defendant no.1 company from encashment of bank guarantees and for recovery of a sum of Rs.10,69,77,650/- against the defendant no.1.

3. It is the case of the plaintiff that the defendant no.1 had wrongfully and unlawfully invoked/encashed the contract performance bank guarantees and advance bank guarantees issued by the defendant no.2 and defendant no.3 respectively.

4. Vide order dated 27th February, 2017, while issuing summons in the suit, this Court had granted an *ad interim* injunction against payments under the bank guarantees being made to the defendant no.1. In view of the insolvency proceedings initiated against the defendant no.1, the present suit was stayed vide order dated 14th November, 2017. Subsequently, on 21st August, 2018 liquidation proceedings commenced in respect of the defendant no.1 company.

5. Senior counsel on behalf of the plaintiff submits that the proceedings in the present suit shall continue even if liquidation proceedings have commenced and a Liquidator has been appointed in respect of the defendant no.1 company. In support of this contention, the senior counsel on behalf of the plaintiff has highlighted the difference in the language of Section 14 and



Section 33(5) of the IBC to contend that under Section 33(5) of the IBC the moratorium is only in respect of institution of fresh suits and does not apply to pending suits.

6. He further submits that the present suit was initiated much before the initiation of proceedings against the defendant no.1 company before the National Company Law Tribunal (NCLT). During the pendency of the resolution proceedings, the moratorium under Section 14 of the IBC was applicable to the present suit. However, once the resolution process failed, the moratorium came to an end and the suit has to proceed.

7. Per contra, it has been contended on behalf of the defendant no.1 company, represented by the Liquidator, that the defendant no.1 is a “*corporate debtor in liquidation*” in proceedings before the NCLT, Delhi. In terms of Sections 63 and 231 of the IBC, jurisdiction of Civil Courts is barred in respect of any issue for which NCLT is empowered under the IBC to pass any order. He relies upon Section 60(5)(b) of the IBC to contend that NCLT alone has the jurisdiction to entertain ‘any claim’ made by or against the corporate debtor. Therefore, the remedy of the plaintiff would be to file a claim before the Liquidator and thereupon, invoke the provisions of the IBC.

8. Though he concedes that Section 33(5) of the IBC does not refer to pending suits, it is vehemently contended that the aforesaid provision should be read in a manner or interpreted in a manner that the moratorium that is the subject matter of the aforesaid provision, would also include pending suits. It is submitted that the entire object of the IBC would be defeated unless the moratorium under Section 33(5) of the IBC includes pending suits, as the pendency of a civil suit would result in liquidation proceedings getting delayed. This would result in frustration of the strict timelines that



are provided under the IBC for carrying out liquidation proceedings. Therefore, he submits that the Court should interpret Section 33(5) of the IBC in a manner that the moratorium provided under the said Section would cover pending suits as well. Counsel for the Liquidator has placed reliance on the Report of the Insolvency Law Committee dated 20th February, 2020 to submit that the omission of '*pending suits and legal proceedings*' under Section 33(5) of the IBC seems to be an error.

9. Reliance is placed on the judgment in ***Guru Gobind Singh Indraprastha University v. Naincy Sagar & Anr.***, 2019 (178) DRJ 372, to submit that while interpreting a Statute, Court should reject a construction that results in defeating the intent behind the Statute.

10. Reliance is also placed on the judgment in ***Delhi High Court Bar Association & Anr. v. Govt. of NCT of Delhi & Anr.***, 2013 (203) DLT 129, to submit that the Court should rely upon the Statement of Objects and Reasons of a Statute for appreciating the true intent of the legislature.

11. I have heard the rival submissions.

12. At the outset, the Relevant provisions of Section 13, Section 14, Section 33(5), Section 60(5), Section 63 and Section 231 of the IBC are set out below:

“13. (1) The Adjudicating Authority, after admission of the application under section 7 or section 9 or section 10, shall, by an order —

(a) declare a moratorium for the purposes referred to in section 14;

14. (1) Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following,



namely:—

(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

(4) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process:

Provided that where at any time during the corporate insolvency resolution process period, **if the Adjudicating Authority** approves the resolution plan under sub-section (1) of section 31 or **passes an order for liquidation of corporate debtor under section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order,** as the case may be.

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33.(5) Subject to section 52, when a liquidation order has been passed, no suit or other legal proceeding shall be instituted by or against the corporate debtor:

Provided that a suit or other legal proceeding may be instituted by the liquidator, on behalf of the corporate debtor, with the prior approval of the Adjudicating Authority.

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60.(5) Notwithstanding anything to the contrary contained in any other law for the time being in force, the National Company Law Tribunal shall have jurisdiction to entertain or dispose of—

(a) any application or proceeding by or against the corporate debtor or corporate person;



(b) any claim made by or against the corporate debtor or corporate person, including claims by or against any of its subsidiaries situated in India; and

(c) any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under this Code.

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63. *No civil court or authority shall have jurisdiction to entertain any suit or proceedings in respect of any matter on which National Company Law Tribunal or the National Company Law Appellate Tribunal has jurisdiction under this Code. Civil court not to have jurisdiction.*

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231. *Bar of jurisdiction. – No civil court shall have jurisdiction in respect of any matter in which the [Adjudicating Authority or the Board] is empowered by, or under, this Code to pass any order and no injunction shall be granted by any court or other authority in respect of any action taken on to be taken in pursuance of any order passed by such [Adjudicating Authority or the Board] under this Code.”*

13. From the language of Section 33(5) of the IBC, it is clear that the bar/moratorium is only in respect of fresh suits or legal proceedings. Unlike the moratorium under Section 14 of the IBC, where it is clearly noted that the moratorium is in respect of institution of suits or continuation of pending suits or proceedings against corporate debtor, the words “*continuation of pending suits or proceedings*” are conspicuously absent in Section 33(5) of the IBC.



14. Section 33(5) of the IBC came up for consideration before the Madras High Court in *Chennai Metro Rail Limited, Represented By The Chief General Manager v. Lanco Infratech Limited, Represented By the Liquidator Lanco House And Ors.*, 2020 SCC OnLine Mad 26397. Comparing Section 446 of the Companies Act, 1956 and Section 279 of Companies Act, 2013 with Section 33(5) of the IBC, the Madras High Court observed as under:

“31. Section 446 of the Company Act 1956 Act prohibited the commencement of any suit or legal proceeding when a winding up order is made. It also applied for the pending proceeding and the leave was required. Section 279 of the Companies Act 2013 also deals with the word ‘pendency’ and this word is conspicuously absent in the main part of Section 33(5) and in the proviso of the IBC2016.

32. Comparison between Section 446 of the 2013 Act and 279 of 1956 Act. Seeking of leave under Section 33(5) for pending cases was obviously omitted as the case before the other authority might have progressed until the declaration of moratorium. In such circumstances, it would be imprudent to transfer the case to the file of the Adjudicating Authority and try from that stage. Whereas, in cases of fresh commencement, it could commence before the Adjudicating Authority without any delay. A power to grant leave also includes power to reject the same. A rejection of the leave necessarily entails in the authority taking over the case in conducting the same. The Legislature in its wisdom thought that in cases coming in respect of inability to pay debts and where the resolution plan has failed, there should be no further delay in the procedural aspects while dealing with the pending cases. That is why Section 33(5) omitted to consider the case of pending matters.



Therefore, no analogy or support can be drawn from Section 279 in interpret Section 33(5) of the IBC2016.”

15. As noted above, under Section 446 of the Companies Act, 1956, once the Official Liquidator was appointed as the provisional liquidator, neither a fresh suit nor a pending suit could be proceeded against the company except with the leave of the Company Court/Tribunal. Similar position has been maintained under the Section 279 of the Companies Act, 2013. However, the word ‘pending’ is missing in Section 33(5) of the IBC. In paragraph 32, the Madras High Court has given the possible reason for such omission.

16. A similar view was taken by Kerala High Court in ***The Liquidator of The Corporate Debtor, Viz., Orion Kuries And Loans Private Limited v. The State of Kerala And Ors.*** MANU/KE/1245/2022. It was specifically observed in the said judgment that unlike Section 14(1)(a) of the IBC, under Section 33(5) of the IBC there is no prohibition for continuance of already instituted suits and proceedings. The moment the liquidation proceedings commence, there would be a bar only in respect of fresh suits or proceedings in terms of Section 33(5) of the Code. However, the pending suits and proceedings shall continue. In view thereof, the Kerala High Court upheld the order passed by the Controlling Authority under the Minimum Wages Act, 1948 even though the same was passed during the liquidation process.

17. I am in respectful agreement with the views expressed by Madras High Court and Kerala High Court above. To appreciate the difference in the language of Sections 14 and 33(5) of the IBC it may be useful to refer to the scheme of the IBC in the context of the aforesaid Sections. Section 14 and Section 33 are part of two separate Chapters of IBC. Section 14 is part of Chapter II which deals with ‘***Corporate Insolvency Resolution Process***’,



whereas Section 33 is a part of Chapter III which deals with '*Liquidation Process*'. Chapter II of the IBC deals with the Resolution Process in respect of a 'corporate debtor', where the objective is to revive the corporate debtor by coming out with a resolution plan, which is to be approved by the committee of creditors and thereafter, by the Adjudicating Authority. Chapter III of the IBC deals with the liquidation process which comes into effect upon the failure to come out with a resolution plan within the prescribed time period or a resolution plan not being approved. The moratorium under Section 14 of the IBC comes into effect upon the Adjudicating Authority passing an order declaring a moratorium and continues till the completion of Corporate Insolvency Resolution Process. Upon the approval of the resolution plan by the Adjudicating Authority or upon passing of a liquidation order under Section 33 of the IBC, the moratorium shall cease to have effect. After the Adjudicating Authority (NCLT) passes a liquidation order under section 33(4) of the IBC, a fresh moratorium in terms of Section 33(5) of the IBC comes into place.

18. The objective of the liquidation process is to derive the maximum value from the assets of the corporate debtor for the benefit of various creditors and other stakeholders in the company under liquidation. The objective is not the revival of the company. It is perhaps for this reason that unlike Chapter II, no time limits have been provided in Chapter III of the IBC. Therefore, legislature in its wisdom has decided not to include '*pending suits or legal proceedings*' within the scope of moratorium under Section 33(5) of the IBC. To be noted that even the proviso to Section 33(5) of the IBC only uses the word '*instituted*', but does not use the word '*pending*'. Further, in terms of the said proviso, even a fresh suit or legal



proceedings may be instituted by the Liquidator with the prior approval of the Adjudicating Authority. So, unlike Section 14 of the IBC, under Section 33(5) of the IBC there is no absolute bar in a suit or legal proceedings continuing along with the liquidation proceedings.

19. It is vehemently contended on behalf of the counsel for the Liquidator that in light of Sections 63 and 231 of the IBC, the jurisdiction of the Civil Court is barred and therefore, the present suit cannot be continued as the claims made in the said suit fall within the jurisdiction of NCLT. Reliance is also placed on Section 60(5) of the IBC.

20. A reading of Section 63 of the IBC would reveal that the bar on the Civil Court is only to '*entertain any suit or proceeding in respect of any matter on which NCLT has the jurisdiction under this Code*'. This would not apply to suits, which were already pending before the commencement of liquidation proceedings. Section 231 of the IBC, *inter alia* states that no injunction shall be granted by a Court in respect of action taken in pursuance to any order passed by the Adjudicating Authority. The intent is clear that the bar is only in respect of civil suits filed after an order has been passed by the Adjudicating Authority. In my view, the aforesaid bar under Sections 63 and 231 of the IBC would only be in respect of fresh suits. Sections 63 and 231 of the IBC cannot be read in manner so as to defeat the provisions of Section 33(5) of the IBC. If Sections 63 and 231 of the IBC are interpreted in the manner canvassed by the counsel for the Liquidator, the provision of Section 33(5) of the IBC would be rendered otiose and the moratorium under Section 33(5) of the IBC, which was to apply only in respect of fresh suits would also apply to pending suits. This cannot be the intention of the legislature. Therefore, I do not find any merit in the submission of the



Liquidator that the present suit cannot proceed in view of Sections 63 or 231 of the IBC.

21. Counsel for the Liquidator has relied upon the Report of the Insolvency Law Committee dated 20th February, 2020, the relevant portions of which are set out hereinafter:

“1. STAY ON CONTINUATION OF PROCEEDINGS

1.1. Section 33(5) of the Code bars the institution of suits or legal proceedings by or against the corporate debtor without the leave of the Adjudicating Authority during the liquidation process. However, it does not bar the resumption of any such pending suit or legal proceeding. It was brought to the Committee that this was causing hindrance to the liquidator's ability to conduct the liquidation process in an orderly manner.

*1.2. In this regard, the Committee noted that the Notes on Clauses for Section 33(5) state that the legislative intent behind the section was to provide for "a moratorium on the initiation or continuation of any suit or legal proceeding by or against the corporate debtor except proceedings pending in appeal before the Supreme Court or the High Court". **Therefore, the omission of pending suits and legal proceedings of the corporate debtor from the scope of the bar provided under Section 33(5) seems to be an error.** The Committee noted that even under the corresponding provision of the Companies Act, 2013, both the commencement of new suits and legal proceedings and the continuation of pending suits and legal proceedings by or against a company, is prevented once a winding up order is passed or a provisional liquidator is appointed against it, except with the leave of the Tribunal.*

*1.3. **Given this, the Committee agreed that this should be suitably addressed by making requisite amendments to sub-section (5) of Section 33 so that, apart from proceedings under Section 52, the leave of the Adjudicating Authority is also required for***



continuing any suit or legal proceeding by or against a corporate debtor undergoing liquidation.”

22. In the paragraphs of the Report of the Insolvency Law Committee extracted above, it has been noted that the omission of pending suits and legal proceedings of the corporate debtor from the scope of moratorium provided under Section 33(5) of the IBC seems to be an error. Further, the Committee recommended that suitable amendments should be made to Section 33(5) of the IBC so that leave of the Adjudicating Authority is also required for continuing any pending suit or legal proceeding by or against the corporate debtor undergoing liquidation. The said report is of 20th February, 2020 and the IBC has been amended many times thereafter. However, the legislature in its wisdom has not made any amendments in respect of Section 33(5) of the IBC. Therefore, the reliance placed on the Report of the Insolvency Law Committee is misplaced. It cannot even be stated that the legislature was not aware of the omission in view of the fact that the words ‘*pending suit or legal proceedings*’ have been specifically used in Section 14 of the IBC.

23. In any event, the submission of the counsel for the liquidator that words which are missing from the language of Section 33(5) of the IBC can be added by the Court is completely against the rule of *casus omissus*, in terms of which, an omission in a statute cannot be supplied by judicial interpretation.

24. The Supreme Court in ***Ebix Singapore Private Ltd v. Committee Of Creditors Of Educomp Solutions Limited And Anr.***, (2022) 2 SCC 401, applying the rule of *casus omissus* refused to add words in the language of Section 12-A of the IBC. Similarly, in ***Babita Lila and Anr., v. Union of***



India (2019) 9 SCC 647, the Supreme Court held that *casus omissus* cannot be supplied by the Court where the omissions noticed in a statute had been on account of conscious legislative intendment. In *Padma Sundara Rao (Dead) And Ors v. State of T.N. And Ors.*, (2002) 3 SCC 533, the Supreme Court held that while interpreting a provision, the Court only interprets the law and cannot legislate it. If a provision of law can be misused, it is for the legislature to amend the same and the legislative *casus omissus* cannot be supplied by judicial interpretative process.

25. The position of law as laid down by the Supreme Court in *Rohitash Kumar And Ors v. Om Prakash Sharma And Ors.*, (2013) 11 SCC 451, as summarised in paragraph 27 of the said judgment is set out below:

“Addition and subtraction of words

27. The court has to keep in mind the fact that, while interpreting the provisions of a statute, it can neither add, nor subtract even a single word. The legal maxim “A verbis legis non est recedendum” means, “from the words of law, there must be no departure”. A section is to be interpreted by reading all of its parts together, and it is not permissible to omit any part thereof. The court cannot proceed with the assumption that the legislature, while enacting the statute has committed a mistake; it must proceed on the footing that the legislature intended what it has said; even if there is some defect in the phraseology used by it in framing the statute, and it is not open to the court to add and amend, or by construction, make up for the deficiencies, which have been left in the Act. The Court can only iron out the creases but while doing so, it must not alter the fabric, of which an Act is woven. The Court, while interpreting statutory provisions, cannot add words to a statute, or read words into it which are not part of it, especially when a literal reading of the same produces an intelligible result. (Vide *Nalinakhya Bysack v. Shyam Sunder Halder* [AIR 1953 SC 148] , *Sri Ram Ram Narain Medhi v. State of Bombay* [AIR 1959 SC 459] , *M.*



Pentiah v. Muddala Veeramallappa [AIR 1961 SC 1107], Balasinor Nagrik Coop. Bank Ltd. v. Babubhai Shankerlal Pandya [(1987) 1 SCC 606 : AIR 1987 SC 849] and Dadi Jagannadham v. Jammulu Ramulu [(2001) 7 SCC 71], SCC pp. 78-79, para 13.)”

26. In light of the aforesaid legal principles, even if it is assumed that there was an omission on behalf of the legislature in not applying the moratorium under Section 33(5) of the IBC to pending suits, the same cannot be supplied by the Courts. It is for the legislature to amend the statute.

27. In view of my finding above that there appears to be no error or omission in Section 33(5) of the IBC, the judgements in ***Guru Gobind Singh Indraprastha University*** (supra) and ***Delhi High Court Bar Association*** (supra) cited by the counsel for the Liquidator have no application in the present case.

28. Counsel for the Liquidator has relied upon an order dated 25th September, 2019 passed by the National Company Law Appellate Tribunal (NCLAT), New Delhi in Company Appeal (AT) (Insolvency) No.230 of 2019 titled ***KSB Shanghai Pump Co. Ltd. v. Lanco InfraTech Ltd. and Ors.*** In the said case, the Resolution Professional in respect of the corporate debtor, invoked the performance bank guarantees in order to recover the advance payment. In the appeal before the NCLAT, the appellants sought a restraint against the invocation of the bank guarantees. In view of the fact that the performance bank guarantees had been invoked and the corporate debtor had received the amount out of the said guarantees, NCLAT did not interfere with the same and gave liberty to the appellants to file their claims before the Appropriate Forum for appropriate relief. No finding has been



given in the aforesaid order whether the bank guarantees were validly invoked by the Liquidator or not. This was not a case where a suit had already been filed challenging the invocation of performance guarantees.

29. In view of the discussion above, I am of the considered view that the bar under Sections 33(5), 63 and 231 of the IBC will not apply to the present suit and therefore, the proceedings in the present suit shall continue.

30. The Liquidator in its Report dated 11th February, 2019 has stated that the plaintiff submitted its claim of Rs.13,15,73,901/- before the Liquidator on 20th September, 2018 and the Liquidator has not adjudicated this claim as the present suit is sub-judice before this Court. The aforesaid claim is also the subject matter of the present suit.

31. In view of my finding that the bar/moratorium under Sections 33(5), 63 and 231 of the IBC would not apply to the present suit, the aforesaid claim of the plaintiff can only be adjudicated in the present proceedings. The plaintiff cannot pursue two separate remedies in respect of the same claim. Therefore, the Liquidator is directed not to adjudicate the claim filed on behalf of the plaintiff before the Liquidator.

32. List the suit along with pending applications before the Roster Bench on 19th September, 2022.

AMIT BANSAL, J.

SEPTEMBER 13, 2022

at/sr