

Comp. App. (AT) (Ins) No. 1406 of 2023 & I.A. No. 5032 of 2023

Devashree Developers Pvt. Ltd. & Ors. ...Appellants

Aravali Cylinders Pvt. Ltd.

...Respondent

For Appellants : Mr. Sumesh Dhawan, Vatsala Kak, Raghav Dembla, Adv.

For Respondent : Mr. Ankur Mahindra, Adv.

**Comp. App. (AT) (Ins) No. 1430 of 2023 & I.A. No. 5118, 5119
of 2023**

Leelawati Mahipal & Anr. ...Appellants

Aravali Cyclinders Pvt. Ltd. & Ors.

...Respondents

For Appellants : Mr. Dhruv Gupta, Adv.
For Respondent : Mr. Sumesh Dhawan, Vatsala Kak, Raghav
Dembla, Adv. for R2 to 7
Mr. Ankur Mahindra, Adv.

ORDER

Per: Justice Rakesh Kumar Jain (Oral)

05.08.2024: Comp. App. (AT) (Ins) No. 1406 of 2023

This appeal is directed against the order dated 29.08.2023 by which an application filed under Section 7 of the Code by the Appellant for the resolution of its amount of Rs. 2,31,00,000/- has

been dismissed without the arguments having been addressed on the aforesaid application.

2. Mr. Ankur Mahindra, Counsel appearing on behalf of the Respondent has not denied this fact.

3. In view of the aforesaid facts and circumstances, since the Tribunal has not followed the basic principle that nobody should be condemned without hearing, therefore, in our considered opinion, the impugned order deserves to be set aside and be remanded back to take a decision on the application in accordance with law after hearing both the parties and passing a speaking order.

4. Consequently, the present appeal is allowed and the impugned order is set aside. CP (IB) No. 267 of 2021 is hereby restored and the matter is remanded back to the Tribunal. The parties are directed to appear before the Tribunal on 02nd September, 2024. The Tribunal is directed to hear both the parties and decide the application in accordance with law as early as possible. It is however clarified that while disposing of this appeal, we have not entered upon the merits of the case and thus no observation has been made.

This appeal is directed against the order dated 29.08.2023 passed by the Adjudicating Authority (National Company Law Tribunal, New Delhi) by which an application jointly filed by Leelawati Mahipal and Sanjay Mahipal, shareholder of Aravali Cylinders Pvt. Ltd. (Corporate Debtor) under Section 60(5), 65 and 75 of the Code has been dismissed on the ground that the application has been filed before the admission of the application filed under Section 7 of the Code.

2. Counsel for the Appellant has submitted that the Tribunal has committed a patent error in dismissing the application only on the ground that it has been filed before the admission of application under Section 7 which is contrary to the law laid down by the Hon'ble Supreme Court and this Court in various judgments.

3. In this regard, he has relied upon a decision of the Hon'ble Supreme Court rendered in the case of Beacon Trusteeship Limited Vs. Earthcon Infracon Pvt. Ltd. & Anr., 2020 SCC OnLine SC 1233 and referred to Paras 7 and 8 which read as under:-

“7. Considering the provision of Section 65 of the IBC, it is necessary for the Adjudicating Authority in case such an allegation is raised to go into the same. In case, such an objection is raised or application is filed before the Adjudicating Authority, obviously, it has to be dealt with in accordance with law. The plea of collusion could not have been raised for the first time in the appeal before the

NCLAT or before this Court in this appeal. Thus, we relegate the appellant to the remedy before the Adjudicating Authority.

8. In case, a proper application is filed, aspect whether the proceedings have been initiated in collusive manner will be looked into, in accordance with law and the appropriate orders have to be passed, considering the facts and circumstances of the case. We have made it clear that we have not commented on the merit of the case. We set aside the impugned order passed by the NCLAT and dispose of the appeal in accordance with the aforesaid direction.”

4. He has also relied upon a decision of this Court rendered in the case of Ashmeet Singh Bhatia Vs. Sundrm Consultants Pvt. ltd. & Anr., 2023 SCC OnLine NCLAT 1423 which is also on the issue of application filed under Section 65 in case filed under Section 7 and referred to para 12, 13, 14, 16 & 18 which read as under:-

“12. The issue involved in this case is as to whether an application filed under Section 65 of the Code is maintainable after the filing of the application under Section 7, 9 or 10 of the Code or could be maintainable only after the admission of such an application?

13. As a matter of fact, the Learned Tribunal has taken a decision, while interpreting Section 65 of the Code, that the application under Section 65 of the Code would be maintainable only once the application under Section 7, 9 or 10 is admitted and the CIRP is initiated. However, in our considered opinion the view taken by the Learned Tribunal is totally erroneous as it has not looked into the basic provisions much less the definitions provided under Section 5(11) and 5(12) of the Code and has been unnecessarily influenced with the word “initiates” used

under Section 65 to observe that it would mean that when the CIRP is initiated i.e. after the admission. “

14. In this respect, regard may be had to the decision of the Hon’ble Supreme Court in the case of Ramesh Kymal (Supra) in which the Hon’ble Supreme Court has held that the date of initiation of CIRP is the date on which the Financial Creditor, Operational Creditor or Corporate Applicant makes an application with the Adjudicating Authority for the initiation of the process and the insolvency commencement date is the date of the admission of the application.

16. Thus, in view of the aforesaid discussion, the question posed herein before, is answered in favour of the Appellant and against the Respondents. It is hereby held that in case where application is filed under Section 65 of the Code, it would be maintainable after the application is filed either under Section 7, 9 or 10 of the Code.

18. As far as, the objection of the Respondents in regard to the locusstandi of the Appellant for filing such an application under Section 65 of the Code is concerned, the said issue shall be decided by the Tribunal after taking into consideration the objection raised or to be raised by the Respondent and after giving due opportunity to the Appellant/Applicant.”

5. He has further relied upon a decision of this Court rendered in the case of Shree Ambica Rice Mill Vs. Kaneri Agro Industries Ltd., 2021 SCC Online NCLAT 599 and referred to para 19 which read as under:-

“19. Thus, it is clear that the Adjudicating Authority is obliged to investigate the nature of the transaction and should be very cautious in admitting the Application in order to prevent taking undue benefit of provisions of IBC to detriment of the rights of legitimate creditors as well as to protect the Corporate Debtor from being dragged into

CIRP with malafide. Section 65 provides that if any person initiates the Insolvency Resolution Process or liquidation proceedings fraudulently or with malicious intent for any purpose other than for resolution of Insolvency or Liquidation, the Adjudicating Authority may impose upon such person a penalty. Section 65 provides that where any person furnishes any information under Section 7, which is false in material particulars, knowing it to be false or omits any material facts, knowing it to be material such person shall be punished with fine.”

6. Counsel for the Respondent (FC) has though reiterated the stand taken by it before the Tribunal.

7. We have heard Counsel for the parties and perused the record.

8. The issue involved in this case is as to at what stage the application under Section 65 is maintainable.

9. The answer of this question is not farfetched because of the decisions in the cases of Beacon Trusteeship Limited (Supra), Ashmeet Singh Bhatia (Supra) and Shree Ambica Rice Mill (Supra). In the case of Beacon Trusteeship Limited (Supra) the Hon’ble Supreme Court has held that *“The plea of collusion could not have been raised for the first time in the appeal before the NCLAT or before this Court in this appeal. Thus, we relegate the appellant to the remedy before the Adjudicating Authority”*.

10. In the case of Ashmeet Singh Bhatia (Supra) a specific question was framed in para 12 that *“as to whether an application filed under Section 65 of the Code is maintainable after the filing of the application under Section 7, 9 or 10 of the Code or could be maintainable only after the admission of such an application?”*

11. The answer to the aforesaid question is captured in para 16 where this order as this Court has held that the application filed under Section 65 of the Code is maintainable after the application is filed either under Section 7, 9 or 10 of the Code and not after the admission.

12. Thus, in view of the aforesaid discussion and law laid down by the Hon’ble Supreme Court and this court dismissal of the application by the Tribunal only on this ground that the application has been filed before the admission of the application under Section 7 is not sustainable.

13. Accordingly, the appeal is allowed and the impugned order is set aside. The application bearing 1120 of 2022 dismissed by the impugned order is restored and the matter is remanded back to the Tribunal to decide the aforesaid application in accordance with law. At this stage, Mr. Sumesh Dhawan, Counsel for the Respondent (FC) has also raised an objection about the locus of the intervenor and submitted that the same may be kept open

before the Tribunal to decide the same. We order accordingly. However, it is made clear that while deciding this appeal, we have not entered upon the merit of the case and have only decided the issue of law involved therein. The Tribunal is directed to list the aforesaid application alongwith the main petition i.e CP (IB) No. 267 of 2021 which has been remanded today by a separate order.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Mr. Naresh Salecha]
Member (Technical)

[Mr. Indavar Pandey]
Member (Technical)

Sheetal/Ravi