

NATIONAL COMPANY LAW APPELLATE TRIBUNAL. PRINCIPAL BENCH,**NEW DELHI****Comp. App. (AT) (Ins) No. 830 of 2020****IN THE MATTER OF:****Suchi Paper Mills Ltd. & Ors.****...Appellant****Versus****Ashish Gupta****Resolution Professional in the Matter of Anush
Finlease and Construction Pvt. Ltd. & Ors.****...Respondents****Present:****For Appellant** : Mr. Saurabh Kripal, Sr. Adv. with Mr. Amit George, Ms. Preeti Goel, Mr. Anubhav Goel, Ms. Priyanka Dhyani, Mr. Prateek Tomar, Mr. R. Bharat, Mr. Sidharatha Jain, Arkaneil Bhaumik, Advocates**For Respondent** : Mr. Abhijeet Sinha, Mr. Ashish Verma, Advocates for R1
Mr. Gaurav Mitra, Iswar Mohapatra, Advocates for R2
Mr. Shikhar Kumar, Adv. for R3 to 5**O R D E R****Per: Justice Rakesh Kumar Jain: (Oral)**

16.10.2023: This appeal is directed against the order dated 01.04.2020 passed by the Adjudicating Authority (National Company Law Tribunal, Principal Bench, New Delhi, Camp at Chennai) in two unnumbered applications filed in CP (IB) No. 1705/PB/2018 by which the resolution plan submitted by M/s Kendriya Bhandar, Delhi has been approved.

2. Shorn of unnecessary details, Phoneix ARC Pvt. Ltd. filed an application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (in short 'Code') for initiation of Corporate Insolvency Resolution Process (in short 'CIRP') against Anush Finlease & Construction Pvt. Ltd. (Corporate Debtor), which was admitted on 30.05.2019 and Ashish Gupta was appointed as an Interim Resolution Professional (in short 'IRP').

3. The IRP was appointed as RP in the first meeting of Committee of Creditors (in short 'CoC') held on 01.07.2019. The RP invited Expression of Interest (in short 'EOI') by publication of Form G. M/s Kendriya Bhandar submitted its plan, discussed in the CoC in its 08th meeting held on 13.03.2020 and approved on 17.03.2020.

4. Two unnumbered applications came to be filed one by the RP and other by the Resolution Applicant seeking approval of the resolution plan approved by the CoC of the Corporate Debtor with 77.54%. Both unnumbered applications have been allowed by the Adjudicating Authority on 01.04.2020 with the following impugned orders:-

“The RP (Ashish Gupta) and the RA (M/s Kendriya Bhandar, Delhi) filed two unnumbered applications seeking approval of the resolution plan approved by the CoC of the Corporate Debtor namely Anush Finlease and Construction Pvt. Ltd. with 77.54% on 14.03.2020, in pursuance of it, Kendriya Bhandra also executed a performance security for Rs. 12 Crore by way of fixed deposits on 23.03.2020.

2. The reason for urgent hearing is, in the wake of coronavirus outbreak in the country, the RA is proposing to convert the hotel and commercial complex in construction into a temporary shelter which could accommodate 2500-3000 persons and cater the needs of the Govt. as a measure to control spread of the pandemic. A copy of the lay out plan of the temporary night shelter as proposed by the applicant is at page-11 of the application filed by the RA.

3. The entire cost of the project Rs.2.55 Crore is said that it would be met by the Applicant and the Work would be carried out in collaboration through an NGO, PURARVAS(Pratibha Uthaan Rashtriya Vikas Sanstha). The applicant stated that the project shall be implemented as soon as the resolution plan is approved by the Tribunal.

4. In view of the urgency, I hereby approve the resolution plan under Section 31 of the IBC looking at the approval given by the CoC making it clear that the exemptions or discounts anything asked in this plan, which is not permitted under law, are not approved.

5. Accordingly, these two applications are allowed.”

5. At the outset, Sr. Counsel for the Appellant has submitted that firstly, the impugned order has been passed by a single member which is contrary to the provision of Section 419(3) of the Companies Act, 2013 (in short 'Act'). However, it is submitted by him that first proviso to Section 419(3) lays down that a single member can also hold the court if the President may, by general or special order, specify. Section 419 of the Act is reproduced as under:-

“Section 419: Benches of Tribunal.

***419.** (1) There shall be constituted such number of Benches of the Tribunal, as may, by notification, be specified by the Central Government.

(2) The Principal Bench of the Tribunal shall be at New Delhi which shall be presided over by the President of the Tribunal.

(3) The powers of the Tribunal shall be exercisable by Benches consisting of two Members out of whom one shall be a Judicial Member and the other shall be a Technical Member:

Provided that it shall be competent for the Members of the Tribunal authorised in this behalf to function as a Bench consisting of a single Judicial Member and exercise the powers of the Tribunal in respect of such class of cases or such matters pertaining to such class of cases, as the President may, by general or special order, specify:

Provided further that if at any stage of the hearing of any such case or matter, it appears to the Member that the case or matter is of such a nature that it ought to be heard by a Bench consisting of two Members, the case or matter may be transferred by the President, or, as the case may be, referred to him for transfer, to such Bench as the President may deem fit.

¹[(4) The Central Government shall, by notification, establish such number of benches of the Tribunal, as it may consider necessary, to exercise the jurisdiction, powers and authority of the Adjudicating Authority conferred on such Tribunal by or under Part II of the Insolvency and Bankruptcy Code, 2016.]

(5) If the Members of a Bench differ in opinion on any point or points, it shall be decided according to the majority, if there is a majority, but if the Members are equally divided, they shall state the point or points on which they differ, and the case shall be referred by the President for hearing on such point or points by one or more of the other Members of the Tribunal and such point or

points shall be decided according to the opinion of the majority of Members who have heard the case, including those who first heard it.”

6. It is submitted that no such notification has been issued by the president for the purpose of holding the Court by a single member, therefore, the impugned order is hit by coram non-juris. He has further drawn our attention to an administrative order purported to have been issued by the President, NCLT himself which is at pg. 32 of the rejoinder filed by the Appellant. The said order dated 22.03.2020 is reproduced as under:-

“National Company Law Tribunal

6th Floor, Block-3,
CGO Complex, Lodhi Road
New Delhi-110003
Dated: 22.3.2020

NOTICE

1. In view of the lockdown announced by several state governments and Central Govt notifying affected districts due to COVID19, it has been decided that:-

(i) All NCLT benches shall remain closed from 23.3.2020 to 31.3.2020 for the purpose of judicial work, as to unavoidable urgent matters, on application by the aggrieved, through email to the registry NCLT Chennai after service of notice to the other side, Hon'ble Acting President sitting singly at Chennai will examine and pass necessary orders on Wednesday and Friday

(ii) Parties/counsels will not be provided making oral submissions. The NCLT discourages persons arriving to NCLT Chennai. Application shall be verified by the respective counsel through affidavit by mentioning their bar enrolment number, above process should not be abused. The application/communication shall be sent to Registrar NCLT Chennai email from email of respective counsel.

(iii) As financial year is at closure therefore for administrative work Skeletal staff may attend the office as per decision of HOD of respective bench whenever required. Other staff will work from home and remain available on mobile phone.

(iv) As regard to the IBC-2016 matters extension of time, approval of resolution plan and liquidation will not be construed as urgent matters. These matters will be taken up as soon as regular benches start functioning, until such time such application not to be filed.

2. This issues with approval of Hon'ble Acting President, NCLT.

(Shiv Ram Bairwa)
Registrar”

7. He has further submitted that the order dated 22.03.2020 has been further extended on 28.03.2020 till 14.04.2020. The order dated 28.03.2020 is also reproduced as under:-

“National Company Law Tribunal
6th Floor, Block-3,
CGO Complex, Lodhi Road
New Delhi-110003
Dated:22.3.2020

NOTICE

1. In view of the lockdown announced by the Government of India until 14.04.2020, to curtail the spread of Covid-19, the directions given in the notice dated 22.03.2020 issued by NCLT are hereby extended upto 14.04.2020.

2. This issues with approval of Hon’ble Acting President, NCLT.

(Shiv Ram Bairwa)
Registrar”

8. It is contended that it has been decided and conveyed to all the NCLTs benches across the country that the matters pertaining to extension of time, approval of resolution plan and liquidation will not be construed as urgent matters. Whereas in the impugned order, the Acting President himself while dealing with the resolution plan has observed that he is passing the order keeping in view the urgency involved, therefore, it is submitted that there is a total departure from the instructions issued by the NCLT, which are supposed to be followed by it.

9. On merits, it is submitted that the impugned order is totally non-speaking and hit by principles of natural justice. In this regard, he has referred to the last paragraph (4) of the impugned order to contend that the Adjudicating Authority has approved the resolution plan under Section 31 of the Code only on the basis of the approval given by the CoC without recording

its own satisfaction which is sine qua none in Section 31 of the Code itself which is also reproduced for a quick reference:-

“Section 31. Approval of resolution plan.

1) If the Adjudicating Authority is satisfied that the resolution plan as approved by the committee of creditors under sub-section (4) of section 30 meets the requirements as referred to in sub-section (2) of section 30, it shall by order approve the resolution plan which shall be binding on the corporate debtor and its employees, members, creditors, ¹[including the Central Government, any State Government or any local authority to whom a debt in respect of the payment of dues arising under any law for the time being in force, such as authorities to whom statutory dues are owed,] guarantors and other stakeholders involved in the resolution plan.

²[Provided that the Adjudicating Authority shall, before passing an order for approval of resolution plan under this sub-section, satisfy that the resolution plan has provisions for its effective implementation.]

(2) Where the Adjudicating Authority is satisfied that the resolution plan does not conform to the requirements referred to in sub-section (1), it may, by an order, reject the resolution plan. (3) After the order of approval under sub-section (1),-

(a) the moratorium order passed by the Adjudicating Authority under section 14 shall cease to have effect; and

(b) the resolution professional shall forward all records relating to the conduct of the corporate insolvency resolution process and the resolution plan to the Board to be recorded on its database.

²[(4) The resolution applicant shall, pursuant to the resolution plan approved under sub-section (1), obtain the necessary approval required under any law for the time being in force within a period of one year from the date of approval of the resolution plan by the Adjudicating Authority under sub-section (1) or within such period as provided for in such law, whichever is later:

Provided that where the resolution plan contains a provision for combination, as referred to in section 5 of the Competition Act, 2002 (12 of 2003), the resolution applicant shall obtain the approval of the Competition Commission of India under that Act prior to the approval of such resolution plan by the committee of creditors.]”

10. It is further submitted that the resolution plan has to be tested on the anvil of Section 30(2) which is conspicuous by its absence in the impugned

order, therefore, without going much into merit of the case, it is submitted that the impugned order is totally arbitrary and deserves to be set aside.

11. He has further submitted that in such circumstances this Court may remand the case back to the Adjudicating Authority to decide the issue involved in the application once again by recording reasons.

12. Counsels for the RP as well as SRA have contested the argument of the Appellant. It is submitted by the Respondents that though it is required under Section 419 (3) of the Act that the constitution of bench has to be two members i.e. one Judicial and other Technical but as per first proviso to Section 419(3) the matters can be taken up even by a single member (judicial) but on a prior notification issued in this regard by the President.

13. Counsel for the Respondents have submitted that at present they do not have any notification with them as to whether the power had been bestowed upon a single member (judicial) to decide present lis or not.

14. In regard to the issue raised by the Respondent about the administrative orders dated 22.03.2020 and 28.03.2020 which have been referred to hereinabove, it is submitted that the impugned order has been passed keeping in view the immense suffering at the time of lockdown and therefore, there is no error committed by the Adjudicating Authority.

15. As regard Section 31 is concerned, it is also submitted that the Court has referred to Section 31 of the Code and then approved the resolution plan which has been approved by the CoC and therefore, there is no mistake.

16. We have heard Counsel for the parties and perused the record with their able assistance.

17. The first issue involved in this case is as to whether as per Section 419(3) of the Act, the order has to be passed by two members or a single member until and unless there is a notification specifically issued in this regard?

18. We have already referred to Section 419 of the Act in the earlier part of this order, therefore, it is not required to be repeated, however, it is very much clear from the bare reading of Section 419(3) of the Act that the powers of the Tribunal shall be exercisable by Benches consisting of two Members out of whom one shall be a Judicial Member and the other shall be a Technical Member but still a single Judicial Member can exercise the powers of the Tribunal in respect of such class of cases or such matters pertaining to such class of cases, as the President may, by general or special order, specify. In the present case which is pending since 2020, nothing has been brought on record by the Respondents that there has been a notification in this regard much less in terms of first proviso to Section 419 (3) of the Act authorising the solitary judicial member (Acting President at that time) to entertain unnumbered applications filed by RP and Resolution Applicant to decide the same in such a summary manner, therefore, the answer to this question is that until and unless a notification is issued under the first proviso to Section 419(3) of the Code the single judicial member cannot take upon itself the jurisdiction to entertain an application such like the one in hand and decide the same, therefore, the impugned order has been passed by an authority having no jurisdiction.

19. The second question is in regard to the administrative order which was issued on 22.03.2020 by none else than the NCLT. This administrative order

was issued in the wake of Covid-19. It was specifically mentioned in the said instructions that because the whole country is fighting against Covid-19, therefore, during this period the serious matter like extension of time, approval of resolution plan and liquidation shall not be entertained as urgent matters. The President further issued instructions dated 28.03.2020 and extended the order of 22.03.2020 to 14.04.2020 whereas the impugned order has been passed on 01.04.2020 very much during the currency of those instructions. It is needless to mention that on the one hand the Adjudicating Authority itself is issuing instructions that the issue regarding the extension of time, approval of the resolution plan and liquidation should not be treated as urgent matter and on the other hand the Acting President heard the unnumbered applications treating them most urgent and then approved the resolution plan only on the basis that the CoC has already approved the same without recording his satisfaction about Section 30(2) of the Code.

20. In the end, we are also of the considered opinion that the impugned order is patently illegal as it is without any reason which is the heart and soul of a judicial order because the Adjudicating Authority has passed the order though referring to Section 31 of the Code but it has not recorded its satisfaction about the provisions of Section 30(2) of the Code.

21. The resume of the aforesaid discussion thus takes us to the conclusion that the impugned order is not only illegal on the issues discussed hereinabove but also unreasonable and non-speaking.

22. In such circumstances, conclusion is that the impugned order has to be set aside and the matter has to be remanded back to the Adjudicating

Authority to decide the issues again after recording its findings in accordance with law.

23. Consequently, the appeal is allowed and the impugned order dated 01.04.2020 is set aside. The matter is remanded back to the Adjudicating Authority. Those two unnumbered applications are hereby restored. The registry of the NCLT shall assign numbers to both the applications i.e. filed by the RP and Resolution Applicant and then both the applications shall be decided by the Adjudicating Authority in accordance with law by passing a speaking order. The parties are directed to appear before the Adjudicating Authority on **10th November, 2023**. It is made clear that we have not touched the merit of the case because we were satisfied that it is a case where impugned order has been passed firstly without jurisdiction and secondly without following the principle of natural justice. All the issues regarding the merits are still open which shall be decided by the Adjudicating Authority in accordance with law. Since, both Counsel for the parties have earnestly requested that a direction may be issued to the Adjudicating Authority to decide it expeditiously, therefore, we order accordingly.

The registry is directed to send the copy of this order to the concerned Adjudicating Authority.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Mr. Naresh Salecha]
Member (Technical)

sc/rr