

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Ins) No. 707 of 2023

IN THE MATTER OF:

Jaldhara Properties and Trading Pvt. Ltd. ...Appellant

Versus

Sudal Industries Ltd. & Anr.

...Respondents

Present:

For Appellants : Mr. Shubhrato Chakraboti, Mr. Sumesh Dhawan, Shaurya Shyam, Adv.

For Respondent : Mr. Gaurav Mitra, Aditya Singh, Vineet Gupta, Roy Chowdhury, Lavanya Pathak, Adv.
Mr. Amar Dave, Sr. Adv. with Abhinav Agrawal, Adv. for RP

With

Company Appeal (AT) (Ins) No. 1420 of 2023

IN THE MATTER OF:

Jaldhara Properties and Trading Pvt. Ltd. ...Appellant

Versus

Prashant Jain

RP of Sudal Industries Ltd. & Anr.

...Respondents

Present:

For Appellants : Mr. Shubhrato Chakraborti, Mr. Sumesh Dhawan, Shaurya Shyam, Adv.

For Respondent : Mr. Gaurav Mitra, Aditya Singh, Vineet Gupta, Roy Chowdhury, Lavanya Pathak, Adv.
Mr. Amar Dave, Sr. Adv. with Abhinav Agrawal, Adv. for RP

ORDER

Per: Justice Rakesh Kumar Jain: (Oral)

22.07.2024: This order shall dispose of two appeals, filed by the Appellant, namely, CA (AT) (Ins) No. 707 of 2023 against the order dated 20.04.2023 passed in CP (IBPP) No. 01/MB-IV/2022 initiating Pre-Packaged Insolvency Resolution Process (in short 'PPIRP'), on an application filed under Section 54(C) of the Insolvency and Bankruptcy Code, 2016 (in short 'Code') by the Corporate Debtor, namely, Sudal Industries Limited (hereinafter referred to as 'the first appeal') and CA (AT) (Ins) No. 1420 of 2023, filed against the order dated 10.08.2023 by which an application bearing I.A. No. 3021 of 2023 in CP (IBPP) No. 01/MB-IV/2022 filed by the Resolution Professional on 13.07.2023 under Section 54K(15) of the Code r/w Regulation 49(1) of the IBBI (Pre-packaged Insolvency resolution process) Regulation, 2021 (in short 'Regulations') for the approval of the base resolution plan, has been allowed (herein after referred to as 'the second appeal').

2. The first appeal came up for preliminary hearing on 26.05.2023 in which the following order was passed:-

Learned Counsel for the Appellant submits that the Adjudicating Authority committed error in interpreting Section 11A(4) of the Insolvency & Bankruptcy Code, 2016 while proceeding with the pre pack CIRP and declined to consider the Section 7 Application which was much prior in point of time. Submissions need scrutiny. Issue notice to the Respondents through Speed Post as well as Email. Requisites along with process fee, if not filed, be filed within two days. Let Reply Affidavit be filed

within three weeks. Rejoinder may be filed within two weeks, thereafter. List this Appeal on 25th July, 2023. It is made clear that in this Appeal we are not passing any interim order staying the proceedings.

3. The second appeal came up for preliminary hearing on 02.11.2023 in which the following order was passed:-

Learned Counsel for the Appellant submits that the Company Appeal (AT) (Ins.) No.707 of 2023 has been filed challenging the PrePackaged Insolvency Resolution Process (PPIRP) order and the present Appeal has been filed challenging the approval of the Resolution Plan. It is submitted that the Company Appeal (AT) (Ins.) No.707 of 2023 is coming on 16.11.2023. 2. Issue Notice. Learned Counsel accepts notice on behalf of Respondent No.1 and Respondent No.2. Both the Respondents may file Reply before the date fixed. 3. List the Appeal on 16.11.2023. In the meantime, any action taken in pursuance of the Resolution Plan shall be abide by the result of this Appeal.

4. We are disposing of both these appeals together because the survival of the second appeal depends upon the decision of the first appeal because in case the first appeal succeeds then the second appeal shall have to be allowed and the order passed by the National Company Law Tribunal, Mumbai Bench, C-IV (the Tribunal) approving the resolution plan has to be set aside.

5. The brief facts of the case are that the Appellant (Jaldhara Properties and Trading Pvt. Ltd.) filed an application under Section 7 of the Code as unsecured financial creditor for the resolution of

an amount of Rs. 9,63,75,010/- on 09.12.2020 before the Tribunal which was assigned CP (IB) No. 63/MB-IV/2021.

6. While the aforesaid application, filed by the Appellant, under Section 7 of the Code, was pending before the Tribunal, the Code was amended by the Insolvency and Bankruptcy Code (Amendment) Act, 2021 (In short 'the Act of 2021') (No. 26 of 2021) which got the assent of the President of India on 11.08.2021 and become enforceable w.e.f. 04.04.2021 in terms of Section 1 (2) of the Act of 2021.

7. By virtue of the Act of 2021, Chapter III-A was added to the Code in regard to PPIRP. There were other amendments also in the Code and one of the amendment which is relevant for the decision of this case was by way of Section 5 of the Act, 2021 which inserted Section 11A to the Code.

8. After coming into force of the Act, 2021 w.e.f 04.04.2021, the Corporate Debtor filed an application under Section 54(C) of the Code for initiation of the PPIRP in respect of the CD. This application was assigned CP (IBPP) No. 01/MB-IV/2022 and was transferred to NCLT, Mumbai –IV where Section 7 application filed by the Appellant was already pending.

9. It is pertinent to mention that the application under Section 54(C) of the Code was filed by the Corporate Debtor on 04.09.2022.

10. The Tribunal, instead of deciding the application filed under Section 7 of the Code by the Appellant, chose to decide the application filed under Section 54(C) of the Code to which the Appellant raised the objection by referring to Section 11A(4) of the Code, however, the said objection was overruled by the Tribunal and the application filed under Section 54(C) of the Code was admitted by the impugned order dated 20.04.2023 and moratorium was imposed as well as the Resolution professional named in the application was appointed.

11. The Impugned order dated 20.04.2023 is challenged by the Appellant before this Court by way of the first appeal.

12. It is pertinent to mention that since the application under Section 54(C) is filed alongwith the base resolution plan, the RP filed an application bearing I.A. No. 3021 of 2023 on 30.07.2023 invoking Section 54K(15) of the Code and Regulation 49(1) of the Regulations for the purpose of approval of the resolution plan which was approved by the Tribunal vide its impugned order dated 10.08.2023 by allowing the said application.

13. Aggrieved against the said order dated 10.08.2023, the second appeal has been filed.

14. Counsel for the Appellant, while arguing the first appeal, has submitted that the Tribunal has committed a patent error in giving precedence to the application filed under Section 54(C) of

the Code over and above the application filed under Section 7 of the Code, violating the provisions of Section 11A(4) of the Code. He has submitted that Section 11A, inserted by the amendment, has four parts which are all independent of each other in which Section 11A(4) says that 'the provision of this section shall not apply where an application under Section 7 or 9 or 10 is filed and pending as on the date of the commencement of the Insolvency and Bankruptcy Code (Amendment) Act, 2021'. He has thus argued that the Tribunal giving precedence and priority to the application filed under Section 54(C) of the Code on 04.09.2022 over and above the application filed under Section 7 of the Code on 09.12.2020, much before the coming into force of amendment of the Act, 2021 on 04.04.2021, has committed a patent error, therefore, the order challenged in the first appeal deserves to be set aside.

15. On the other hand, Counsel for the Respondent in the first appeal has submitted that there is no error in the impugned order because the Tribunal has discussed Section 11A(4) and then the merits of the case to hold that the application under Section 54(C) has to be given precedence over and above the application filed under Section 7 of the Code.

16. To buttress his arguments, he has read over para 5.9 and 5.10 of the impugned order which is reproduced for a quick glance:-

“5.9. This Bench also notes that the applicant in CP(IB) 63 (MB) 2021 had attended the meeting of Financial Creditors but chose to abstain from participating in the voting on resolution. Considering this in the light of opposition to present application of Jaldhara, applicant in CP(IB) 63 (MB) 2021, this Bench feels its opposition stems from its intent to displace the existing promoter(s) from its management than to resolve the Corporate Applicant, as the promoters of the Corporate debtor are entitled to seek restoration of control under resolution in CIRP in precedence over any other applicant. Accordingly, this Bench feels that its application CP(IB) 63 (MB) 2021 is not in accordance with the intent and object of the code and deserve to be dealt with accordingly. In view of this, this Bench feels that the CP(IB) 63 (MB) 2021 is not maintainable as being against the basic intent and purport of the Code.

5.10. This Bench finds that section 11A (4) is clear and unambiguous and makes it clear that rule of precedence as provided in sub-section (1) to (3) does not apply to application(s) filed prior introduction of PIRP regime in the code. Further, this Bench finds the intent of legislature to allow the management of MSMEs to restore its control as contemplated under section 240A of the Code providing waiver of clause ©to (h) of section 29A in case of MSMEs where the promoters are otherwise qualified u/s remaining clauses of section 29A of the Code. On the harmonious construction of provisions of section 240A and 54C, this Bench finds that while section 240A of the Code allows restoration of control back to the Promoters of MSME in resolution in precedence of other prospective resolution applicants, section 54C allows the promoters to keep it with them till the resolution plan proposed by MSME is not found acceptable by the financial creditors. Accordingly, this Bench feels it would in order to adjudicate application filed u/s 54C of the Code prior to adjudication of application filed u/s 7 of the Code, where such section 7 application filed prior to introduction of PIRP regime remain pending with the Adjudicating Authority. However, as held in preceding

para, the intervenor's application CP(IB) 63 (MB) 2021 is not in accordance with the intent and object of the code and is not maintainable under the Code. This Bench proceeds to decide on the present application, as no application is pending before us.”

17. We have heard Counsel for the parties in so far as the first appeal is concerned and perused the record with their able assistance.

18. Question involved in the first appeal is as to whether the application filed under Section 54(C) of the Code shall have the precedence/priority of consideration and decision over and above the application filed under Section 7 of the Code, against the same Corporate Debtor, if the application under Section 7 is filed much prior of enforcement of the amendment of the Act, 2021 i.e. w.e.f. 04.04.2021 and is hit by Section 11A(4) of the Code?

19. In order to answer this question, it would be relevant to refer to Section 11A of the Code which is reproduced as under:-

“Section 11A. Disposal of applications under section 54C and under section 7 or section 9 or section 10

11A. Disposal of applications under section 54C and under section 7 or section 9 or section 10. (1) Where an application filed under section 54C is pending, the Adjudicating Authority shall pass an order to admit or reject such application, before considering any application filed under section 7 or section 9 or section 10 during the pendency of such application under section 54C, in respect of the same corporate debtor.

(2) Where an application under section 54C is filed within fourteen days of filing of any application under section 7 or section 9 or section 10, which is pending, in respect of

the same corporate debtor, then, notwithstanding anything contained in sections 7, 9 and 10, the Adjudicating Authority shall first dispose of the application under section 54C.

(3) Where an application under section 54C is filed after fourteen days of the filing of any application under section 7 or section 9 or section 10, in respect of the same corporate debtor, the Adjudicating Authority shall first dispose of the application under section 7 or section 9 or section 10.

(4) The provisions of this section shall not apply where an application under section 7 or section 9 or section 10 is filed and pending as on the date of the commencement of the Insolvency and Bankruptcy Code (Amendment) Act, 2021.”

20. Since the facts are not much in dispute, therefore, the case rests upon the interpretation of Section 11A, therefore, we shall be discussing all the provisions of Section 11A of the Code.

21. Section 11A is divided into four parts. Section 11A talks of disposal of applications under Section 54C and under Section 7 or 9 or 10 of the Code. The legislature has provided the mechanism for deciding the application under Section 54C vis a vis the applications filed under Section 7 or 9 or 10. If we talk about Section 11A(1) which is not the question involved here, it provides that where an application filed under Section 54C is pending, the AA shall pass an order to admit or reject such application, before considering any application filed under Section 7 or 9 or 10 during the pendency of such application under Section 54C, in respect of the same corporate debtor. In so far as Section 11A (2) is

concerned, it provides that if an application under Section 54C is filed within fourteen days of filing of any application under Section 7 or 9 or 10, which is pending, in respect of the same CD, then AA is bound to dispose of the application under Section 54C at the first instance. Section 11A(3) provides that where an application under Section 54C is filed after fourteen days of the filing of any application under Section 7, 9 or 10, which is pending, in respect of the same CD, then AA shall first dispose of the application under Section 7, 9 or 10 of the Code.

22. The aforesaid three provisions are not related to the present controversy. Section 11A(2) says that precedence is to be given to an application if the application under Section 54C already pending and application under Section 7, 9 or 10 is filed or if the application under Section 7, 9 or 10 is pending and the application under Section 54C is filed within 14 days of the filing of the said application then the precedence has to be given to the said application but Section 11A(3) cast an exception as it provides that where an application under Section 54C is filed after fourteen days of the filing of the application under Section 7, 9 or 10 then it has not to be given precedence rather the precedence has to be given to the application filed under Section 7, 9 or 10 of the Code.

23. Now we will deal with Section 11A(4) of the Code which travels in a different direction. It says that the provision of this Section i.e.

11A shall not apply where an application under Section 7, 9 or 10 is filed and pending as on the date of the commencement of the Insolvency and Bankruptcy Code (Amendment) Act, 2021. Meaning thereby, if the application under Section 7, 9 or 10 is already filed and then the Act of 2021 came into being then the applicant filing the application under Section 54C cannot take the help of this Section.

24. In the present case, what precisely has happened is that the application under Section 7 was filed on 09.12.2020, the Act of 2021 came into being on 04.04.2021 and the application under Section 54C was filed on 04.09.2022 that is much after the expiry of year, therefore, in our considered opinion, the rigours of Section 11A(4) is squarely applied to the controversy at hand and hence the Tribunal has committed a patent error in taking up the application under Section 54C of the Code over and above the application filed much earlier under Section 7 of the Code and decided the same.

25. In our considered opinion, this procedure could not have been followed as the law is totally against it, therefore, in such circumstances, we hold that the order passed on the application filed under Section 54C on 20.04.2023 for the purpose of initiation of PPIRP is patently illegal and thus, the same is hereby set aside.

26. The first appeal is therefore allowed.

27. Since, we have allowed the first appeal and set aside the PPIRP proceedings, therefore, the second appeal which has been filed by the Appellant to challenge the approval of the resolution plan submitted by RP because the PPIRP proceedings were initiated earlier than the application under Section 7 filed by the Appellant is also allowed and the impugned order passed in I.A No. 3021 of 2023 is set aside. Both appeals succeed. No costs.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Mr. Naresh Salecha]
Member (Technical)

[Mr. Indevar Pandey]
Member (Technical)

Sheetal/Ravi