

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI**

Company Appeal (AT) (Insolvency) No. 887 of 2024

In the matter of:

Sibanarayan Chhotray

...Appellant

Vs.

Indian Overseas Bank & Anr.

...Respondents

For Appellant: Mr. Arun Kathpalia, Sr. Advocate with Ms. Saman Ahsan, Mr. Aayush Jain and Mr. Arjit Oswal, Advocates

For Respondents: Ms. Mayuri Raghuvanshi, Mr. Vyom Raghuvanshi, Ms. Akanksha Rathore and Ms. Kinjal Sharma, Advs. for R1
Mr. Sumit Shukla, Mr. Sanjeev Panda, Mr. Prachi Johri and Ms. Abhipsa Sahu, Advocates for R-2/Liquidator.
Mr. Palash S. Singhai and Mr. harshad Sareen, Advocates for Intervenors

WITH

Company Appeal (AT) (Insolvency) No. 2246 of 2024

In the matter of:

Sibanarayan Chhotray

...Appellant

Vs.

Indian Overseas Bank & Anr.

...Respondents

For Appellant: Mr. Arun Kathpalia, Sr. Advocate with Ms. Saman Ahsan, Mr. Aayush Jain and Mr. Arjit Oswal, Advocates

For Respondents: Ms. Mayuri Raghuvanshi, Mr. Vyom Raghuvanshi, Ms. Akanksha Rathore and Ms. Kinjal Sharma, Advocates for R-1
Mr. Sumit Shukla, Mr. Sanjeev Panda, Mr. Prachi Johri and Ms. Abhipsa Sahu, Advocates for R-2/Liquidator.

J U D G M E N T

(17th December, 2024)

Ashok Bhushan, J.

These two Appeals have been filed by the Suspended Director of the Corporate Debtor challenging the order dated 17.04.2024 and order dated 21.11.2024 passed by the Adjudicating Authority (National Company Law Tribunal) Cuttack Bench in CP (IB) No. 199/CB/2020.

2. Company Appeal (AT) (Insolvency) No.887 of 2024 has been filed against the order dated 17.04.2024 passed by the Adjudicating Authority passed in IA (IB) No.93/CB/2024 by which Appellant has prayed for recall of the order of liquidation passed on 13.12.2023. By the same order, the said application has been rejected, aggrieved by which this Appeal has been filed.

3. Company Appeal (AT) (Insolvency) No.2246 of 2024 has been filed by the Appellant challenging the order dated 21.11.2024 passed in IA (IB) No.301/CB/2024 which was filed by the Appellant seeking direction to the liquidator not to conduct the sale of the properties and to set aside the sale notice dated 24.05.2024 (24.10.2024). The Adjudicating Authority has directed that the liquidator may continue the forthcoming auction process which will be subject to decision of NCLAT in pending appeal. IA was directed to be listed on 19.12.2024. Aggrieved by the said order dated 21.11.2024, this Appeal has been filed.

4. Brief facts of the case necessary to be noticed for deciding these Appeals are:-

4.1. The Corporate Debtor- Srabani Constructions Pvt. Ltd. took financial facilities from Indian Overseas Bank in the year 2011. Since 2015, Corporate Debtor committed default. In the year 2017, seven OTS proposals were submitted by the corporate debtor to the bank which could not be finalised. The Financial Creditor filed an application under Section 7 being CP (IB) No.199/CB/2020 against the Corporate Debtor. The Corporate Debtor from 22.01.2020 to 07.09.2023 submitted 9 OTS proposals and also deposited amount of Rs.48 lakhs with the Financial Creditor but OTS proposals could not be sanctioned. On 29.11.2022, Section 7 application was admitted. 1st meeting of the CoC was convened on 29.12.2022 and 2nd CoC meeting held on 22.03.2023. CoC decided to replace the Resolution Professional. Application to replace the Resolution Professional was filed on 06.07.2023 for replacement of the Resolution Professional. On 09.10.2023, Adjudicating Authority allowed the application for replacement of the Resolution Professional. On 30.11.2023, IA (IB) No.354/CB/2023 was filed by the Resolution Professional for exclusion of the CIRP period from 22.03.2023 till the date of filing of the said application i.e. 30.11.2023. Adjudicating Authority dismissed IA (IB) No.354/CB/2023 and directed for liquidation of the Corporate Debtor. On 28.12.2023, Financial Creditor issued an e-mail to the Appellant in reference to the OTS proposal dated 07.09.2023 asking the Appellant to deposit the amount of Rs.61 Lakhs at the earliest. Corporate Debtor could deposit only Rs.48 Lakhs. On

28.02.2024, Auction Sale Notice was issued by the Liquidator and IA (IB) No.81/CB/2024 was filed by the Appellant to stay the Auction Sale Notice which was dismissed on 27.03.2024. On 08.04.2024, IA (IB) No.93/CB/2024 filed by the Appellant seeking recall of the liquidation order dated 13.12.2023 which IA came to be dismissed by the Adjudicating Authority on 17.04.2024. In this Appeal- Company Appeal (AT) (Insolvency) No.887 of 2024 challenging the order dated 17.04.2024, following interim order was passed on 03.05.2024:

“In the meantime, Adjudicating Authority shall not approve the Auction already taken place.”

4.2. Subsequent to the passing of the interim order IA (IB) No.301/CB/2024 was filed by the Suspended Director paying for stay of Sale Notice dated 24.10.2024 in which an order dated 21.11.2024 was passed by the Adjudicating Authority directing for continuance of auction process which was subject to the order passed in pending appeal Company Appeal (AT) (Insolvency) No.887 of 2024.

5. Counsel for the Appellant challenging the order dated 17.04.2024 submits that the Adjudicating Authority committed error in directing for liquidation of the corporate debtor whereas the application was filed by the Resolution Professional for exclusion of time from the date when CoC decided to replace the Resolution Professional and the date on which application was filed. CoC although decided to replace the Resolution Professional on 22.03.2023 however, the application was filed on

06.07.2023 before the Adjudicating Authority which could be allowed only on 09.10.2023. When the decision was taken to replace the Resolution Professional, CIRP did not proceed at all. It is submitted that the application IA (IB) No.93/CB/2024 filed by the Appellant to recall the order dated 13.12.2023 ought to have been allowed. Adjudicating Authority failed to notice relevant facts and further liquidation order was passed on suppression of material facts and misrepresentation without giving notice to the suspended director. It is submitted that the liquidation order deserves to be recalled and Adjudicating Authority erroneously rejected the application. It is further submitted that when OTS proposal was under consideration and bank has intimated the Appellant to deposit Rs.61 Lakhs, there was no occasion to direct liquidation. Appellant could have cleared the entire debt and saved the corporate debtor. It is further submitted that when this Tribunal passed an interim order in the present appeal on 03.05.2024, liquidator ought not to have proceeded with any auction and auction notice which has been issued by liquidator is on grossly undervalued reserved price and the assets which are valued of Rs. 16 Crores are being sought to be auctioned for reserved price of Rs.4,80,00,000/. It is submitted that the Adjudicating Authority ought to have stayed the auction.

6. Counsel for the Bank submits that the bank has never accepted any OTS proposal and the deposit of Rs.48 lakhs was in pursuance of the letter asking for deposit 10% of upfront amount which amount was also not deposited fully. Bank has never sanctioned any OTS letter and the submission that OTS was sanctioned is incorrect. It is submitted that the

liquidation order was passed and period of CIRP having already been over, the Adjudicating Authority declined to exclude the period of CIRP as prayed by the Resolution Professional. When no resolution has taken place within time of CIRP, no error has been committed by the Adjudicating Authority in passing any order of liquidation. It is submitted that no case has been made out for recall of the liquidation order dated 13.12.2023. Neither there was any fraud nor misrepresentation. Adjudicating Authority has rightly taken the view that no case has been made out to recall of the liquidation order. This Tribunal in interim order dated 03.05.2023 never stayed the auction and only held that auction shall be subject to the order passed in these appeals. Appellant is free to file objection to the auction when auction comes for approval before the Adjudicating Authority. It is submitted that no case has been made out to interfere with the impugned order passed in these Appeals and both the Appeals deserve to be dismissed.

7. Learned Counsel for auction purchaser who has filed an intervention application submits that he has deposited amount of Rs.10 Cr.

8. We have considered the submissions of the Counsel for the parties and perused the record.

9. The first question which need to be answered in the Appeal is as to whether Adjudicating Authority committed error in rejecting IA (IB) No.93/CB/2024 filed by the Appellant praying for recall of the order dated 13.12.2023. The order dated 13.12.2023 was an order which was passed by the Adjudicating Authority on an application which was filed by the

Resolution Professional praying for excluding the CIRP period from 22.03.2023 till the date of filing of the application (30.11.2023). Adjudicating Authority heard the application and by the order dated 13.12.2023 after noticing the relevant facts refused to extend the period. It was noticed by the Adjudicating Authority that already 365 days have expired. In paragraphs 5 and 6, Adjudicating Authority has made following observations: -

“5. The corporate debtor was admitted into CIRP on 29.11.2022 this application for exclusion is filed on 01.12.2023 after expiry one year. In between L.A.No.200/CB/2023 was file for removal of resolution professional. In the mean while no time extension application was filed after the expiry of initial CIRP period of 180 days on 28.05.2023. Now the applicant wants to exclude the period from 22.03.2023 to 01.12.2023 for 252 days at one stroke. The only reasons attributed is the erstwhile Resolution professional not carried out the work properly. In the present application the present stage of CIRP is not mentioned, what was the work till date carried out also not furnished and also unable to furnish during the course of argument. From the submission it appears that the applicant wants to start the CIRP as fresh from the beginning. In the application it is stated that in the 2nd COC meeting held on 22.03.2023 resolution was passed to appoint new RP. It is stated that the erstwhile RP not taken steps to file application in this regard hence delay occurred. The application for removal of RP LA.No.200/CB/2023 was filed on 6.07.2023, but there was no explanation why there was delay of about 100 days in filing the application,

further there is no material produced regarding any compliant is made against the Resolution professional for non-function either to the IBBI nor to this Authority.

6. The maximum time line prescribed under section 12 (3) of IBC is 330 days, of course few days may be extended to complete the CIRP process, but there is no scope to exclude the entire period of 252 days in one stroke and allow to commence the CIRP as fresh. The extension or exclusion can be granted to complete the process/work, but the same cannot be granted to begin the process. Proviso to section 12 (3) IBC made it clear the CIRP shall mandatorily be completed within a period of 330 days. Here already 365 days expired, the applicant is not in a position to say how long he will take to complete the CIRP in the event of exclusion is allowed, it shows that the CIRP is in a beginning stage. The counsel for the applicant stated that the 330 days mentioned in proviso to section 12 (3) IBC 2016 is not mandatory it is only directory. It is true the Hon'ble Supreme Court of India in Committee of Creditors of Essar Steel India Limited Through Authorised Signatory ... Appellant Versus Satish Kumar Gupta & others (2020)8 SCC 53, held it is directory but given caution when the time can be extended beyond 330 days Para 127 of the citation runs as follow: -

Both these judgments have been followed in Neeraj Kumar Sainy v.State of Uttar Pradesh (2017) 14 SCC 136 at paragraphs 29 and 32. Given the fact that the time taken in legal proceedings cannot possibly harm a litigant if the Tribunal itself cannot take up the litigant's case within the requisite period for no fault of the

litigant, a provision which mandatorily requires the CIRP to end by a certain date without any exception thereto - may well be an excessive interference with a litigant's fundamental right to non-arbitrary treatment under Article 14 and an excessive, arbitrary and therefore unreasonable restriction on a litigant's fundamental right to carry on business under Article 19(1)(g) of the Constitution of India. This being the case, we would ordinarily have struck down the provision in its entirety. However, that would then throw the baby out with the bath water, inasmuch as the time taken in legal proceedings is certainly a 131 important factor which causes delay, and which has made previous statutory experiments fail as we have seen from *Madras Petrochem (supra)*. Thus, while leaving the provision otherwise intact, we strike down the word "mandatorily" as being manifestly arbitrary under Article 14 of the Constitution of India and as being an excessive and unreasonable restriction on the litigant's right to carry on business under Article 19(1)(g) of the Constitution. The effect of this declaration is that ordinarily the time taken in relation to the corporate resolution process of the corporate debtor must be completed within the outer limit of 330 days from the insolvency commencement date, including extensions and the time taken in legal proceedings. However, on the facts of a given case, if it can be shown to the Adjudicating Authority and/or Appellate Tribunal under the Code that only a short period is left for completion of the insolvency resolution process beyond 330 days, and that it would be in the interest of all stakeholders that the corporate debtor be

put back on its feet instead of being sent into liquidation and that the time taken in legal proceedings is largely due to factors owing to which the fault cannot be ascribed to the litigants before the Adjudicating Authority and/or Appellate Tribunal, the delay or a large part thereof being attributable to the tardy process of the Adjudicating Authority and/or the Appellate Tribunal itself, it may be open in such cases for the Adjudicating Authority and/or Appellate Tribunal to extend time beyond 330 days. Likewise, even under the newly added proviso to Section 12, if by reason of all the aforesaid factors the grace period of 90 days from the date of commencement of the Amending Act of 2019 is exceeded, there again a discretion can be exercised by the Adjudicating Authority and/or Appellate Tribunal to further extend time keeping the aforesaid parameters in mind. It is only in such exceptional cases that time can be extended, the general rule being that 330 days is the outer limit within which resolution of the stressed assets of the corporate debtor must take place beyond which the corporate debtor is to be driven into liquidation.

From the said citation even though it is observed that the provision is not mandatory but held that period beyond 330 days can be granted only if a short period is left for completion. Here practically no effective CIRP is commenced to extend short period for completion. The period sought to be excluded is 252 days, this is huge, hence the request for exclusion is liable to be turned down.”

10. Counsel for the Appellant contended that in view of the law laid down by the Hon'ble Supreme Court in ***"Committee of Creditors of Essar Steel India Limited Through Authorised Signatory vs. Satish Kumar Gupta & Ors- (2020) 8 SCC 53"***, period of CIRP could have been extended even beyond 330 days. There can be no dispute to the proposition laid down by the Hon'ble Supreme Court in the above case. However, for extension of period beyond 330 days there has to be valid reason. The present is a case where in CIRP no substantial progress has been made nor completion of Resolution Process was insight. The most important fact to be considered is that the application which was filed by the Appellant was for recall of the order dated 13.12.2023 passed by the Adjudicating Authority refusing exclusion of the period and directing the liquidation of the corporate debtor. In paragraphs 12 while directing for liquidation, following has been observed by the Adjudicating Authority:

"12. From the above citations it is clear that the CIRP must be completed within a period of 330 days from the date of commencement of Insolvency, in exceptional cases beyond 330 days short period can be extended for approval of resolution plan. In our case there is neither any resolution plan is pending, not even published form 'G'. In our case the applicant has not made out 'exceptional circumstances' for an extension of beyond 330 days. In this case till the date of filing this application already 365 days expired. In order to grant exclusion or extension beyond 330 days, the RP or the COC is required to show that there is a high prospect that he may receive

a resolution plan. No such positive, viable, prospective were placed before us. Thus, as to the facts of the present case the applicant has not substantiated any exceptional circumstances to order exclusion of period from CIRP. This application to exclude 252 days is not considered and that the exclusion application is dismissed and in consequence, this Authority in terms of section 33(1)(a) of IBC 2016 we inclined to order liquidation. In the result the M/s Srabani Constructions Pvt. Ltd, corporate debtor is ordered to be liquidated.”

11. No Appeal was filed by the Appellant challenging the order of liquidation. He filed an application recall of the said order. The ground for recall of the order by the Adjudicating Authority is very limited which is now settled by judgment of the Hon’ble Supreme Court dated 12.02.2024 in Civil Appeal Nos.7590-7591 of 2023- **“Greater Noida Industrial Development Authority vs. Prabhjit Singh Soni & Anr.”**. The Hon’ble Supreme Court referring to five Members’ Judgment of this Tribunal in **“Union Bank of India vs. Dinkar T. Vekatasubramanian & Ors.”** has noted and laid down that the grounds on which a recall can be ordered. In paragraphs 49 and 50 of the judgement, Hon’ble Supreme Court has laid down following:-

“49. In a recent decision (i.e., Union Bank of India vs. Dinakar T. Vekatasubramanian & Ors.), a five-member Full Bench of NCLAT held that though the power to review is not conferred upon the Tribunal but power to recall its judgment is inherent in the Tribunal and is preserved by Rule 11 of the NCLT Rules, 2016.

It was held that power of recall of a judgment can be exercised when any procedural error is committed in delivering the earlier judgment; for example, necessary party has not been served or necessary party was not before the Tribunal when judgment was delivered adverse to a party. It was observed that there may be other grounds for recall of a judgment one of them being where fraud is played on the Court in obtaining a judgment. This decision of NCLAT was upheld by a two-Judge Bench of this Court vide order dated 31.07.2023 in Civil Appeal No.4620 of 2023 (Union Bank of India vs. Financial Creditors of M/s Amtek Auto Ltd. & Ors.).

50. In light of the discussion above, what emerges is, a Court or a Tribunal, in absence of any provision to the contrary, has inherent power to recall an order to secure the ends of justice and/or to prevent abuse of the process of the Court. Neither the IBC nor the Regulations framed thereunder, in any way, prohibit, exercise of such inherent power. Rather, Section 60(5) (c) of the IBC, which opens with a non-obstante clause, empowers the NCLT (the Adjudicating Authority) to entertain or dispose of 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 the IBC. Further, Rule 11 of the NCLT Rules, 2016 preserves the inherent power of the Tribunal. Therefore, even in absence of a specific provision empowering the Tribunal to recall its order, the Tribunal has power to recall its order. However, such power is to be exercised sparingly, and not as a

tool to re-hear the matter. Ordinarily, an application for recall of an order is maintainable on limited grounds, inter alia, where (a) the order is without jurisdiction; (b) the party aggrieved with the order is not served with notice of the proceedings in which the order under recall has been passed; and (c) the order has been obtained by misrepresentation of facts or by playing fraud upon the Court /Tribunal resulting in gross failure of justice.”

12. When we look into the grounds which are available for a recall of the judgment and the grounds which were raised by the Appellant, they does not fall within any of the grounds on which recall could have been directed. We, thus, are of the view that the Adjudicating Authority did not commit any error in rejecting IA (IB) No.93/CB/2024 filed by the Appellant for recall of the liquidation order.

13. As noted above, the liquidator has proceeded to issue e-auction notice for sale of the assets of the corporate debtor. Interim order was passed in Company Appeal (AT) (Insolvency) No.887 of 2024 on 03.05.2024 by which we have directed that the Adjudicating Authority shall not approve the auction already taken place. Company Appeal (AT) (Insolvency) No.2246 of 2024 has been filed by the Appellant challenging the order dated 21.11.2024 by which in IA (IB) No.301/CB/2024, Adjudicating Authority has directed the liquidator to continue the auction process which was subject to the decision of this Tribunal in Company Appeal (AT) (Insolvency) No.887 of 2024. Counsel for the Bank has submitted that the auction has already

taken place, however, it has not yet been approved. Counsel for the Bank submits that the Appellant is at liberty to file objection to the auction conducted by the liquidator when the auction comes for confirmation before the Adjudicating Authority. Insofar as deposit of Rs.48 lakhs by the Appellant, it is categorical case of the bank that the OTS proposal was never agreed and Appellant can withdraw the amount at any time without the intervention of the bank. In paragraph 18 of the reply filed by the Indian Overseas Bank in Company Appeal (AT) (Insolvency) No.887 of 2024, following has been stated:-

“18. That, in respect of averments made in para 7(T), it is submitted that the appellant was required to deposit Rs. 61 lakh. At the rate of 10% of the offered amount that is Rs. 6.1 core, in a non-lien account with Bank but the appellant deposited only Rs.48 lakh in the account. Hence this OTS proposal was never agreed by the Bank. As this is a non-lien account, the appellant can withdraw that amount at any time without the intervention of the Bank.”

14. As observed above, we do not find any error committed by the Adjudicating Authority rejecting IA (IB) No.93/CB/2024 filed by the Appellant, hence, the liquidation order dated 13.12.2023 remains unaffected. We further are of the view that the Appellant is at liberty to file objection to the auction already undertaken by the liquidator before the Adjudicating Authority which may be considered while considering the application for confirmation of the auction. Appellant is free to raise all issues regarding the auction including inappropriate valuation of the assets

as is being contended before us in these Appeals. The order dated 21.11.2024 which is challenged in the Company Appeal (AT) (Insolvency) No.2246 of 2024 also does not require any interference since the said application IA (IB) No.301/CB/2024 filed by the Appellant is still pending and fixed for 19.12.2024. As observed above, Appellant is at liberty to raise objections regarding auction conducted by the liquidator in accordance with law.

15. In view of the foregoing discussions, we do not find any good ground to interfere with the orders impugned in these Appeals, giving liberty to the Appellant to raise objection with respect to auction already held by the liquidator which are yet to be confirmed by the Adjudicating Authority, we dispose of both the Appeals accordingly.

[Justice Ashok Bhushan]
Chairperson

[Arun Baroka]
Member (Technical)

New Delhi

Anjali