

NATIONAL COMPANY LAW APPELLATE TRIBUNAL PRINCIPAL BENCH,
NEW DELHI

Company Appeal (AT) (Ins) No. 310 of 2023

IN THE MATTER OF:

Canara Bank

...Appellant

Versus

TRN Energy Pvt. Ltd. &Ors.

...Respondents

Present:

For Appellant: Ms. Anju Jain, Mr. Hitesh Sachar and Mr. Surender, Advocates.

For Respondents: Mr. Rakesh Kumar, Ms. Preeti Kashyap, Mr. Ankit Sharma, Mr. Varun Pandit and Mr. Yash Dhawan, Advocates. Mr. Ramkripal Sharma (IRP).

O R D E R

Per: Justice Rakesh Kumar Jain:

This appeal has arisen from the order dated 07.02.2023, passed by the Adjudicating Authority (National Company Law Tribunal, New Delhi Bench – V) dismissing the application bearing I.A. No. 226 of 2023 filed by the Appellant, under Rule 11 of the NCLT Rules, 2016 (in short ‘Rules’) for revival of the Corporate Insolvency Resolution Process (in short ‘CIRP’) against the Corporate Debtor.

2. Brief facts of this case are that M/s Natraj Transport (Operational Creditor) filed an application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (in short ‘Code’) bearing CP (IB) 322/ND/2021 for initiation of CIRP against M/s TRN Energy Pvt. Ltd. (Corporate Debtor). The application was admitted on 07.12.2021 and Ramkripal Sharma was appointed as the Interim Resolution Professional (in short ‘IRP’).

3. The Operational Creditor submitted Form-FA to the IRP who filed I.A. No. 5908 of 2021 before the Adjudicating Authority for withdrawal of the main petition. The Adjudicating Authority permitted the withdrawal of the main petition bearing CP (IB) No. 322/ND/2022 and disposed of I.A No. 5908 of 2021 with the following order:-

“IA/5908/2021

By filing this application, the applicant has prayed to withdraw the present Company Petition bearing No. IB-322/ND/2021. Heard the ld. Counsel appearing for the applicant as well as IRP appeared in person and perused the averments made in the application. Ld. Counsel for the applicant submits that the Form FA is submitted by the applicant of Company Petition No. IB/322/ND/2021 on 16.12.2021, at page no. 17 and the CIRP was initiated on 07.12.2021. He further submits that the CoC has not been constituted as yet. The IRP has appeared in person and submits that he has received fee and cost. So considering this, we permit the applicant to withdraw the application. Accordingly, the Company Petition bearing No. IB/322/ND/2021 is dismissed and withdrawn. With this the present IA stands disposed of.”

4. However, the Operational Creditor filed RA/82/2022 invoking Rule 11 of the Rules for seeking revival of the CP (IB) No. 322/ND/2021, inter alia, on the ground that the Corporate Debtor has failed to abide by the terms of the settlement. The said application was allowed vide order dated 30.11.2022 and the main petition was revived and restored to its original position with a direction to the RP to continue with the CIRP. The said order is reproduced as under:-

“RA/82/2022

This is an application filed by Applicant/OC under Rule 11 of the Rules seeking revival of the main petition.

We have heard Counsel for the Applicant. Counsel for the Applicant has submitted that in terms of the settlement agreement between the OC and CD, the CD has failed to abide by the terms of settlement agreement and they have referred to the

judgment of Hon'ble NCLAT in Pooja Finlease Ltd. Vs. Auto Needs (India) Pvt. Ltd. & Anr. by order dated 18.07.2022 in which the Hon'ble NCLAT has revived the application taking into consideration the terms of settlement which contained a clause for revival in case of failure to abide by the terms of settlement by any of the parties, even when in the order of NCLAT, no specific mention had been made for granting the liberty regarding the revival of application. In the light of orders of Hon'ble NCLAT, the petition is revived to its original position and since the petition had already been admitted and RP has been appointed, the RP may continue the process of CIRP for its completion and submit the report. With this order, the present IA stands disposed of."

5. After revival of the main petition, the IRP invited claims on 13.12.2022 and the last date was fixed as 23.12.2022. However, the IRP received 'Form FA' from the Operational Creditor and filed application bearing I.A. No. 6271 of 2022 under Section 12A r/w Section 60(5) of the Code and Regulation 30A(1)(a) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (in short 'Regulations') for withdrawal of the main petition on account of settlement between the CD and the OC.

6. While this application was pending, the Appellant being the Financial Creditor, submitted its claim to the IRP on 21.12.2022 since the last date for submission of claim was 23.12.2022. The IRP did not bring it to the notice of the Adjudicating Authority either through an application or orally about the submission of claim by the Financial Creditor. I.A. No. 6271 of 2022 was thus allowed on 22.12.2022 prior to the last date of submission of claim. The order dated 22.12.2022 is reproduced as under:-

"I.A. No. 6271 of 2021

This is an application under Section 12A of IBC r/w 60(5) of the Code and Regulation 30A(1)(a) of the Regulations alongwith affidavit as well as copy of the settlement agreement.

We have perused the contents of copy of the settlement agreement. Copy of the settlement agreement denotes that the entire principal amount outstanding has been paid by the CD to the OC and the said payment was made towards full and final settlement of the entire outstanding amount. Therefore, the IRP has prayed for withdrawal/termination of CIRP process in view of the Form FA for withdrawal of the CIRP process under Regulation 30A of the Regulations submitted by the OC.

Having heard the submissions made by Counsels present at the time of hearing and having noted the contents of the application and the prayers thereto, this Tribunal allows the present application as the Resolution Professional has confirmed that no CoC is formed till date and no claim has been received from any claimant and also no claim is outstanding. However, since the last date of filing the claim is 23.12.2022, in case, if the RP receives any claim he should pass on the same to the CD to enable the CD to make good of such claim.

Since time granted in paper publication inviting the public claim is up to 23.12.2022, the IRP will be relieved from his duties and responsibilities on the close of the business hours on 23.12.2022. In view of the above, the CD is relieved from the clutches of CIRP process. Dasti of this order is allowed.”

7. It is pertinent to mention that the Adjudicating Authority allowed the application observing thus ‘this Tribunal allows the application as the RP has confirmed that no CoC is formed till date and no claim has been received from any claimant and also no claim is outstanding’. The Adjudicating Authority further observed that ‘however, since the last date of filing the claim is 23.12.2022, in case, if the RP receives any claim he should pass on the same to the CD to enable the CD to make good of such claim’ The Adjudicating Authority further observed that ‘since time granted in paper publication inviting the public claim is up to 23.12.2022, the IRP will be relieved from his duties and responsibilities on the close of the business hours on 23.12.2022. In view of the above, the CD is relieved from the clutches of CIRP process’.

8. The Appellant filed an application bearing 226 of 2023, invoking Rule 11 of the Rules, for the revival of CIRP against the Corporate Debtor, inter alia, alleging that the IRP has failed to discharge his statutory duty in accordance with law in not bringing to the notice of the Adjudicating Authority, before the order was passed in I.A. No. 6271 of 2022, that the Appellant had already submitted its claim on 21.12.2022 to the IRP rather this fact has been concealed because of which the Adjudicating Authority has observed that 'as the RP has confirmed that no CoC is formed till date and no claim has been received from any claimant and also no claim is outstanding'

9. The IRP filed his reply to the application in which he made the following averments in para 12 of the reply "that during the course of the proceedings, a query was raised by the Hon'ble NCLT whether the CoC was constituted or not. It was apprised to the Hon'ble NCLT that no CoC has been constituted. The answering Respondent was not present during the course of hearing in person due to some personal difficulty. It was erroneously submitted that no claims were received wherein the intent was to apprise the Tribunal that no CoC has been formed."

10. The IRP has thus in his reply admitted that it was erroneously mentioned before the Adjudicating Authority that no claim was received whereas the claim by the Appellant had already been received by the IRP on 21.12.2022 and the order on the application was passed on 22.12.2022 in which it has been specifically observed by the Adjudicating Authority that no claim has been received from any claimant as confirmed by the IRP.

11. The application bearing I.A. No. 226 of 2023 has been dismissed by the Adjudicating Authority by the impugned order dated 07.02.2023 but the following observations have been made “as the CD is already discharged from the clutches of CIRP and Resolution Professional is also discharged from his duties and responsibilities as RP, this Tribunal cautions the RP for allowing his counsel to act without proper instructions which resulted in slippage of claim filed by the Canara Bank during consideration of Section 12A application by this Adjudicating Authority”. It further observed that “as the present application has come for consideration after discharge of the CIRP process, this Tribunal directs the Canara Bank/Applicant to file a fresh Section 7 application, if permitted by law against the CD, if the Canara Bank is entitled to do so as on date” It also observed that “we do not find any justifiable reason to allow the prayers made in this application”. It also observed that “Once again the RP who acted as IRP is directed to act with due care and caution in future while exercising his functions and discharging the duties as IRP. Corporate Debtor is also directed to look into the matter of Canara Bank’s claim and discharge the same as per the terms of repayment of the loan/credit facilities availed from the Canara Bank”.

12. Aggrieved by the impugned order dated 07.02.2023, the present appeal has been filed.

13. Counsel for the Appellant has submitted that the Adjudicating Authority has committed a patent error in dismissing the application bearing 226 of 2023 holding that there is no justifiable reason to allow the same whereas the reason is writ large because the order dated 22.12.2022 was passed in I.A. No. 6271 of 2022 under a wrong impression given by the

IRP that he has not received any claim from any claimant and no claim is outstanding which is a fact admitted by the IRP in his reply to the application filed under Rule 11 of the Rules that there was an error on his part when it is submitted that no claim was received. Counsel for the Appellant has thus submitted that an order obtained by the OC against the CD on an application filed under Section 12A by misleading the Adjudicating Authority is no-nest in law. In this regard, he has referred to a decision of this Court rendered in the case of CoC of Shree Maheshwar Hydel Power Corporation Vs. Entegra Ltd. &Ors. (CA (AT) (Ins) No. 480 of 2023) and referred to para 16 of the said order which read as under:-

“In our considered opinion, keeping in view the decision of Hon’ble Supreme Court rendered in the case of Amar Singh Vs. Union of India (2011) 7 SCC 69, it is an act of concealment of fact on the part of the respondent because the Hon’ble Supreme court has time and again held that a litigant when comes to the court has to bring all the facts to the notice of the court and if some facts which are relevant, are concealed then the litigant is guilty of concealment of facts”

14. It is submitted that the Respondents cannot be given premium of their misdeeds by dismissing the application filed by the Appellant who has been unnecessary relegated to its remedy to file an application under Section 7 whereas the OC could not have been given a priority in payment of dues over and above the financial creditor (Canara Bank). It is further submitted that once the CIRP is initiated, it is a proceeding in rem and in this regard, the Appellant has drawn our attention to a decision of this Court rendered in the case of Jai Kishan Gupta Vs. Green Edge &ors. CA (AT) (Ins) No. 969-970 of 2019 to contend that “once the Code gets triggered by admission of a creditor’s petition under Sections 7 to 9, the proceeding that is before the

adjudicating authority, being a collective proceeding, is a proceeding in rem. Being a proceeding in rem, it is necessary that the body which is to oversee the resolution process must be consulted before any individual corporate debtor is allowed to settle its claim” It is submitted by the Appellant that by way of settlement an amount of Rs. 12 Cr. has been given to the OC out of the kitty of the Financial Creditor which has caused a substantial prejudice to the Appellant being a financial creditor, even if the Appellant has filed a petition under Section 7 before the Adjudicating Authority after the impugned order was passed.

15. In reply, Counsel for Respondent No. 1 has submitted that the application bearing 6271 of 2022 was rightly decided by the Adjudicating Authority because nothing was there before the Adjudicating Authority as a fact that any claim made by the Appellant was received by the IRP. It is also submitted that the Appellant being a complete stranger to the main petition cannot ask for restoration of the main petition especially when the Appellant has already filed an application under Section 7 in which the pleadings of the parties are complete. He has also submitted that once the CIRP has been withdrawn then a separate fresh application can be filed before the Adjudicating Authority and main petition cannot be revived.

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

17. The admitted facts of this case are that the application under Section 12A was filed by the IRP at the instance of the OC. It is also an admitted fact that the Adjudicating Authority allowed the application bearing 6271 of 2022 after confirming from the IRP that he has not received any claim from

any claimant and no claim is outstanding. The IRP has also confirmed that he has not constituted the CoC till date whereas it is also a fact that the last date for the submission of claim was 23.12.2022 and the claim was submitted by the Appellant on 21.12.2022 and the order was passed on 22.12.2022 on the application bearing 6271 of 2022. It is also an admitted fact that the IRP, in his reply filed to the application under Rule 11 of the Rules for revival of the application, has admitted that he has committed an error in submitting to the Court that no claim has been received. Thus, there is not even an iota of a doubt that the Adjudicating Authority has been grossly misled by the IRP at the time when the order was passed on 22.12.2022 but instead of rectifying its mistake and or to undo the injustice caused to the Appellant, the Adjudicating Authority has dismissed the application bearing 226 of 2023 holding that it could not find any justifiable reason to allow the prayer made in the application and rather in the entire impugned order expressed its anguish and dissatisfaction about the working of the IRP and repeatedly cautioned him to be careful while exercise of his functions and discharging his duties. The prejudice shown by the Appellant, having been caused to it on account of withdrawal of the petition after receiving about Rs. 12 Cr. as an operational creditor over and above the claim of the Appellant being a financial creditor is well made out which should not have been ignored by the Adjudicating Authority while dismissing the application of the Appellant for revival of the main petition which appears to be an act of connivance of the IRP with the OC so that the OC may settle its dues before the dues of the Appellant (Canara Bank) are considered. The filing of application under Section 7 by the Appellant is in no way causes any hindrance in maintaining the present application by the

Appellant because the said application has been filed in terms of the order passed in the application bearing 6271 of 2022. If the misrepresentation/concealment of any fact by the IRP to the Adjudicating Authority is considered lightly by relegating the Financial Creditor to any other remedy as it happened in the present case, to take his other remedy in accordance with law then it would be giving a premium to the statutory authority for his lapses and unprofessional act and conduct.

18. Thus, looking from any angle, it is a fit case for interference by this Court in this appeal and thus, the appeal is allowed and the impugned order is hereby set aside though without any order as to costs.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Mr. Naresh Salecha]
Member (Technical)

[Mr. Indavar Pandey]
Member (Technical)

New Delhi

04th April, 2024

Sheetal