

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
Principal Bench, New Delhi

Comp. App. (AT) (Ins) No. 480 of 2023
& IA No. 2382 of 2023

IN THE MATTER OF:

Committee of Creditors of Shree Maheshwar Hydel Power Corporation Ltd. (Through Power Finance Corporation Ltd.) & Ors. ...Appellant

Vs.

Entegra Ltd. & Ors.

....Respondents

Present:

For Appellants : Mr. Ramji Srinivasan, Sr. Adv. with Mr. Deepak Khurana, Mr. Meenal Garg, Ms. Namrata Saraogi and Mr. Kartik Pandey Advocates

For Respondent : Mr. Ritin Ray, Sr. Advocate Mr. Abhishek Puri, Mr. Vimal Kirti Singh, Mr. Siddhartha Singh, Ms. Aashima Thukraal, Mr. Rohit Rayershi, Advocates Adv for R1 Mr. Apoorv Sawariya, Adv for R2&3

O R D E R

Per: Justice Rakesh Kumar Jain (Oral)

17.07.2023: This appeal is directed against the order dated 17th March, 2023 passed by the 'National Company Law Tribunal, Indore Bench' (hereinafter referred as to 'the Adjudicating Authority') by which an application bearing IA No. 9 of 2023 filed in TP No. 258 of 2019 CP(IB) No. 111 of 2018 titled as 'Entegra Limited vs. Shree Maheshwar Hydel Power Corporation Limited and Ors' under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred as to 'The Code') r/w rule 11 of NCLT Rules, 2016 through the authorised representative of the Applicant Company, to remove Respondent No.2- Apoorv

Sarvaria as Resolution Professional (RP) of the Corporate Debtor and to reconstitute the Committee of Creditors (CoC) of Respondent No.1 Company by including the claim of the Applicant and by removal of Respondent Nos. 4 to 7 from the CoC, has been kept for hearing on the issue to decide as to whether provisions of first proviso to Section 21(2) of the Code would apply or second proviso to Section 21(2) of the Code would apply to the case in hand and, thereafter, directed the RP to keep on hold the CIRP of the Corporate Debtor till then.

2. Shorn of unnecessary details, 'M/s. Power Finance Corporation Ltd' (Financial Creditor) filed an application on 16.02.2018 before the Adjudicating Authority, under Section 7 of the Code against the Corporate Debtor for resolution of a debt now allegedly running into more than Rs. 1200 Crore which was admitted to CIRP vide order dated 27.09.2022. The admission order has been challenged by Entegra Ltd by way of an appeal bearing Company Appeal (AT) (Ins) No. 1287 & 1291 of 2022. In the said appeal, on 21.10.2022, this Tribunal had passed the following order:

“Heard Learned Sr. Counsel-Mr. Mahesh Jethmalani appearing for the Appellant, Learned Sr. Counsel-Mr. Ramji Srinivasan appearing for Respondent No. 2 and Learned Counsel appearing for the IRP.

2. Issue notice. Respondents represented through

Learned Counsels accept notice.

3. Let Reply-Affidavits be filed within two weeks. Rejoinder, if any, may be filed within two weeks, thereafter.

List this Appeal on 23rd November, 2022. Any action in pursuance of the Impugned Order dated 27.09.2022 shall abide by the result of the Appeal.”

3. While this appeal was pending, the Respondent (Entegra Ltd.) filed an application bearing IA No. 9 of 2023 before the Adjudicating Authority in which the prayer was made already mentioned in the earlier part of this order. However, in the said application, the Applicant did not mention the pendency of the appeal against the order of admission i.e. Company Appeal (AT) (Ins) No. 1287 & 1291 of 2022 and also the order dated 21.10.2022 passed by this Tribunal by which this Tribunal had practically denied to grant any stay and rather observed that *“any action Any action in pursuance of the Impugned Order dated 27.09.2022 shall abide by the result of the Appeal”*.

4. In the impugned order, the Adjudicating Authority, without referring to the order dated 21.10.2022, directed the RP to keep on hold the CIRP of the Corporate Debtor till then (next date of hearing). This Appeal, against the impugned order, was filed on 10.04.2023 and on 11.05.2023, the case was adjourned to 19.05.2023 by the Adjudicating Authority and on 19.05.2023, the Adjudicating Authority passed the following order:

“IA/9(MP)2023 & IA/47(MP)2023

IA/9(MP)2023

Learned counsel, Mr. Abhishek Puri appears for the applicant and the Learned counsel, Mr. Deepak Khurana appears for the CoC.

This is the matter in which vide order dated 17.03.2023 of this Adjudicating Authority, the RP was directed not to hold the CIRP till the next date of hearing. It is noted from the record that on 11.05.2023, another related IA 135 of 2023 had come up before us whereby the RP had submitted that on account of the order dated 17.03.2023, the CoC has stopped payment of security services. Therefore vide our order dated 11.05.2023 in that IA, we clarified that no such restrictions were imposed vide order dated 17.05.2023 as regards allowing any such expenses. We had accordingly directed the CoC to consider the proposal of the RP to ratify the expenses required for continuing the security.

The matter for IA 9/2023 was taken up today. In view of the fact that the CIRP has been kept on hold, this application as regards the objection on constitution of the CoC need to be heard at the earliest so that decision could be taken up for withdrawal of the Stay and CIRP could proceed ahead. However, when we wanted to hear the matter today, the learned counsel for the CoC raised objection saying that they have already appealed that order dated 17.03.2023 before the Hon'ble NCLAT whereby they have challenged certain observations as well as the directions of this Adjudicating Authority to RP not to hold

the CIRP. We made it clear that direction to RP not to hold the CIRP was given till next date of hearing only; and as such now the matter need to be heard on merit so that a decision could be taken on the issue stated in that order dated 17.03.2023.

However, the Learned counsel of the CoC kept on insisting that the matter should not be taken up today. The learned counsel for the applicant objected for giving any adjournment.

In the circumstances, the matter is finally adjourned. The counsels to file synopsis for the convenience of the bench and upload the same on e-portal before the next date of hearing.

Interim relief shall continue till the next date of hearing.

List both the applications i.e. IA/9 of 2023 and IA/47 of 2023 for hearing on 09.06.2023.”

5. Thereafter, the case has been adjourned from time to time i.e. 19.05.2023 to 09.06.2023, 13.07.2023, 14.07.2023 and it is now fixed for hearing on 20th July, 2023 with interim order to continue.

6. Counsel for the Appellant has vehemently argued that not only the Respondent/Applicant is guilty of concealment of facts before the Adjudicating Authority but also the Adjudicating Authority has committed a patent error in

staying the CIRP proceedings despite the fact that the proceedings were not stayed by this Tribunal at the time when the admission order was challenged. It is sought to be argued that it is not only the case of approaching the court with unclean hand but also the case of judicial indiscipline on the part of the Adjudicating Authority. In order to substantiate his arguments, he has referred to the case set up by the Respondent/Applicant in their appeal i.e. Appeal against the admission order, in para 8.6 it is averred that *“Whether the Member (Judicial) of NCLT, Ahmedabad vide order dated 08.10.2021 and the Member (Judicial) of Special Bench of NCLT, Kolkata vide order dated 27.09.2022 ought to have rejected the Petition filed U/s7 of the Code ought to have rejected the IBC petition filed by PFC on the ground that PFC is clearly not a “Financial Creditor” and rather was admittedly a “related party”/Holding Company of Respondent No.1 at the time of filing the present Insolvency Petition and even thereafter?”*.

7. He has also referred to Ground GGG of the grounds of Appeal, which read as under:

“BECAUSE the NCLT failed to appreciate that it is an admitted position on the basis of the observations made by RoC, Gwalior, the NCLT and Hon'ble NCLAT in proceedings under Section 241,242 and 243 that the Respondent No.2 was in control of the Respondent No. 1, the Respondent No. 2 becomes a corporate applicant as defined under Section 5(5)(b) of IBC 2016 as "a person who has the control, and supervision over the Financial

affairs of the corporate debtor" and a 'related party' under Section 5(24) of IBC 2016 which defines it as "any person who controls more than 20% in the corporate debtor on account of ownership or a voting agreement". Section 2(23) of IBC, 2016 which defines 'person' includes 'a company' under Section 2(23)(c). Therefore, the only manner in which the Respondent No. 1 could have been to put to insolvency is by filing self-insolvency under Section 10' of the IBC and not under Section 7. This aspect has not been analysed by the Hon'ble NCLT. It is submitted that the time when Section 7 Petition was filed, the Respondent No. 2 was a 'related party' and a 'corporate applicant' under the framework of IBC, hence no petition could have been filed by the Respondent No.2."

8. He has then referred to the application for stay which is filed along with main appeal against the order of admission and has referred to para 8 (a) which read as under:

"8. The present Application, if not allowed, will cause grave and irreparable loss to the Applicant as also to the Project in as much as;-

(a) Despite the Respondent No.2 having mismanaged the affairs including the financial affairs of the Respondent

No.1 company, having usurped control of the Company from the Appellant illegally, and h.aving led to the situation where on account of their own default in management of the Project and the Company, no impact would happen to the status of Respondent No.2 and they will call the shots and dominate the CIRP, and, the Appellants may become ineligible under Section 29A of the Code.”

9. He has also referred to prayer made in the application for stay which is contained in para 14(c). The said prayer is as under:

“14(c) Pending of hearing and final disposal of the Appeal, constitution of the Committee of Creditors under Section 21 of the Insolvency and bankruptcy Code 2016 be stayed.”

10. Counsel for the Appellant has then referred to his reply filed to the Application bearing IA No. 9 of 2023 before the Adjudicating Authority, the averment made in para 5 of the said reply, which read as under:

“5. It is submitted that by making the aforesaid allegations in the present Application, the Applicant is seeking to challenge the admission order passed by this Tribunal, which is not only impermissible in law, but also amounts to gross abuse of process & wastage of precious

judicial time. It is pertinent to submit that on these very grounds as raised in the present Application, the Applicant has in fact challenged the admission order passed by this Tribunal before the Hon'ble NCLAT, by filing an Appeal registered as Company Appeal (AT) (Insolvency) No. 1287 & 1291 of 2022. In the present Application, the Applicant has not only concealed filing of the said Appeal, but has also concealed that in the said Appeal, basis the very same grounds as the present Application, the Applicant had sought an interim stay on constitution of the CoC [Prayer (c) of the said Application]. It is an admitted position that the Hon'ble NCLAT has not granted any stay and vide order dated 21.10.2022 has ordered as follows:

"Any action in pursuance of the Impugned Order dated 27.09.2022 shall abide by the result of the Appeal. "

The present Application is thus filed on concealment of vital facts, without disclosing the fact that the Applicant has challenged the admission orders before the Hon'ble NCLAT. After failing to secure any interim order from the Hon'ble NCLAT, the Applicant has filed the present Application on the very same grounds as raised before the Hon'ble NCLAT. This is a classic case of defaulting promoters/ex-management seeking to embroil the lenders in litigation and to thwart the

CIRP of the CD by filing frivolous Applications and delaying the resolution process. Such an attempt must be put to an end right at the inception.”

11. It is submitted by Counsel for the Appellant that despite the fact that this Tribunal is already seized of the issue involved in regard to applicability of Section 21 of the Code which has been highlighted in the grounds of appeal and in the reply to the application, the Appellant categorically averred that not only the appeal against the admission order is pending before this Tribunal but also stay prayed for with the application, has not been categorically granted rather it has been ordered that *“Any action in pursuance of the Impugned Order dated 27.09.2022 shall abide by the result of the Appeal”* but despite that the Adjudicating Authority did not refer to the said order in the impugned order and decided to deliberate on the issue of the applicability of Section 21(1) & 21(2) of the Code and directed the RP to keep on hold the CIRP of the Corporate Debtor till then, which is stated to be against the tenets of judicial discipline on the part of the Adjudicating Authority. He has, thus, prayed that the impugned order much less the order by which the RP has been directed to keep on hold the CIRP proceedings may be set aside.

12. In response, Counsel for the Respondent No.1/Applicant has admitted that though it has not categorically mentioned in the application bearing IA No. 9 of 2023 filed before the Adjudicating Authority about the order passed by this Tribunal in respect of stay or even the pendency of the appeal against the

admission order but that was not deliberate on the part of the Applicant because the application which has been filed is about the subsequently events in respect of the constitution of the CoC which is a step next to be taken by the RP after the order of admission. It is further submitted that the Applicant has not overreached the Court by filing the said application because that is the only Forum available to the Applicant for the purpose of redressal of his grievance in respect of the situation arising therein and all applications could not have been filed before this Tribunal.

13. Counsel for Respondent No.1/Applicant has also argued that it is not an absolute order passed by the Adjudicating Authority on 17.03.2023 because the said order was further diluted on 19.05.2023 to the extent that the RP may make the payment of security of the Corporate Debtor. He has further argued that issue of Section 21 of the Code could not have been an issue in the Appeal which has been filed against the order of admission and could have been raised by way of separate application which has rightly been done by the Respondent. He has further argued that in any case, the main application is listed on 20.07.2023 before the Adjudicating Authority 'for argument' and therefore, instead of passing any order at this stage in respect of the impugned order, it can be deferred till the decision is taken by the Adjudicating Authority, who may be directed to decide the application on same day which has already been fixed for hearing.

14. We have heard counsel for the parties and perused the record with their able assistance.

15. The issue involved in this case travels in a narrow compass (i) as to whether the Adjudicating Authority has committed an act of Judicial Indiscipline in not taking into consideration the order passed by this Tribunal while passing the order of stay in the impugned order? (ii) as to whether the Respondent/Applicant is guilty of concealment of facts in respect of pendency of appeal against the order of admission and the order passed by this Tribunal on 21.10.2022 by which the proceedings in respect of CIRP has specifically been not stayed and brought to the notice to the Tribunal while pursuing the application in question?

16. Since both the issues are inter-connected, therefore, we will decide both the issues together. The facts narrated hereinabove are not in dispute because the facts are borne out from the record itself. Therefore, we are only required to look into the fact as to whether there is a concealment on the part of the Respondent/Applicant in not bringing to the notice of the Adjudicating Authority, in the application bearing IA No. 9 of 2023, about pendency of the appeal against the order of admission as well as the order passed therein by this Tribunal on 21.10.2022. 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 decided on 11.05.2011, 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.

17. Having said so, the next question is about the validity of the impugned order in respect of the stay granted by the Adjudicating Authority directing the RP to keep on hold the CIRP of the Corporate Debtor till the next date of hearing despite the fact that this Tribunal did not grant any stay in the appeal which has been filed against the order of admission and had passed categoric order that *“Any action in pursuance of the Impugned Order dated 27.09.2022 shall abide by the result of the Appeal”*.

18. In our considered opinion, the word used by this Tribunal that “Any Action” has a wide connotation as it includes any order to be passed in future either by this Tribunal or by the Adjudicating Authority to take into consideration the order passed by this Tribunal otherwise the order dated 21.10.2022 would become otiose.

19. In view of the aforesaid discussions, having observed that both the ‘Applicant’ and the ‘Adjudicating Authority’ have committed an error at the time when the impugned order was passed, firstly at the instance of the Respondent, concealment of the order passed by this Tribunal on 21.10.2022 and secondly on the part of the Adjudicating Authority while not referring to that order at all in its impugned order though it has been brought to its notice in the reply to the application and only mentioned that an appeal against the order of admission is pending in this Tribunal. Therefore, in such circumstances, the present appeal

succeeds and the order passed by the Adjudicating Authority 17.03.2023 is hereby quashed only to the extent that “*directed the RP to keep on hold the CIRP of the Corporate Debtor till then*”. Since we have been told that the application bearing IA No. 9 of 2023 is now listed for hearing before the Adjudicating Authority on 20.07.2023, therefore, we direct the Adjudicating Authority to decide the same on the date already fixed and in case it is found difficult to decide the same on that date due to some reasons, it shall decide the same within a period of one week thereafter. No order as to costs.

[Justice Rakesh Kumar Jain]
Member (Judicial)

(Barun Mitra)
Member (Technical)

[Naresh Salecha]
Member (Technical)

Raushan/Ravi