

Mr Hemant Mehta vs Asst. Commissioner Of State Tax & Ors on 5 August, 2022

NATIONAL COMPANY LAW APPELLATE TRIBUNAL

PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT)(Insolvency) No. 328 of 2022

[Arising out of order dated 31.01.2022 passed by the Adjudicating Authority, National Company Law Tribunal, Mumbai Bench, Court-I in IA 192/2021 in CP (IB) 990/MB/2019]

IN THE MATTER OF:

Mr. Hemant Mehta
Resolution Professional of
Pan India Utilities Distribution Co. Ltd.
D-613/614, Neelkanth Business Park,
Opp. Near Railway Station,
Vidyavihar (W),
Mumbai - 400 086.

Appellant

Vs.

1. Asst. Commissioner of State Tax
4th Floor New Building, Cabin F-4,
GST Bhavan, Mazgaon,
Mumbai-400010.

Respondent No. 1

2. Commercial Tax Officer
Opposite Gulmohar city behind
New Collectrate Sirol road,
3rd Floor, Gwalior Circle - 1
Madhya Pradesh - 475001.

Respondent No. 2

3. General Manager
IDBI Bank, Plot No. 77,
Dharmi Nivas,
Ramakrishna Marg, Khar West Branch,
Mumbai-400 052.

Respondent No. 3

4. General Manager
Axis Bank Ltd.
Worli Branch,
Mumbai - 400 052.

Respondent No. 4

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Present:

For Appellant:

PCS Devarajan Raman, Advocate.

For Respondents:

Mr. Rahul Chitnis and Mr. Aaditya Pande,
Advocates for R-1.

JUDGMENT

{Per: Barun Mitra, Member (Technical)} The present appeal, filed under Section 61 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'IBC') by the Appellant arises out of the order dated 31.01.2022 (hereinafter referred to as the 'Impugned Order') passed by the Adjudicating Authority (National Company Law Tribunal, Mumbai) in I.A. No. 192/2021 in C.P. (IB)- 990/MB/2019. In the impugned order, the Adjudicating Authority while disposing of the said I.A., directed the Appellant/Liquidator to take up with the relevant government authorities and their grievances redressal mechanism to de-freeze the bank accounts of the Corporate Debtor towards consolidating the assets of the Corporate Debtor which is under liquidation. Aggrieved by the said impugned order, the Appellant has challenged this order on the ground that the Adjudicating Authority has refused to exercise the powers vested on it by the IBC to direct the banks/government authorities to de-freeze the accounts of Corporate Debtor and instead directed the Appellant to again approach the appropriate government authorities.

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2. The Learned Counsel for the Appellant has also filed I.A. No. 860 of 2022 in Company Appeal (AT) (Insolvency) No. 328 of 2022 seeking condonation of delay in filing this Appeal. There being a delay of less than 15 days in filing the appeal and the delay period falls within the permissible period under Proviso to Section 61(2) of IBC and the grounds of delay cited appear to be bona-fide, the I.A. is allowed and the delay in filing the appeal is condoned.

3. The brief facts of the case, as stated by the Appellant, is that the Corporate Debtor was admitted to Corporate Insolvency Resolution Process (hereinafter referred to as 'CIRP') by the Adjudicating Authority on 20.09.2019. The Appellant was appointed initially as Interim Resolution Professional ('IRP' in short) and later confirmed as Resolution Professional of the Corporate Debtor. The Resolution Professional having not received any Expression of Interest following the public announcement made on 22.02.2020, the Committee of Creditors ('CoC' in short) on 13.06.2020 resolved by majority to go ahead with liquidation. Accordingly, the Liquidation Order was passed on 11.08.2020 by the Adjudicating Authority.

4. The Learned Counsel for the Appellant has further submitted that the exercise of consolidation of the assets of the Corporate Debtor, by bringing the bank accounts of the Corporate Debtor held in IDBI Bank and Axis Bank within the liquidation estate, was occasioned by the need to further the liquidation process in accordance with the provisions of the Company Appeal (AT)(Insolvency) No. 328 of 2022 IBC. However, this exercise could not progress as Respondents No. 1 and 2, namely, the Assistant Commissioner of State Tax, Mumbai and the Commercial Tax Officer, Gwalior Circle-1, Madhya Pradesh respectively had issued notices to IDBI and Axis Bank, arrayed herein as Respondents No. 3 and 4, directing them to freeze the current account of the Corporate Debtor towards clearance of outstanding dues/liabilities of CST/VAT. Following these directions,

Respondents No. 3 and 4 had placed debit freeze on the accounts of the Corporate Debtor. Copy of the notices, as issued by Respondents No. 1 and 2, find place in the Appeal Paper Book. It has been further submitted that the Appellant sent several communications to the government/bank authorities urging them to de-freeze the relevant current accounts, but as there was no progress in the matter, he was constrained to file I.A. No 192 of 2021 before the Adjudicating Authority seeking directions to be issued to Respondents No. 1 and 2 setting aside their notices issued to the bank authorities freezing the bank accounts of the Corporate Debtor and separate directions to Respondents No. 3 and 4 to de-freeze the bank accounts of the Corporate Debtor.

5. The Adjudicating Authority, after hearing the Appellant, disposed of the I.A. and passed the impugned order, the relevant portions of which are extracted as under: -

".....As per the procedure in law as liquidator, the Liquidator has powers to Company Appeal (AT)(Insolvency) No. 328 of 2022 take appropriate steps to consolidate the assets of the Corporate Debtor.

Liquidator is directed to take the matter with the relevant Government Authorities including the grievances redressal mechanism of those Authorities. The Applicant is at liberty to take appropriate steps as available under the law. With this observation, the Application is disposed of."

In other words, it was held by the Adjudicating Authority that the Appellant/Liquidator, as empowered by IBC, ought to continue the follow-up exercise with the relevant government authorities to consolidate the assets of the Corporate Debtor.

6. Aggrieved by the above directions contained in the impugned order, the Appellant has preferred this appeal with the prayer to set aside the impugned order and direct the Respondents No 1 and 2 to release the attachment placed by them on the bank accounts of the Corporate Debtor and, in the alternative, direct Respondents No. 3 and 4 to defreeze the bank accounts of the Corporate Debtor.

7. We also heard the Learned Counsel for Respondent No.1 who submitted that the Adjudicating Authority was justified in directing the Liquidator to continue following up with the government authorities/bank Company Appeal (AT)(Insolvency) No. 328 of 2022 and their grievance redressal mechanism for defreezing the attached current bank accounts but did not contest the other arguments advanced by the Learned Counsel for the Appellant. The other three Respondents No. 2 to 4 were not present during the hearing. None of the Respondents have filed any counter affidavit.

8. Having heard the Learned Counsels and after perusing carefully the records/documents placed before us, the issue before us for our consideration is whether the Liquidator having already made sufficient efforts and still having failed to persuade the government authorities and the banks to de-freeze the relevant bank accounts of the Corporate Debtor, does it become incumbent upon the Adjudicating Authority in terms of the IBC to intervene and issue appropriate directions to the relevant government authorities/banks to lift the debit freeze on the accounts of Corporate Debtor,

if it is so requested by the Liquidator.

9. Before we proceed to dwell on this matter any further, a quick look into some of the duties of the liquidator as provided under Section 35 of the IBC juxtaposed against the facts of the present case will be useful and constructive. Section 35 reads as follows: -

35. Powers and duties of liquidator -

(1) Subject to the directions of the Adjudicating Authority, the liquidator shall have the following powers and duties, namely: --

Company Appeal (AT)(Insolvency) No. 328 of 2022 "(a) to verify claims of all the creditors;

(b) to take into his custody or control all the assets, property, effects and actionable claims of the corporate debtor;

(c) to evaluate the assets and property of the corporate debtor in the manner as may be specified by the Board and prepare a report;

(d) to take such measures to protect and preserve the assets and properties of the corporate debtor as he considers necessary;

(e) to carry on the business of the corporate debtor for its beneficial liquidation as he considers necessary.

xxx xxx xxx

(n) to apply to the Adjudicating Authority for such orders or directions as may be necessary for the liquidation of the corporate debtor and to report the progress of the liquidation process in a manner as may be specified by the Board."

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10. A bare reading of the stipulations contained in the above provision of IBC clearly empowers the liquidator to exercise authority to seek the defreezing of the current bank accounts of the Corporate Debtor and transfer the funds lying therein to the Liquidator's account so as to form part of the liquidation estate. The Learned Counsel for the Appellant has submitted that exercising these powers, the Appellant/Liquidator in the present matter had entered into protracted correspondence, through emails and letters, both with the government authorities and the banks to unlock the frozen accounts. This has been substantiated by the Learned Counsel for the Appellant by attaching related documents at pages 22-41 and 44-50 of Appeal Paper Book. On perusal of these communications, we note that the Appellant made genuine and sustained efforts to bring the bank accounts of the Corporate Debtor into the liquidation estate and thus cannot be faulted for any inaction or non-compliance on his part. That these efforts of the liquidator, so far, has remained an exercise in

futility and not generated any traction is also borne out by the facts placed before us.

11. The Learned Counsel for the Appellant submitted that their endeavours to persuade the Respondent parties to defreeze the bank accounts not having yielded the desired results, the Appellant was constrained to approach the Adjudicating Authority praying for issue of direction to the Respondent parties that bank accounts of the Corporate Debtor be defreezed so that the Appellant is in a position to make available Company Appeal (AT)(Insolvency) No. 328 of 2022 the funds in the bank account of the Corporate Debtor as part of the liquidation estate.

12. It has been further stated by Learned Counsel for the Appellant that Regulation 44(1) of Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 mandates that the Liquidator shall liquidate the Corporate Debtor within a period of one year from the liquidation commencement date. It has also been pointed out that it is necessary to take over the bank accounts of the Corporate Debtor as part of the liquidation estate within the prescribed time-frame or otherwise the object of value maximization will be lost if not completed within a reasonable time. It has been further argued that the Appellant had already tried his level best to get the accounts defreezed and despite having failed to succeed in doing so, the directions made in the impugned order remanding the Appellant yet again before the government authorities would only add to delay in completion of the CIRP and mount liquidation costs. We agree with these submissions in as much as the Preamble to the IBC aspires to bring in place a statutory framework where insolvency resolution can take place in a time bound manner for maximization of value of assets amongst other objectives.

13. Advancing the arguments further, the Learned Counsel for the Appellant has drawn attention to two specific legal provisions, namely, Section 60(5) and Section 238 of the IBC which, according to him, empowers the National Company Law Tribunal as the Adjudicating Company Appeal (AT)(Insolvency) No. 328 of 2022 Authority to intervene in such circumstances to resolve the impasse facing the liquidation process.

14. For better understanding, it would be desirable to study Section 60(5) of the IBC which reads as follows: -

Section 60: Adjudicating Authority for corporate persons -

xxx xxx xxx "(5) Notwithstanding anything to the contrary contained in any other law for the time being in force, the National Company Law Tribunal shall have jurisdiction to entertain or dispose of -

(a) any application or proceeding by or against the corporate debtor or corporate person;

(b) any claim made by or against the corporate debtor or corporate person, including claims by or against any of its subsidiaries situated in India;

and

(c) 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 Company Appeal (AT)(Insolvency) No. 328 of 2022 the corporate debtor or corporate person under this Code."

From a plain reading of the above provision of IBC and also given that the said section is prefaced with a non-obstante clause, we are inclined to agree that the Adjudicating Authority is vested with residuary jurisdiction and it therefore casts a responsibility on the Adjudicating Authority to intervene in certain circumstances. The present is also a fit case where the Adjudicating Authority could have exercised its residuary discretion under Section 60(5) so as to ensure that the objectives of IBC are not frustrated including providing relief to the Liquidator in stalemate circumstances as the present. It has also been held by the Hon'ble Supreme Court in the Gujarat Urja Vikas Nigam Ltd. Vs. Amit Gupta & Ors. (Civil Appeal No. 9241 of 2019) that the residuary jurisdiction of the NCLT under Section 60(5) (c) of the IBC provides it a wide jurisdiction and can be exercised as long as the matter is not dehors the insolvency proceedings.

15. This now brings us to Section 238 of the IBC which reads as follows: -

Section 238: Provisions of this Code to override other laws -

"The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the Company Appeal (AT)(Insolvency) No. 328 of 2022 time being in force or any instrument having effect by virtue of any such law".

Section 238 of IBC clearly overrides anything inconsistent contained in any other enactment. The IBC is thus a complete code and prevails over all other laws which are inconsistent with or in conflict with the Code. This is a settled position of law and a catena of judgements of the Hon'ble Supreme Court affirms this position viz. Principal Commissioner of Income Tax Vs. Monnet Ispat and Energy Limited¹; Tata Consultancy Services Limited Vs. Vishal Ghisulal Jain² and Indus Biotech Pvt. Ltd. v. Kotak India Venture (Offshore) Fund³. We therefore agree that the directions issued by Respondent No.1 and 2 freezing the accounts of the Corporate Debtor during liquidation process is bad in law and hence it was within the remit of the Adjudicating Authority to issue appropriate directions to the Respondents No. 1 and 2 to set the matter right and provide statutory relief to the Appellant.

16. The Learned Counsel for the Appellant has also relied on the Order of this Tribunal in Pinakin Shah- Liquidator of M/S Brew Berry Hospitalities Pvt Ltd Vs. Assistant Commissioner of State Tax & Anr. Company Appeal (AT) (Insolvency) No. 32 of 2021. The relevant extracts, therefrom, are as placed below:

Principal Commissioner of Income Tax Vs. Monnet Ispat and Energy Limited (2018 SCC Online SC 3465) Tata Consultancy Services Limited Vs. Vishal Ghisulal Jain (2020 SCC Online SC 1254) Indus Biotech Pvt. Ltd. v. Kotak India Venture (Offshore)

Fund (2021 SCC Online SC 268). Company Appeal (AT)(Insolvency) No. 328 of 2022 "The Learned Counsel for the Appellant has relied on Judgment of the Hon'ble Supreme Court in the matter of Pr. Commissioner of Income Tax versus Monnet Ispat and Energy SCC 786) (Annexure- I page 53) where Hon'ble Supreme Court in Order dated 10th August, 2018 observed as under:

"Heard.

Delay, if any, is condoned.

Given Section 238 of the Insolvency and Bankruptcy Code, 2016, it is obvious that the Code will override anything inconsistent contained in any other enactment, including the Income Tax Act.

We may also refer in this connection to Dena Bank Vs. Bhikhabhai Prabhudas Parekh and C. & Ors. (2000) 5 SCC 694 and its progeny, making it clear that income tax dues, being in the nature of Crown debts, do not take precedence even over secured creditors, who are private persons.

Company Appeal (AT)(Insolvency) No. 328 of 2022 We are of the view that the High Court of Delhi, is, therefore, correct in law. Accordingly, the Special Leave Petitions are dismissed.

Pending applications, if any, stand disposed of."

8. The Learned Counsel has referred to this Order of Hon'ble Supreme Court as well as the Judgment referred by the Hon'ble Supreme Court in the Order and submits that the freezing of Account by the Respondent No. 1 is not maintainable and the Liquidator cannot be made to run to the parties and Authorities under the Sales Tax Act to get the Account defrozeed. Learned Counsel submits, and, rightly says that Liquidation Proceedings are time-bound to maximize the value and all the Creditors are entitled to get their dues only in terms of Section 53 of 1&B Code, 2016 and different Creditors cannot be allowed to resort to different proceedings and enactments only because they are Authorities under earlier Company Appeal (AT)(Insolvency) No. 328 of 2022 enactments considering the Provision of Section 238 of 1 & B Code, 2016.

9. We accept the submissions made by the Learned Counsel for the Appellant.

10. We find that the Adjudicating Authority has failed to exercise jurisdiction vested in it to give relief to the Appellant in the context of the position of law under Section 238 of IBC."

17. Given that the persistent efforts on the part of the Appellant to defreeze the accounts of the Corporate Debtor did not bear any result; given that there is sufficient proof of reluctance on the part of Respondents 1 to 4 to defreeze the bank accounts of the Corporate Debtor; given that Section 238 of IBC overrides anything inconsistent contained in any other enactment and also given that

Section 60(5) of the IBC vests residuary jurisdiction on the Adjudicating Authority to intervene and, above all, keeping in mind that the cardinal objective of the IBC Code is to obviate uncalled for derailment of the insolvency resolution process, we find sufficient merit in the submission made by the Learned Counsel for the Appellant that the Adjudicating Authority ought to have appreciated the constraints faced by the Appellant/Liquidator and provided relief by exercising its residuary jurisdiction rather than remanding the Appellant once again back in the hands of the government authorities. Company Appeal (AT)(Insolvency) No. 328 of 2022

18. In view of the above discussions, facts and circumstances, we hold that the Adjudicating Authority erred in not exercising the residuary jurisdiction vested in it under Section 60(5) of the IBC and having failed to provide necessary relief to the Appellant, the impugned order is set aside. The I.A. No. 192 of 2021 in CP(IB)-990/MB/2019 before the Adjudicating Authority shall be treated as allowed with the following directions: -

(i) Respondents No. 1 and 2 are herewith directed to immediately withdraw the notices issued by them defreezing the Bank Accounts of the Corporate Debtor, Pan India Utilities Distribution Co. Ltd., maintained in IDBI Bank, Khar West Branch, Mumbai and Axis Bank Ltd., Worli Branch, Mumbai.

(ii) Respondents No. 3 and 4 are herewith directed to defreeze the Bank Accounts held in the name of the Corporate Debtor.

(iii) The appeal is allowed. There will be no order as to costs.

(Justice Ashok Bhushan) Chairperson (Justice M. Satyanarayana Murthy) Member(Judicial) (Barun Mitra) Member(Technical) Place: New Delhi Date: 05.08.2022 shashi Company Appeal (AT)(Insolvency) No. 328 of 2022