

Entegra Ltd vs Shree Maheshwar Hydel Power ... on 22 August, 2022

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NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH
NEW DELHI
COMPANY APPEAL (AT) No.148 of 2022

In the matter of:

Entegra Ltd & Ors

Appellant

Vs

Shree Maheshwar Hydel Power Corp Ltd & Ors

Respondent

For Appellant: Mr Jaideep Gupta, Sr. Advocate, Mr. Ankur Sood, Mr.

Abhishek Puri, Ms Surbhi Gupta, Advocates.

For Respondent: Mr Ramji Srinivasan, Sr. Advocate, Mr Vineet Tayal, Mr

Ashwini Tak, Mr. Bhaskar, advocates.

ORDER

22.08.2022: Heard Mr Jaideep Gupta, learned senior counsel assisted by Mr. Abhishek Puri, learned counsel for the Appellant and Mr. Ramji Srinivasan, learned senior counsel assisted by Mr. Vinit Dayal, learned counsel who appeared on behalf of Respondent No.2. They intended to file Vakalatnama. Learned Counsel for Respondent No.2 is permitted to file Vakalatnama in the Registry during the course of the day.

It is a peculiar case that the Appeal has been preferred under Section 421 of the Companies Act, 2013 assailing an order which was only in the nature of adjournment. The order impugned is "all matters stands adjourned to 29.09.2022". This order was passed in CP 175/2017. CP 175/2017 was filed by the Appellant herein sometime in the month of August, 2017 under Section 241/242 of the Companies Act, 2013 assailing mismanagement. Prior to filing of present CP i.e. CP 175/2017, record reflects that alleging some mismanagement a petition being CP NO.15/2017 under Company Appeal (AT) No.148 of 2022 Section 241/242 was filed by the Respondent No.2. The said CP was rejected against which an Appeal was preferred before this Tribunal which too stood rejected and finally it was confirmed by the Hon'ble Supreme Court.

Learned senior counsel for the appellant assailing the impugned order submits that of course prima facie on perusal of the order it appears that it was an adjournment simpliciter but fact remain that the NCLT even contrary to its earlier order, without assigning any reason was deferring hearing in the CP 175/2017. Learned senior counsel for the appellant highlighting his submissions has taken this Tribunal to an order dated 18th December, 2020 passed by NCLT in CP 175/2017 wherein IA No.67/2018 and 68/2018 was filed by the appellant herein. In the said order the Learned Tribunal has noticed the reliefs sought for by the Appellant in IA No.67/2018 and 68/2018. It would be appropriate to reproduce paras 1 and 2 of the impugned order which starts from running page 221 to

223:-

"1. In IA 67 of 2018 the following reliefs have been sought:

A. Allow the amendments as proposed in the attached Schedule A to the present application.

B. Allow the paragraph 215A, as mentioned in the attached Schedule A, to be inserted after paragraph 215 of the captioned company petition. C. Allow the prayers given in paragraphs 218 (ua), (ub) and (uc), as mentioned in the attached Schedule A to be inserted after paragraph 216(u) of the captioned company petition.

Company Appeal (AT) No.148 of 2022 D. Allow the applicants/petitioners to carry out the amendment in the captioned company petition and/or to file a copy of the caption company petition with the amendments.

E. Pass any other orders as this Hon'ble Tribunal may deem fit. II. In terms of prayer C above, following prayers are sought to be added after para 218(u) "(ua) Restraining the Respondents from acting upon the illegal Recall Notice dated 17.01.2018 in any manner.

(ub) Restrain the Respondent No.1 company from approaching this Hon'ble Tribunal, or any other forum, with an application under the Insolvency and Bankruptcy Code, 2016 seeking to institute voluntary insolvency process.

(uc) Restrain the Respondent No.2, and other lenders, from instituting insolvency proceedings qua the Respondent No.1 company, under the Insolvency and Bankruptcy Code, 2016."

2. In IA 68 of 2018 following reliefs have been sought:

A. Restrain the Respondents from acting upon the illegal Recall Notice dated 17.01.2018 in any manner during the pendency of CP No.175/241-242/NCLT/AHM/2017;

B. Restrain the Respondent No.1 company from approaching this Hon'ble tribunal, or any other forum, with an application under the Insolvency and Bankruptcy Code, 2016 seeking to institute voluntary insolvency process during the pendency of CP No.175/241-242/NCLT/AHM/2017. Company Appeal (AT) No.148 of 2022 C. Restraining the Respondent No.2, and other lenders from instituting insolvency proceedings qua the Respondent No.1 company, under the Insolvency and Bankruptcy Code, 2016 during the pendency of CP No.175/241-242/NCLT/AHM/2017.

D. Direct urgent hearing of CP No.175/241-242/NCLT/AHM/2017; and E. Pass any other orders as this Hon'ble Tribunal may deem fit." Learned senior counsel while referring to the aforesaid prayers has further drawn our attention to the fining recorded by the NCTT in the aforesaid order. Finding has been recorded in paras 27 to 30 which are reproduced hereinbelow:-

"Findings;

27. We have considered submission made by both the sides and material on record. It is noted that earlier Respondent No.2 had filed oppression and mismanagement petition against the Petitioner vide CP No.15 of 2017 which was dismissed by NCLT on 15.06.2017. Various observations were made in the order as regard to the conduct and management of affairs of the Corporate Debtor by the Respondent No.2 since 2005. Against this order, the Respondent No.2 preferred an appeal before Hon'ble NCLAT, however, order of the Hon'ble NCLAT confirmed the order of NCLT in Appeal No. CA(AT) 237 of 2017 order dated 12.03.2018. The Hon'ble Supreme Court also confirmed the order of Hon'ble NCLAT vide its order dated 18.05.2018. The Applicant herein had filed an oppression and mismanagement petition against the Company Appeal (AT) No.148 of 2022 Respondent No.2 under Section 241 and 242 of the Companies Act, 2013 on 16.08.2017. IA 67 of 2018 and IA 68 of 2018 were filed on 20.02.2018. The Respondent No.2 in the capacity of lender of the Corporate Debtor had filed a petition under Section 7 of IB code, 2016 being CP (IB) No.111 of 20158 (TP No.76/2019) ON 16.02.2018. Thus, it is evident that the Applicant had filed a petition under Section 241-242 of the Companies act, 2013 before filing of a petition under Section 7 of IB Code, 2016 by the Respondent No.2. It is also noted that this petition had been filed before order of Hon'ble NCLAT duly confirmed by the Hon'ble Supreme Court in respect of petition filed by the Respondent No.2 against the Applicant. From the perusal of the grounds raised in CP No.175/2017 alongwith amendments sought therein through IA No.67 of 2018, it is seen that a number of issues raised therein stand adjudicated in favour of the Applicant. It is also noteworthy that respondent No.2 has acted upon by reversing the share pledge invocation transactions. However, the fact remains that since 2005 Respondent No.2 is in the management of the Respondent No.1 company and all its activity have been conducted under the guidance of board of directors controlled by the Respondent No.2, several allegations of mismanagement and self- serving actions by the Respondent No.2 to protect its interest as lender have been made. The fact remains that the project has remained incomplete and no viable solution could be found so far. In this background, from the written submissions filed before us by the Respondent No.2, it appears that now the Respondent No.2 does not hold any shareholding in the Respondent No.1 company nor it has got Company Appeal (AT) No.148 of 2022 any nominee director. It is claimed that the applicant alongwith other financial investor has not taken any steps to reconstitute the board of the Respondent No.1 company by appointing their directors. It is also mentioned that general meeting is not being held whereas it is being pressed before us that the Applicant be

given an opportunity to represent the company. During the course of hearing on behalf of the company it is being pleaded that Respondent No.2 is not taking initiatives to restructure the board and management of the company. Thus, there is a complete deadlock and interests of the company are suffering in a great manner. In this background both the parties are claiming that their application/petitions be heard first.

28. As far as legal aspects are concerned. NCLT functions as Tribunal under the provisions of Companies Act, 2013 and it functions as Adjudicating Authority in terms of provisions of Section 5(1) r/w Section 60(1) of IB Code, 2016. As per Rule 11, 34(1) and 51 of NCLT Rules, 2016 which are applicable to the proceedings under IB Code, 2016 also, NCLT as Adjudicating Authority or as Tribunal can, in appropriate cases, take a call as to which proceedings should be taken first. Provisions of Section 422 of the Companies Act, 2013 and Section 64 of IB Code, 2016 require expeditious disposal of cases. It is, however, not in dispute that both statutes operate in different fields though there are linkages between the two, Section 63 of Code, 2016 bars the jurisdiction of Civil Court or Authority in respect of matters pertaining to IB Code 2016 Section 231 also operate in the same manner and also prohibits passing Company Appeal (AT) No.148 of 2022 of any order or injunction by Court or other Authority in respect of matters pertaining to IB Code, 2016. Section 64(2) of IB Code 2016 also provides that no injunction shall be granted by any Court, Tribunal or Authority in respect of any action taken or to be taken in pursuance of any power confirmed on NCLT under IB Code, 2016. Though, no injunction or stay order has been passed by NCLT on the hearing of application filed under Section 7 of IB Code, 2016, however, it is being claimed that indirectly it is so as this is not being disposed off. We in the background of the facts narrated in the preceding para have specifically noted that it is a unique case where the lender has itself taken over the ownership and management of the Corporate Debtor on one hand and in the capacity of lender executed documents/agreements to enable itself to initiate proceedings against the same Corporate Debtor under Section 7 of IB Code, 2016. The applicant in these applications is very much challenging the legality and validity of such actions of the Respondent No.2 by taking a ground that notice recalling loan should be quashed and its petition filed under Section 241-242 of the Companies Act, 2013 should be heard first. We are of the view that to hear the application filed under Section 7 of IB Code, 2016 the representation on behalf of the Corporate Debtor is required as the applicant thereunder cannot represent the company once putting the company under the process of Insolvency and Bankruptcy itself. Hence, we direct the applicant here and Respondent No.2 to reconstitute the board of directors of the RespondentNo.1 company within a period of 30 days from the date of this order in terms of order of Hon'ble NCLAT duly confirmed by the Hon'ble Supreme Court. Company Appeal (AT) No.148 of 2022 The applicant herein, then, can represent the Respondent No.1 company, being Corporate Debtor in application filed under Section 7 of the IB code, 2016. The necessary statutory compliances under the provisions of Companies Act, 2013 are done on priority and a copy of all documents be provided to NCLT to

proceed further in the matter.

29. Further, as far as aspect of examination of illegality of recall notice is concerned, the same can be examined even in the course of proceedings filed under Section 7 of the IB Code, 2016 as an application filed thereunder can be admitted only when there is a debt which is due and payable both in law and in fact and a default has occurred in payment thereof. Our this view is duly supported by the findings of the Hon'ble Supreme Court in the case of Innoventive Industries Ltd Vs. ICICI Bank and another (2018) 1 SCC 407. Thus, in this manner, the balancing of interest of the Corporate Debtor, applicant and Respondent No.2 can happen and, in our view, some solution can be worked out to complete the project. Thus considering this aspect, we refrain ourselves from entering into deliberations on the legal contentions raised by the parties and leave the question as regard to which matter be heard first open. Further, other two grounds of IA 67 of 2018 i.e. 218 (ub), 218(uc) and IA 68 of 2018 are concerned, the same have become infructuous in view of the fact that application under Section 7 of IB Code, 2016 had already been filed prior to raising of such grounds.

30. Accordingly, we hold issue raised in ground No.218 (ua) of IA 67 of 2018 and ground No.A of IA 68 of 2018 would be considered while Company Appeal (AT) No.148 of 2022 considering the application filed by the Respondent No.2 under Section 7 of IB code, 2016. However, the right of applicant to raise these grounds in the course of hearing of CP No.175 of 2017 shall be considered during the course of hearing of main petition. Other grounds raised in IA 67 of 2018 shall be considered and disposed off while considering the main CP No. 175 of 2017 as these relate to amendment/additions to grounds/issues raised therein. Ground No.B & C of IA 68 of 2018 and 218(ub) and (uc) stand dismissed as being infructuous. Ground No. D in IA No.68 of 2018 stands dismissed. CP(IB) No.111 of 2018 be fixed for hearing on 22.01.2021 after the board of directors of the Respondent No.1 company is reconstituted in terms of our directions herein before."

Learned senior counsel submits that despite there were directions by the NCLT to Respondent No.2 herein for reconstitution of the Directors without following its own directions the NCLT proceeded to adjourn hearing in CP No.175/2017 and at the same time they preferred to take up CP(IB) No.111/2018. It has been argued by the learned senior counsel for the Appellant that once the Respondent No.2, who was managing the affairs of the Respondent No.1, failed to get any relief from the NCLT in its petition i.e. CP 15/2017, subsequently with oblique motive filed a petition under Section 7 of Insolvency & Bankruptcy Code, 2016 (hereinafter referred to as IB Code). Without following the direction of the NCLT as directed vide order dated 18.12.2020 the Respondent No.2 on one ground or the other tried to stall the disposal of CP No.175/2017 and pressed for disposal of a petition filed by him i.e. CP(IB) No.111/2018. It has been reiterated that since 2017 without any Company Appeal (AT) No.148 of 2022 cogent reasons the CP No.2015/2017 has been kept pending and lastly by the impugned order dated 28.07.2022 without assigning any reason the case has been adjourned to the month of September, 2022. Accordingly a prayer has been made to direct the NCLT to take final decision in CP No.175/2017.

Mr. Ramji Srinivasan, learned senior counsel appearing on behalf of Respondent No.2 submits that the present appeal is itself not maintainable in view of the fact that the order which has been assailed in the present appeal is an order simpliciter of adjournment. He submits that it was the responsibility of the Appellants to inform the Court the reason for adjournment by the Tribunal. He submits that much prior to the passing of the impugned order, which is an adjournment order, in CP(IB) No.111/2018 which was filed by the Respondent No.2 final hearing has been concluded and judgement is reserved. He has referred to certain dates i.e. order dated 28.02.2020 on which date the Learned NCLT after hearing had reserved order. But subsequently since both the Members of the Tribunal were transferred, the Bench dissolved. Again CP (IB) No.111/2018 was heard by new Bench in which on 25.03.2021 order was reserved. Unfortunately subsequently again before delivery of judgement one of Members retired and the matter was assigned to another Division Bench. On third occasion after hearing both the parties order was reserved. Finally on 08.10.2021 a split verdict came in which one of the Members admitted the petition filed under Section 7 of IB Code, 2016, whereas another Member declined to admit the same. This situation compelled the President, NCLT to refer the matter to the third Member. On 21.02.2022 the matter was referred to third Bench. Before the Company Appeal (AT) No.148 of 2022 third Bench again hearing concluded on 24.05.2022, judgement was reserved and again the third Member before delivering judgement, on 01.07.2022 superannuated and thereafter the case was assigned to one other Bench. The new Member considering the fact that it was a case filed under Section 7 of the IB Code, took the matter on priority basis and hearing in the matter was taken on up 26.7.2022, 28.07.2022 and 29.07.2022 and finally on 1st August, 2022 judgement was reserved. The facts which have been disclosed by Mr. Ramji Srinivasan, learned senior counsel has not been disputed by the learned senior counsel for the appellant.

Mr. Ramji Srinivasan, learned senior counsel for Respondent No.2 has further argued that in a situation where two petitions were pending before the NCLT; one filed under the Companies Act and another filed under the IB Code certainly in view of Section 238 of the IB Code it was duty on the part of the Tribunal to first take up the matter which was filed under the provisions of IB Code. According to the learned counsel the Learned NCLT has not committed any error in first taking up the petition filed under Section 7 of the IB Code i.e. CP (IB) No.111/2018. He reiterates that in any event an order whereby simply adjournment has been granted by the Tribunal that too in a situations where a petition which was filed for initiation Corporate Insolvency Resolution Process (hereinafter referred to as 'CIRP') there is no reason to interfere with the order impugned.

Besides hearing the learned counsel for the parties we have examined entire material available on record. It is true that CP No.175/2017 was filed prior to filing of petition under Section 7 of IB Code by Respondent No.2, but Company Appeal (AT) No.148 of 2022 fact remain that in CP 175/2017 no effective hearing has taken place which is reflected from some of the orders which have been filed alongwith the Memo of Appeal. Besides granting time for filing of reply or rejoinder the Tribunal has noticed the reasons for not taking up the matter due to Covid. The reasons have been assigned by the Tribunal in its earlier order while taking up the matter. We are of the opinion that once a petition under Section 7 of the IB Code was filed before the NCLT it was duty cast on the Tribunal to first decide the petition filed under Section 7 of the Code. However, we are not recording any finding on this issue as the present appeal is confined only to an order of adjournment of the case. But in

any event it is not in dispute that two parallel proceedings were pending before the NCLT; one under Section 7 of the IB code and the other under the Companies Act. As has been admitted by both the parties, hearing in CP(IB) No.111 of 2018 has been concluded and the order has been reserved, we find no error in the impugned order whereby the hearing in the CP No.175/2017 was deferred and as such we do not find any ground to interfere with the impugned order. The Appeal stands dismissed.

(Justice Rakesh Kumar) Member (Judicial) (Mr. Kanthi Narahari) Member (Technical) Bm/gc
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