

Standard Surfa Chem India Pvt. Ltd vs Mr. Kishore Gopal Somani on 14 February, 2022

NATIONAL COMPANY LAW APPELLATE TRIBUNAL

PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 684 of 2021

[Arising out of Impugned Order dated 09 August 2021, passed by the Adjudicating Authority/National Company Law Tribunal, Principal Bench, New Delhi in IA No. 3377 of 2021 in (IB)-922(PB)/2018]

IN THE MATTER OF:

Standard Surfa Chem India Pvt. Ltd.

(formerly known as M/ s Portia

Ventures Private Limited)

Through its Director

85, First Main Road, Gandhi Nagar

Adyar, Chennai - 600020

Appellant

Versus

Kishore Gopal Somani

The Liquidator of Advanced Surfactants

India Ltd. (Corporate Debtor)

3/15, 4th Floor,

Asaf Ali Raod, New Delhi - 110 002

Respondent

Present:

For Appellant : P H Arvinth Pandian, Sr Advocate with
Mr Goutham Shivshankar, Advocates.

For Respondent : Ms Anju Bhushan and KG Somani (in-person) for
Liquidator

CORAM:

Hon'ble Mr Justice M. Venugopal, Member (J)

Hon'ble Mr V. P. Singh, Member (T)

Hon'ble Dr Ashok Kumar Mishra, Member (T)

J U D G M E N T

(Virtual Mode) [Per; V. P. Singh, Member (T)]

1. The present Appeal has been preferred by the Appellant/Standards Surfa Chem India Private Limited, which was the successful auction purchaser of the Pondicherry unit of the property of the Corporate Debtor, i.e. Advanced Surfactants India Ltd.-in liquidation.

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2. The Respondent/Liquidator had made multiple attempts to auction the property of the corporate debtor. The present Appellant and Appeal are concerned with the auction sale of only the 'Pondicherry unit' of the corporate debtor in an E-Auction. After the announcement in February 2021, E-Auction was conducted in March 2021.

3. The Appellant emerged as the successful bidder in the auction proceeding for the 'Pondicherry unit with a bid of 3.3 crores; the Liquidator had issued a letter of intent dated 5 March 2021 stipulating and 90 days timeline for making the full payment to complete the auction proceeding.

4. The said 90 days was to expire on 3 June 2021. The Appellant had preferred IA number 3377 of 2021 dated 25 May 2021 before the Adjudicating Authority/NCLT, seeking time extension in complying with auction proceedings' completion, under Rule 11 of the NCLT Rules, 2016.

5. The prayer in the said IA number 3377 of 2021 is given as under;

"Allow the present application by granting extension of time of three (3) months from the date of present application; or in the alternative, grant extension of one (1) months from lifting of complete lockdown in the state of Tamil Nadu, to enable the appellant to complete the auction proceedings."

6. However, the Appellant was unable to ensure a listing of its Application before the learned Adjudicating Authority/NCLT until August 2021. The learned Adjudicating Authority dismissed the IA vide impugned order, which reads as under;

Company Appeal (AT) (Insolvency) No. 684 of 2021 2 of 18 "IA-3377/2021-this application has become infructuous and hence dismissed."

Grounds of Appeal

7. The Liquidator of the Corporate Debtor refused to grant any extension of time for completion of the auction process, despite being empowered to do so in terms of E-Auction Process Information Document governing auction, and also despite him recognising the genuine difficulties faced by the Appellant on account of the 2nd wave of Covid 19 outbreak, in securing the requisite loan from its bankers within the stipulated timelines.

8. The Liquidator also failed to take note of Regulation 47 A of the Liquidation Process Regulation 2016.

9. The learned Adjudicating Authority failed to consider that IA 3377 of 2021 was filed on 25 May 2021; 3 months extension as prayed for would have expired only on 24 August 2021.

10. Further, as stated above, the Lockdown in Tamil Nadu State pertaining to the 2nd wave of Covid 19 outbreak on 10 May 2021 continues. Thus, the IA was not infructuous as on 10 August 2021 when the impugned order was passed, since the prayer sought for before the Adjudicating Authority was either a three-month extension from the date of filing of IA or 'one-month extension from the lifting of complete lockdown' in the state of Tamil Nadu.

11. However, there was a complete Lockdown in Tamil Nadu due to the 2nd wave of Covid 19 began on 10 May 2021 and continued and was extremely stringent until 3 July 2021.

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12. The Appellant had also cited other genuine reasons before the Liquidator and the learned Adjudicating Authority/NCLT, which were beyond the Appellant's control, resulting in its ability to comply with a 90 days timeline. These included the factors; closure of the financial year in March; elections in Tamil Nadu in the 1st week of April 2021; and transfer/shuffling of concerned Bank officials.

13. The valuers empanelled with the Bank of India, the Appellant's Bank, we're unable to visit the Pondicherry unit to assess the property's marketability to arrive at the value of the property, which is a benchmark for the bankers to evaluate the Appellant's loan proposal.

14. The Appellant was in any event entitled to complete exclusion of the period from May 2021 on account of Lockdown under Regulation 47 A of the IBBI (Liquidation Process) Regulations, 2016.

15. By Regulation 47, A of the IBBI (Liquidation Process) Regulations, 2016, the period after the imposition of Lockdown must be wholly excluded from the calculation of the 90 days. Accordingly, if the Liquidator had acted as per law, there might have been no occasion for the Appellant to seek an extension of time.

16. Following points arise for the decision of this Appeal.

a) Is the NCLT and Liquidator justified refusing to grant an extension to the Appellant without considering Regulation 47 A of the Liquidation Process Regulation 2016?

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b) Whether the Appellant is entitled to the exclusion/extension of time for the period of Lockdown due to Covid 19 as stipulated under Regulation 47 A of the IBBI (Liquidation Process) Regulation, 2016?

17. Appellants Submissions 17.1 The Counsel for the Appellant submitted that during the pendency of this Appeal, within a few days of the issuing of notice in this Appeal, the Appellants has duly completed the loan formalities with its bankers, obtained sanction and disbursal of the loan amounts and ensured that the entire sale consideration had been paid in the Designated Bank Account specified by the Liquidator.

17.2 In their additional Affidavit (Pg-2), the Appellant submitted that they paid the total amount of 3,48,04,548/- through two banking transactions, and the Liquidator acknowledged the receipt of the payments. The banking transactions are as follows:-

a. 3,39,02,732/- by RTGS vide UTR: BKIDH21251177710 on 08.09.2021; and b. 9,01,816/- vide UTR : BKIDH21251218306 on 08.09.2021.

17.3 Further, the Appellant submitted that the Liquidator ought to have extended the period for completion of the auction proceeding since he was authorised by both law and the terms of the auction documents to do it. In this regard, the Appellant referred to Regulation 47 A of the IBBI (Liquidation Process) Regulations, 2016.

Company Appeal (AT) (Insolvency) No. 684 of 2021 5 of 18 17.4 Further, the E-Auction Process document dated 05.02.2021 also confers the discretion upon the Liquidator to extend timelines. The relevant clause of the E-Auction Process Document is given for ready reference;

"The Liquidator reserves the right to amend the key terms of the E-Auction Process Information Document including reserve price, earnest money deposit, bid increment amounts and timelines at his sole discretion, to the extent permissible under the applicable laws and regulations."

17.5 In the Additional Affidavit (para-6 at pg- 5), the Appellant submitted that the full payment of the purchase consideration together with delayed payment and receipt of the same has also been acknowledged by the Liquidator. The Liquidator has also expressed his willingness to complete the sale in favour of the Appellant subject to the orders of this Appellate Tribunal. 17.6 The Respondent has admitted the two transactions made by the Appellant towards the total bid consideration along with interest @12% till the payment was received on 08.09.2021 in respect of E-auction held on 2.03.2021 for Pondicherry unit of Corporate Debtor. The same has been accepted by the respondent 'without Prejudice'.

18. Statutory Provisions Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 [47. Model timeline for the liquidation process.-- The following Table presents a model timeline of the liquidation process of a Corporate Debtor from the liquidation commencement date, assuming Company Appeal (AT) (Insolvency) No. 684 of 2021 6 of 18 that the process does not include compromise or arrangement under Section 230 of the Companies Act, 2013 (18 of 2013) or sale under Regulation 32-A:

Model Timeline for Liquidation Process Sl. Section/ Description of Task Norm Latest No. Regulation Timeline (Days) (1) (2) (3) (4) (5) 1 Section 33 Commencement of LCD 0=T and 34 liquidation and appointment of Liquidator 2 Section 33(1) Public Within 5 days of T + 5

(b) (ii)/Reg. 12 announcement in appointment of (1, 2, 3) Form B liquidator.

3	Reg. 35 (2)	Appointment of registered valuers	of	Within 7 days of T + 7 LCD
4	[Section (1), Reg. 17,	38 Submission claims; Intimation of	of	Within 30 days of T + 30 LCD

18, 19, and 21-A]	20 the decision on relinquishment of security interest		
5	Section 38(5)	Withdrawal/ modification of claim	Within 14 days of T + 44 submission of claim
6	Reg. 30	Verification of claims received under Regulation 12(2)(b)	Within 30 days T + 60 from the last date for receipt of claims
7	Company Appeal (AT) (Insolvency) No. 684 of 2021 Reg. 31A	Constitution of SCC	Within 60 days of T + 60 LCD
8	Section 40(2)	Intimation about the decision of acceptance/ rejection of claim	Within 7 days of T + 67 admission or rejection of claim
9	Reg. 31 (2)	Filing the list of stakeholders [* * *]	Within 45 days T + 75 from the last date of receipt of claims
10	Section 42	Appeal by a creditor against the decision of the Liquidator	Within 14 days of T + 81 receipt of such a decision
11	Reg. 13	Preliminary report to the AA	Within 75 days of T + 75 LCD
12	Reg. 34	Asset memorandum	Within 75 days of T + 75 LCD
13	Reg. 15 (1), Submission of progress reports to AA; Asset Sale report to be enclosed with every Progress Report, if sales are made		First progress Q1 + 15 report Q-2 Q2 + 15 Q-3 Q3 + 15 Q-4 Q4 + 15 FY: 1 Audited 15 April account of Liquidator's receipt & payments for the financial year
14	Company Appeal (AT) (Insolvency) No. 684 of 2021 Proviso to Progress report in		Within 15 days of Date

Reg. 15 (1)	case of cessation of	cessation	as cessation
15 Reg. 37 (2, 3)	Information secured creditors	to	Within 21 days of Date receipt of intimation from 21 secured creditor
16 Reg. 42 (2)	Distribution of proceeds	to the	Within 3 months Date from the receipt of Realisation+
17 Reg.10 (1)	Application to AA for Disclaimer of onerous property		Within 6 months T + 6 months from the LCD
18 Reg.10 (3)	Notice to persons interested in the onerous property or contract		At least 7 days before making an application to AA for [disclaimer].
19 Reg. 44	Liquidation of Corporate Debtor		Within one year T + 365
[20 Reg. 46	Deposit the amount of unclaimed dividends undistributed proceeds	and	Before submission of Application under sub-regulation (3) of Regulation 45]
21 Sch-1 Sl. No 12	Time period to H1 bidder to provide balance sale consideration		Within 90 days of the date of invitation to provide the balance amount.

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[AA: Adjudicating Authority, LCD: Liquidation Commencement Date, SCC:

Stakeholders' Consultation Committee]] Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 Amendment DT. 20.4.2020 w.e.f.17.4.2020 vide Government Notification. [47-A. Exclusion of period of Lockdown.--Subject to the provisions of the Code, the period of Lockdown imposed by the Central Government in the wake of Covid-19 outbreak shall not be counted for the purposes of computation of the timeline for any task that could not be completed due to such Lockdown, in relation to any liquidation process.] Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016

Amendment DT. 20.4.2020 w.e.f.29.3.2020 vide Government Notification [40-C. Special provision relating to the timeline.--Notwithstanding the timelines contained in these regulations, but subject to the provisions in the Code, the period of Lockdown imposed by the Central Government in the wake of the Covid-19 outbreak shall not be counted for the timeline for any activity that could not be completed due to such Lockdown, in relation to a corporate insolvency resolution process.] Analysis

19. We have heard the argument of the learned counsel for the parties and perused the record.

20. The Appellant is the successful auction purchaser of the Pondicherry unit of corporate debtor M/S Advance Surfactants India Lt.d, i.e., a unit Company Appeal (AT) (Insolvency) No. 684 of 2021 10 of 18 situated in Pondicherry. The Appellant had challenged the impugned order passed by the Adjudicating Authority in IA 3377 of 2021 filed under Rule 11 of NCLT rules 2016 dated 9 August 2021 seeking extension of time for payment of sale consideration to complete auction proceedings.

21. Undisputedly the Appellant had emerged as the successful bidder in the auction proceedings for the Pondicherry unit with a bid of 3.3 crores.

The Liquidator had issued a letter of intent on 5 March 2021, stipulating 90 days timeline for making the full payment to complete the auction proceedings. The said 90 days was to expire on 3 June 2021. However, the Appellant had preferred IA 3377 of 2021 on 25 May 2021, i.e. before the expiry of the timeline provided for depositing the bid amount.

22. The IA 3377 of 2021 was filed under Rule 11 of NCLT Rules with a specific prayer for an extension of three months from the date of filing the Application or in the alternative for extension of one month from the date of the lifting of complete Lockdown in the state of Tamil Nadu, to enable the Appellant to complete auction proceedings. However, the learned Adjudicating Authority disposed of the Application by a one-line order given as under;

"IA-3377/2021-this application has become infructuous and hence dismissed."

23. In the instant case, the Adjudicating Authority disposed of the Appellant's Application IA-3377/2021 by one-line order. We would like to draw the attention to the observations of the Hon'ble Supreme Court in Company Appeal (AT) (Insolvency) No. 684 of 2021 11 of 18 paragraphs 23 to 27 in the case of CCT v. Shukla & Bros., (2010) 4 SCC 785 wherein it is observed that;

"23. We are not venturing to comment upon the correctness or otherwise of the contentions of law raised before the High Court in the present petition, but it was certainly expected of the High Court to record some kind of reasons for rejecting the revision petition filed by the Department at the very threshold. A litigant has a legitimate expectation of knowing reasons for rejection of his claim/prayer. It is then alone, that a party would be in a position to challenge the order on appropriate

grounds. Besides, this would be for the benefit of the higher or the appellate court. As arguments bring things hidden and obscure to the light of reasons, reasoned judgment where the law and factual matrix of the case is discussed, provides lucidity and foundation for conclusions or exercise of judicial discretion by the courts.

24. Reason is the very life of law. When the reason of a law once ceases, the law itself generally ceases (Wharton's Law Lexicon). Such is the significance of reasoning in any rule of law. Giving reasons furthers the cause of justice as well as avoids uncertainty. As a matter of fact it helps in the observance of law of precedent. Absence of reasons on the contrary essentially introduces an element of uncertainty, dissatisfaction and give entirely different dimensions to the questions of law raised before the higher/appellate courts. In our view, the court should provide its own grounds and reasons for rejecting claim/prayer of a party whether at the very threshold i.e. at admission stage or after regular hearing, howsoever concise they may be.

25. We would reiterate the principle that when reasons are announced and can be weighed, the public can have Company Appeal (AT) (Insolvency) No. 684 of 2021 12 of 18 assurance that process of correction is in place and working. It is the requirement of law that correction process of judgments should not only appear to be implemented but also seem to have been properly implemented. Reasons for an order would ensure and enhance public confidence and would provide due satisfaction to the consumer of justice under our justice dispensation system. It may not be very correct in law to say, that there is a qualified duty imposed upon the courts to record reasons.

26. Our procedural law and the established practice, in fact, imposes unqualified obligation upon the courts to record reasons. There is hardly any statutory provision under the Income Tax Act or under the Constitution itself requiring recording of reasons in the judgments but it is no more res integra and stands unequivocally settled by different judgments of this Court holding that the courts and tribunals are required to pass reasoned judgments/orders. In fact, Order 14 Rule 2 read with Order 20 Rule 1 of the Code of Civil Procedure requires that, the court should record findings on each issue and such findings which obviously should be reasoned would form part of the judgment, which in turn would be the basis for writing a decree of the court.

27. By practice adopted in all courts and by virtue of judge-made law, the concept of reasoned judgment has become an indispensable part of basic rule of law and, in fact, is a mandatory requirement of the procedural law. Clarity of thoughts leads to clarity of vision and proper reasoning is the foundation of a just and fair decision. In Alexander Machinery (Dudley) Ltd. [1974 ICR 120 (NIRC)] there are apt observations in this regard to say "failure to give reasons amounts to denial of justice". Reasons are the real Company Appeal (AT) (Insolvency) No. 684 of 2021 13

of 18 live links to the administration of justice. With respect we will contribute to this view. There is a rationale, logic and purpose behind a reasoned judgment. A reasoned judgment is primarily written to clarify own thoughts; communicate the reasons for the decision to the concerned and to provide and ensure that such reasons can be appropriately considered by the appellate/higher court. Absence of reasons thus would lead to frustrate the very object stated hereinabove."

24. In the instant case, the Appellant, i.e. successful auction purchaser by filing IA 3377 of 2021 dated 25 May 2021, sought an extension of 90 days for making the full payment to complete the auction proceedings. However, before the expiry of the 90 days timeline, the appellant/applicant filed the said Application on the ground of Regulation 47 A of Liquidation Process Regulation, 2016.

25. Regulation 47 A was brought by the amendment in liquidation process regulation by Government Notification dated 20 April 2020 with retrospective effect from 17 April 2020. This Regulation provided that the period of Lockdown imposed by the central government in the wake of the Covid 19 outbreak shall not be counted for computation of the timeline for any task that could not be completed due to such Lockdown in relation to any liquidation process.

26. It is pertinent to mention that the Government of India vide notification dated 20 April 2020 brought similar notification 40 C, as a special provision relating to the timeline under the Insolvency Resolution Process Regulation Company Appeal (AT) (Insolvency) No. 684 of 2021 14 of 18 2016. Accordingly, this Regulation was effective with effect from 29 March 2020.

27. In the instant case, the applicant had sought an extension of 3 months on the ground of the 2nd wave of the Covid 19 outbreak. The applicant stated that Lockdown had been imposed in Tamil Nadu since 10 May 2021 because of the 2nd wave of Covid 19. Regulation 47 A provided that the period of Lockdown imposed by the central government in the wake of the Covid 19 outbreak shall not be counted for computation of timeline for any task that could not be completed due to Lockdown in relation to any liquidation process. Although, the applicability of Regulation was dependent on the Lockdown declared by the Central Government. Therefore, we are doubtful about the relevance of Regulation 47 A in the instant case because Lockdown was declared by Tamil Nadu State and not the Central Government.

28. It is pertinent to mention that Liquidation Process Regulation 47 deals with the Model Timeline for Liquidation Process. Model Timeline is only a directory in nature. It cannot be considered a deadline. It is provided under Regulation as a guiding factor to complete the liquidation process in a time- bound manner. In exceptional circumstances, such a time limit can be extended.

29. Hon'ble Supreme Court, while dealing with the timeline provided under Section 7 of the Insolvency and Bankruptcy Code 2016, has held that the timeline provided under Section 7 of the Code is a directory in nature and in special exceptional circumstances, it can be extended. Company Appeal (AT) (Insolvency) No. 684 of 2021 15 of 18

30. Hon'ble Supreme Court's observation in paragraph 58 in the case of Pioneer Urban Land and Infrastructure Ltd. v. Union of India, (2019) 8 SCC 416 is very much relevant in this regard. In this case, Hon'ble Supreme Court has held that;

"58. This Court, while dealing with timelines provided qua operational creditors, in Surendra Trading Co. [Surendra Trading Co. v. Juggilal Kamlapat Jute Mills Co. Ltd., (2017) 16 SCC 143 : (2018) 2 SCC (Civ) 730] , held that the timelines contained in the provisos to Sections 7(5), 9(5) and 10(4) of the Code are all directory and not mandatory. This is for the obvious reason that no consequence is provided if the periods so mentioned are exceeded. Though this decision is not in the context of the 14-day period provided by Section 7(4), we are of the view that this judgment would apply squarely on all fours so that the period of 14 days given to NCLT for decision under Section 7(4) would be directory. We are conscious of the fact that under Section 64(1) of the Code, NCLT President or the Chairperson of NCLAT may, after taking into account reasons by NCLT or NCLAT for exceeding the period mentioned by statute, extend the period of 14 days by a period not exceeding 10 days. We may note that even this provision is directory, in that no consequence is provided either if the period is not extended, or after the extension expires. This is also for the good reason that an Act of the court cannot harm the litigant before it. Unfortunately, both NCLT and NCLAT do not have sufficient members to deal with the flood of applications and appeals that is before them. The time taken in the queue by applicants who knock at their doors cannot, for no fault of theirs, be put against them."

31. Further, it is necessary to mention that E-Auction Process Information Document also provided discretion to the Liquidator to extend the timeline. Company Appeal (AT) (Insolvency) No. 684 of 2021 16 of 18 The impact of the 2nd wave of Covid 19 was everywhere in India, of which judicial notice can be taken. In the special circumstances, the Liquidator ought to have sought permission of the Adjudicating Authority to extend the timeline. The Adjudicating Authority should have also considered clause 17.2 of the E-Auction Process Document, which provides that ;

Clause 17.2 "The liquidator reserves the right to amend the key terms of the E-auction process information document including reserve price, earnest money deposit, bid increment amount and timelines at his sole discretion, to the extent permissible under the applicable laws and regulation."

32. Further, paragraph 4 of the declaration of the bidders is also relevant to consider, which is as under;

Paragraph 4 of the declaration by bidders "The timeline for payment of final sale consideration may be extended by the sole discretion of Liquidator, to the extent permissible under the applicable laws and regulations. However, in case final sale consideration is not paid within stipulated timeline, the Liquidator shall forfeit earnest money."

33. The Adjudication Authority did not consider that satisfaction of creditor claims while ensuring asset maximisation is the underlying principle of the IBC, which cannot be overridden on account of meagre delays induced by a force majeure event.

34. It is further necessary to point out that the respondent liquidator has in its reply affidavit admitted that "it has received two remittances of 3,39,02,732 on 8 September 2021 and 9 September 2021 respectively towards Company Appeal (AT) (Insolvency) No. 684 of 2021 17 of 18 the bid consideration along with up-to-date interest at the rate of 12% till the payment was received in respect of any auction held on 2 March 2021 for Pondicherry unit of the corporate debtor. The same has been accepted by respondent "without prejudice" and would proceed further in the matter in accordance with the order/directions passed by this Appellate Tribunal in the present Appeal."

35. Based on the above discussion, we have concluded that the Appeal deserves to be allowed, and the impugned order deserves to be set aside.

ORDER Company Appeal CA (AT) (Ins) No. 684 of 2021 is allowed. Accordingly, the impugned order dated 9 August 2021 passed in IA No. 3377 of 2021 is set aside, and consequential letter dated 13 August 2021 sent by the Liquidator whereby Appellant's bid in E-auction for sale of assets of the Corporate Debtor was terminated. Accordingly, the Appellant's earnest money deposit was forfeited is set aside, and it is declared that the bid is still valid.

[Justice M. Venugopal] Member (Judicial) [V. P. Singh] Member (Technical) [Dr. Ashok Kumar Mishra] Member (Technical) NEW DELHI 14 February 2022 pks Company Appeal (AT) (Insolvency) No. 684 of 2021 18 of 18