

Tourism Finance Corporation Of India ... vs Rainbow Papers Limited & Ors on 19 December, 2019

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 354 of 2019

IN THE MATTER OF:

Tourism Finance Corporation of India Ltd. ...Appellant

Vs.

Rainbow Papers Ltd. & Ors. ...Respondents

Present: For Appellant: - Mr. Sumant Batra, Ms. Srishti Kapoor,
Ms. Priyanka Anand, Mr. Sanjay Bhatt, Mr. N.
Ramachandran, Advocates and Ms. Kiran Sharma, C.S

For Respondents: - Mr. M.S Vishnu Sankar, Advocate
Mr. David Rao, Advocate for R-2 and Mr. Sriram P.
Advocate for R-4.
Ms. Shilpi Chowdhary and Mr. Jasdeep Dhillon,
Advocates for Resolution Applicant

With

Company Appeal (AT) (Insolvency) No. 364 of 2019

IN THE MATTER OF:

Virag Enterprise ...Appellant

Vs.

Ramchandra D. Chaudhary,
RP of Rainbow Papers Ltd. & Anr. ...Respondents

Present: For Appellant: - Mr. Aniruddh Deshmukh, Advocate

For Respondents: - Mr. M.S Vishnu Sankar, Advocate
Mr. David Rao, Advocate for R-2 and Mr. Sriram P.
Advocate for R-4.
Ms. Shilpi Chowdhary and Mr. Jasdeep Dhillon,
Advocates

With

Company Appeal (AT) (Insolvency) No. 404 of 2019

IN THE MATTER OF:

State Tax Officer (1) ...Appellant

Vs.

Rainbow Papers Limited. ...Respondent

Present: For Appellant: - Ms. Aastha, Mehta, Advocate

For Respondent: - Mr. M.S. Vishnu Sankar, Advocate
Mr. David Rao, Advocate for R-2
Ms. Shilpi Chowdhary and Mr. Jasdeep Dhillon,
Advocates

With

Company Appeal (AT) (Insolvency) No. 1001 of 2019

IN THE MATTER OF:

Regional Provident Fund Commissioner-I,
Ahmedabad ...Appellant

Vs.

Ramchandra D. Choudhary ...Respondent

Present: For Appellant: - Mr. Manish Dhir, Advocate

For Respondent: - Mr. Vishnu Sankar, Advocate
Mr. David Rao, Advocate for R-1 and Mr. Sriram P.
Advocate for R-3.
Ms. Shilpi Chowdhary and Mr. Jasdeep Dhillon,
Advocates.

Company Appeal (AT) (Insolvency) Nos. 354, 364, 404 & 1001 of 2019

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J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

In the 'Corporate Insolvency Resolution Process' of 'Rainbow Papers Limited'- ('Corporate Debtor'), the 'Resolution Professional' filed application under Section 30(6) r/w Section 31 of the Insolvency and Bankruptcy Code, 2016 ("I&B Code" for short) seeking approval of the 'Resolution Plan' submitted by 'Kushal Limited'.

2. In the said 'Corporate Insolvency Resolution Process', 'Tourism Finance Corporation of India Limited' ('Financial Creditor') moved Interlocutory Application No. 273 of 2018 alleging that the 'Tourism Finance Corporation of India Limited' (one of the Appellants herein) has been wrongly categorized as 'Unsecured Financial Creditor'.

3. Another Interlocutory Application No. 337 of 2018 was filed by 'Virag Enterprise', an 'Operational Creditor' (Appellant herein) alleging wrong distribution and delayed payment shown in the 'Resolution Plan'.

4. 'Sales Tax Officer (1), Kadi, Dist. Mehsana, Gujarat' (one of the Appellants) filed petition and prayed for payment of total dues of Rs.47,35,72,314/- towards Value Added Tax/ Central Sales Tax on the ground that the said 'Sales Tax Department' is a 'Secured Creditor'. Company Appeal (AT) (Insolvency) Nos. 354, 364, 404 & 1001 of 2019

5. The Adjudicating Authority (National Company Law Tribunal), Ahmedabad Bench, Ahmedabad, rejected the applications by reasoned order dated 27th February, 2019 and approved the 'Resolution Plan'.

6. The 'Resolution Plan' approved by impugned order dated 27th February, 2019 suggests part payment of 'Provident Fund'. The 'Regional Provident Fund Commissioner-I, Ahmedabad, challenged the same alleging the plan to the extent of 'Provident Fund', is violative of Section 30(2) (e) of the 'I&B Code'.

Case of Appellant- 'Tourism Finance Corporation of India Limited'

7. The case of the Appellant is that the 'Corporate Debtor' approached it for obtaining financial assistance for its business which was sanctioned by the Appellant with credit facility by way of corporate loan of Rs.30 Crores for meeting its capital requirements for expansion of paper manufacturing capacity. The said corporate loan had been secured by way of pledge of equity shares of 'Rainbow Papers Limited' and corporate guarantee of 'Orient Newsprint Limited'. Subsequent to availing the loan, the principal borrower and the guarantor committed persistent defaults in making payment of overdue principal amount and interest and the Appellant issued notices upon them on 4th April, 2016 and 15th April, 2016 calling upon them to make payment of Rs.21,20,71,823/- as on 1st April, 2016 which rose to Rs.22,48,28,156/- as on 30th September, 2017.

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8. It was submitted that in the 'Resolution Plan' dated 26th May, 2018 submitted by 'Kushal Limited', the claim of the Appellant was categorized as 'Secured Financial Creditor'. During the course of meeting of the 'Committee of Creditors' held on 4th June, 2018, it was casually informed by the 'Resolution Professional' that the claim of the Appellant is proposed to be categorized as 'Unsecured Financial Creditor'. Despite several protests and objections raised by the Appellant, the Addendum dated 5th June, 2018 to the 'Resolution Plan' replaced the Appellant from the category of 'Secured Financial Creditor' to 'Unsecured Financial Creditor'.

9. According to the Appellant, the Appellant was entitled to receive 38.27% of admitted claim with 19.14% amount as cash and the balance in the form of 5.22% debentures and 13.92% shares of the 'Corporate Debtor' to be paid over 18 months; as 'Unsecured Financial Creditor' was being offered 35% of admitted claim with only 10% in cash to be paid in 5 installments starting at the end of 3rd year and 25% as share warrants thus causing grave loss and prejudice to the Appellant also discriminating among the same class of 'Secured Financial Creditors'.

10. It was submitted that the action of the 'Resolution Plan' and the 'Committee of Creditors' which convened its meeting on 4th June, 2018 is against the provision of Section 30(4) of the 'I&B Code'. Company Appeal (AT) (Insolvency) Nos. 354, 364, 404 & 1001 of 2019

11. It was further submitted that the 'Resolution Professional' can only collate the claim but it has no jurisdiction to decide or adjudicate upon the nature and status of claim or debt.

12. The 'Resolution Professional' has raised preliminary objections about the maintainability of the appeal preferred by 'Tourism Finance Corporation of India Limited'.

13. It was submitted by the 'Resolution Professional' that the Interlocutory Application Nos. 273 & 224 of 2018 were preferred by the Appellant after the completion of the period of 'Corporate Insolvency Resolution Process' prescribed under the 'I&B Code' and order dated 12th September, 2017 r/w order dated 19th March, 2018 passed by the Adjudicating Authority.

14. It was contended that the 'Resolution Professional' had not changed the status of the Appellant from 'Secured Creditor' to 'Unsecured Creditor' or 'Unsecured Creditor' to 'Secured Creditor'. During the course of the meetings of the 'Committee of Creditors', the issue of classification of the Appellant as 'Secured Creditor' was discussed and the 'Committee of Creditors' had directed the 'Resolution Professional' to take necessary steps to ascertain the same. The 'Resolution Professional' addressed an e-mail dated 30th May, 2018 requesting the Appellant to substantiate its claim whether the same Company Appeal (AT) (Insolvency) Nos. 354, 364, 404 & 1001 of 2019 falls under the category of 'Secured Creditor', and if so, the security involved. The Appellant's response dated 30th May, 2018, failed to substantiate its claim as 'Secured Creditor' as contemplated under the 'I&B Code'.

15. The question as to whether the 'Tourism Finance Corporation of India Limited' is a 'Secured Creditor' or 'Unsecured Creditor' is a question of fact normally determined by the 'Resolution Professional' or the 'Committee of Creditors' or in appropriate cases it has also been discussed by the 'Committee of Creditors'.

16. The Adjudicating Authority (National Company Law Tribunal) or this Appellate Tribunal (National Company Law Appellate Tribunal) has no jurisdiction to decide the same in an appeal preferred under Section 61(3) of the 'I&B Code', which can be preferred for the grounds mentioned therein:

"61. Appeals and Appellate Authority. (3) An appeal against an order approving a resolution plan under section 31 may be filed on the following grounds, namely:--

(i) the approved resolution plan is in contravention of the provisions of any law for the time being in force;

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(ii) there has been material irregularity in exercise of the powers by the resolution professional during the corporate insolvency resolution period;

(iii) the debts owed to operational creditors of the corporate debtor have not been provided for in the resolution plan in the manner specified by the Board;

(iv) the insolvency resolution process costs have not been provided for repayment in priority to all other debts; or

(v) the resolution plan does not comply with any other criteria specified by the Board."

17. As the case of the Appellant- 'Tourism Finance Corporation of India Limited' was not covered by any of the grounds mentioned in Section 61(3) and this Appellate Tribunal cannot decide the question of fact relating to whether it is a 'Secured Creditor' or 'Unsecured Creditor', we are not inclined to interfere with the impugned order dated 27th February, 2019.

The appeal is dismissed.

Company Appeal (AT) (Insolvency) Nos. 354, 364, 404 & 1001 of 2019 Case of Appellant- 'Virag Enterprise'

18. The case of the Appellant- 'Virag Enterprise' is that the proof of the claim for Rs.41,01,098/- was provided to the 'Resolution Professional' along with the Affidavit dated 29th September, 2017 with all the relevant documents. The total amount of the claim included interest as on the Insolvency Commencement Date. However, the 'Resolution Professional' reduced the claim to Rs.29,38,689/-

without giving any explanation.

19. It was submitted that as per the 'Resolution Plan', the Appellant- 'Operational Creditor' will get cash payment of the 10% of the total outstanding amount in five equal installments from the 3rd to 7th year after the effective date.

20. It was stated by the Appellant- 'Virag Enterprise' that apart from 10% of the outstanding amount, the 'Resolution Plan' provides for issue of share warrant with an option to purchase the shares by paying 75% of the offer price within the next 18 months at their sole discretion. The initial subscription towards share warrant, which is 25%, is a credit given by the 'Resolution Applicant' to the Appellant. However, this provision is not compulsive and the Appellant- 'Operational Creditor' is not compelled to take the shares. Company Appeal (AT) (Insolvency) Nos. 354, 364, 404 & 1001 of 2019

21. It was submitted that by this arrangement, the 'Operational Creditor' will lose 65% of the amount, if the Appellant subscribed the shares.

22. Learned counsel for the Appellant submits that the 'Resolution Plan' is against Section 30(2) of the 'I&B Code' as the amount has not been paid within 30 days.

23. Though the aforesaid allegations have been made but the 'Resolution Applicant'- 'Kushal Limited' has not been impleaded as party, therefore, intervention application preferred by the 'Resolution Applicant' to dismiss the appeal being not maintainable.

24. In the present case, as we find that the 'Committee of Creditors' has made the distribution in terms of Section 30(4), this Appellate Tribunal has no jurisdiction to question the distribution so made.

25. Admittedly, the Appellant- 'Virag Enterprise' has been provided the amount more than the liquidation value, therefore, it cannot allege that the plan is violative of Section 30(2)(b) of the 'I&B Code'. If the Appellant does not accept the amount within the time frame, as proposed, in such case, it will not be entitled to receive any amount as the Appellant is not a 'Secured Creditor', it may not receive 10%.

26. The 'Resolution Plan' is not binding to accept the equity share. If the 'Unsecured Financial Creditors' exercise the option to convert Company Appeal (AT) (Insolvency) Nos. 354, 364, 404 & 1001 of 2019 Share Warrants into equity shares, only in such case, they are required to pay the balance subscription as mentioned in the plan which is the three times of the initial subscription amount out of the total amount of Share Warrants.

27. As the aforesaid issue is the question of commercial wisdom of the 'Committee of Creditors', this Appellate Tribunal cannot sit in an appeal over such decision of the 'Committee of Creditors' which approved the plan with more than 77.79% of the voting shares looking into the viability, feasibility and other factors prescribed by the Insolvency and Bankruptcy Board of India.

28. For the reasons aforesaid, we are not inclined to interfere with the impugned order dated 27th February, 2019. The appeal is dismissed.

Case of the Appellant- 'State Tax Officer- (1)'

29. The case of the Appellant- 'Sales Tax Officer- (1)', Kadi, Dist. Mehsana, Gujarat is that the demand of Rs.47,35,72,314/- towards Value Added Tax/ Central Sales Tax due from the 'Corporate Debtor' by Demand Notice in Form 305 under the 'Gujarat Value Added Tax, 2003, and Demand Notice in Form 8(B) under the Central Sales Tax Act, 1956 for the years 2012-13 to 2015-16 and as per return filed by Company Appeal (AT) (Insolvency) Nos. 354, 364, 404 & 1001 of 2019 the Dealer, the 'Corporate Debtor' for the period 1st March, 2016 to 30th June, 2016.

30. After Demand Notice, the matter was challenged and remained pending before the Gujarat Value Added Tax Tribunal at Ahmedabad. In the meantime, by order dated 12th September, 2017, the Adjudicating Authority declared Moratorium under Section 13(1) (a) and Section 14 of the 'I&B Code' since it has the overriding effect. The Adjudicating Authority while admitted the appeals but no order of pre- deposit and subsequently it remanded the matter to the First Appellate Authority.

31. It was submitted that the Appellant vide letter dated 22nd October, 2018 approached the 'Resolution Professional' of the 'Corporate Debtor' asking to confirm the amount of claim accepted by the 'Resolution Professional'. The 'Resolution Professional' in reply to his letter dated 22nd October, 2018 has informed the Appellant as under:

"Applicant's claim has been shown under the head "Proposal for Contingent liabilities of the Corporate Debtor' and all the above contingent liabilities which may or may not have been confirmed in the past, during or before the CIRP or even may be confirmed in the time to come are Company Appeal (AT) (Insolvency) Nos. 354, 364, 404 & 1001 of 2019 proposed to waived off fully. Even any other known or unknown (whether recorded or not recorded in books) are proposed to be waived of fully."

32. It was further submitted that the Appellant- 'Sales Tax Officer-

(1)' is a 'Secured Creditor' in terms of Section 48 of the 'Gujarat Value Added Tax, 2003' which creates first charge over the property of the dealer and can be termed as 'Secured Creditor', having security interest by way of a statutory first charge over the property in question.

33. Reliance has also been placed on definition of 'Secured Creditor' as defined under Section 3(30) and 'Security Interest' as defined under Section 3(31) of the 'I&B Code'.

34. The Adjudicating Authority noticed that the Appellant approached the 'Resolution Professional' on 22nd October, 2018 whereas the 'Resolution Plan' dated 26th May, 2018 along with Addendum dated 5th June, 2018 was approved by the 'Committee of Creditors' with voting majority of 72.79 per cent in favour of the 'Resolution Plan'. Thus, the claim was made by the Appellant at a much belated

stage not only before the 'Resolution Professional' but also before the Adjudicating Authority.

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35. We find that the Appellant has not filed claim within time. It approached the 'Resolution Professional' at belated stage after approval of the 'Resolution Plan' by the Adjudicating Authority.

36. Learned counsel for the 'Resolution Professional' submitted that the claim of the Appellant- 'State Tax Officer- (1)' comes within the meaning of 'Operational Debt' as defined under Section 5(21). The claim of the Appellant also does not fall within the meaning of 'Secured Creditor' as defined under Section 3(30) read with Section 3(31) of the 'I&B Code'.

37. Section 48 of the 'Gujarat Value Added Tax Act, 2003' is under:

"48. Notwithstanding anything to the contrary contained in any law for the time being in force, any amount payable by a dealer or any other person on account of tax, interest or penalty for which he is liable to pay to the Government shall be a first charge on the property of such dealer, or as the case may be, such person."

38. In view of Statement of Objects and Reasons of the 'I&B Code' read with Section 53 of the 'I&B Code', the Government cannot claim first charge over the property of the 'Corporate Debtor'. Section 48 cannot prevail over Section 53. Therefore, the Appellant- 'State Tax Company Appeal (AT) (Insolvency) Nos. 354, 364, 404 & 1001 of 2019 Officer- (1)' do not come within the meaning of 'Secured Creditor' as defined under Section 3(30) read with Section 3(31) of the 'I&B Code'.

39. Further, as 'Sales Tax Department' filed its claim at belated stage after the plan had been approved by the 'Committee of Creditors', the 'Resolution Professional' had no jurisdiction to entertain the same and rightly not entertained.

We find no merit in this appeal preferred by 'State Tax Officer (1)'. It is accordingly dismissed. No costs.

Case of the Appellant- 'Regional Provident Fund Commissioner-I, Ahmedabad'

40. According to Appellant- 'Regional Provident Fund Commissioner', 'Successful Resolution Applicant' is supposed to pay the total provident fund amount, but only a part of the amount has been allowed by the 'Resolution Professional'.

41. It was submitted that the 'Resolution Plan' is against the provisions of Section 36(4) (iii) of the 'I&B Code' as per which the 'provident fund' and 'gratuity fund' cannot be included as assets of the 'Corporate Debtor'.

42. An Affidavit has been filed by 'Kushal Limited'- ('Successful Resolution Applicant') stating that the approved 'Resolution Plan' has duly taken care of all the statutory dues amounting to total

Rs.5.09 Company Appeal (AT) (Insolvency) Nos. 354, 364, 404 & 1001 of 2019 crore. It was further submitted that the principal amount of 'provident fund' has been taken into consideration whereas the order of levying of interest by the 'PF Authority' post 'Corporate Insolvency Resolution process' is not permissible under the law for the time being in force.

43. Further, according to 'Successful Resolution Applicant', Section 7Q and 14B of the 'Employees Provident Funds and Miscellaneous Provision Act, 1952' cannot be relied upon as the provision of the 'I&B Code' has overriding effect on the same in terms of Section 238 of the 'I&B Code'.

44. However, as no provisions of the 'Employees Provident Funds and Miscellaneous Provision Act, 1952' is in conflict with any of the provisions of the 'I&B Code' and, on the other hand, in terms of Section 36 (4) (iii), the 'provident fund' and the 'gratuity fund' are not the assets of the 'Corporate Debtor', there being specific provisions, the application of Section 238 of the 'I&B Code' does not arise.

45. Therefore, we direct the 'Successful Resolution Applicant'- 2nd Respondent ('Kushal Limited') to release full provident fund and interest thereof in terms of the provisions of the 'Employees Provident Funds and Miscellaneous Provision Act, 1952' immediately, as it does not include as an asset of the 'Corporate Debtor'. The impugned order dated 27th February, 2019 approving the 'Resolution Plan' stands modified to the extent above.

Company Appeal (AT) (Insolvency) Nos. 354, 364, 404 & 1001 of 2019 The appeal preferred by 'Regional Provident Fund Commissioner' is allowed with aforesaid observations and directions. No costs.

46. In the result, Company Appeal (AT) (Insolvency) Nos. 354, 364 & 404 of 2019 are dismissed. Company Appeal (AT) (Insolvency) No. 1001 of 2019 is allowed. No costs.

(Justice S.J. Mukhopadhyaya) Chairperson (Justice Bansilal Bhat) Member(Judicial) (Justice Venugopal M) Member(Judicial) NEW DELHI 19th December, 2019 AR Company Appeal (AT) (Insolvency) Nos. 354, 364, 404 & 1001 of 2019