

Idbi Bank Ltd vs Shri Dinkar Tiruvannandapuram ... on 19 August, 2019

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Ins) No. 480 of 2018

IN THE MATTER OF:

Kotak Mahindra Bank Ltd.Appellant
Vs.
Amtek Auto Ltd. & Ors.Respondents
Present:

For Appellant: Mr. Arun Kathpalia and Mr. Amit Sibal, Sr.
Advocates with Mr. Kaushik Moitra, Ms. Sonam
Gupta, Mr. Anurag Tandon, Mr. Aishwary Vikram
and Mr. Soham Kumar, Advocates.

For Respondents: Ms. Srishti Kapoor, Advocate for RP
Mr. Yashvardhan, Mr. Kanishk Rana and Mr.
Kritika Nagpal, Advocates
Ms. Prachi Johri, Advocates for R-3.

With

Company Appeal (AT) (Ins) No. 531 of 2018

IN THE MATTER OF:

Central Bank of IndiaAppellant
Vs.
Dinkar T. Venkatasubramanian, R.P.Respondent
for Amtek Auto Ltd.
Present:

For Appellant: Mr. Debal Benerjee, Sr. Advocate with Ms. Reema
Khurana, Mr. Kartik Rathi, Advocates and
Mrs. Swarnima Singh, Law Officer
Mr. Rahul Raj Mishra and Mr. Krishan Kumar,
Advocates.

For Respondent: Ms. Srishti Kapoor, Advocate for RP
Ms. Prachi Johri, Advocate for R-2.

2

With

Company Appeal (AT) (Ins) No. 561 of 2018

IN THE MATTER OF:

Madhur Engineers Pvt. Ltd.

....Appellant

Vs.

Amtek Auto Ltd. & Ors.

....Respondents

Present:

For Appellant: Mrs. Purti Marwaha and Ms. Henna George,
Advocates.

For Respondents: Ms. Srishti Kapoor, Advocate for RP

With

Company Appeal (AT) (Ins) No. 612 of 2018

IN THE MATTER OF:

IDBI Bank Ltd.

....Appellant

Vs.

Shri Dinkar Tiruvannandapuram

....Respondent

Venkatasubramanian

R.P of Amtek Auto Ltd.

Present:

For Appellant: Mr. Sanjay Bhatt, Advocate

For Respondents: Ms. Srishti Kapoor, Advocate for RP

With

Company Appeal (AT) (Ins) No. 613 of 2018

IN THE MATTER OF:

Company Appeal (AT) (Insol.) Nos.480, 531, 561, 612 & 613 of 2018

3

IDBI Bank Ltd.

....Appellant

Vs.

Shri Dinkar Tiruvannandapuram

....Respondent

Venkatasubramanian

R.P of Amtek Auto Ltd.

Present:

For Appellant: Mr. Sanjay Bhatt, Advocate for RP

For Respondents:

Ms. Srishti Kapoor, Advocate for RP

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

Pursuant to an application under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("I&B Code" for short) filed by the 'Corporation Bank', the 'Corporate Insolvency Resolution Process' was initiated against 'Amtek Auto Limited' ('Corporate Debtor') on 25th July, 2018. In the said case, the 'Resolution Professional' filed one application CA No. 08 of 2018 seeking extension of the period of completion of Insolvency Resolution Process based on the decision taken in 5th Meeting of the 'Committee of Creditors' held on 6th December, 2017 and the period was extended by another 90 days by order dated 17th January, 2018.

2. 'Kotak Mahindra Bank' filed one CA No. 61 of 2018; 'ICICI Bank' filed another CA No. 77 of 2018; 'IDBI Bank' filed CA No. 177 & 178 of 2018 and the 'Central Bank of India' filed CA No. 72 of 2018 before the Adjudicating Authority.

Company Appeal (AT) (Insol.) Nos.480, 531, 561, 612 & 613 of 2018

3. The Applicant Banks stated that they filed their respective claims pursuant to the public announcement on 10th August, 2017 in Form C stating therein even the amount payable under Onshore Facility Agreement for which the Appellant Banks filed document in support of such claim. The 'Resolution Professional' rejected the claim or part thereof. It was in this background, the aforesaid applications being CA Nos. 61, 77, 177, 178 and 72 of 2018 were preferred by the Appellant Banks under sub-section (5) of Section 60 of the 'I&B Code'.

4. The Adjudicating Authority having not granted any relief, the appeals have been preferred by the Appellant Banks.

5. The Appellant- 'Madhur Engineers Pvt. Ltd.' claimed to be 'Operational Creditor' and also filed its claim before the 'Resolution Professional'. According to this Appellant, it was duly admitted at Rs.8,29,23,137/-. The 'Resolution Plan' for 'Amtek Auto Ltd.' though has already been approved but whose contents were not disclosed to the Appellant and, therefore, the Appellant is aggrieved by the impugned order dated 25th July, 2018.

6. Learned counsel appearing on behalf of the Appellants relied on Section 21(1) of the 'I&B Code' and submitted that the 'Interim Resolution Professional' is required to collate all claims received against the 'Corporate Debtor'.

Company Appeal (AT) (Insol.) Nos.480, 531, 561, 612 & 613 of 2018

7. Reliance has been placed on Section 25(2) (e) and submitted that it was the duty of the 'Resolution Professional' to maintain an updated list of claims.

8. Reliance has also been placed on Section 29 (1) to suggest that the 'Resolution Professional' was required to prepare an information memorandum in such form and manner containing such relevant information as may be specified by the Board for formulating a 'Resolution Plan' which should include the claims of all the Creditors'.

9. Reliance has also been placed on the decision of the Hon'ble Supreme Court in "Swiss Ribbons Pvt. Ltd. & Anr. vs. Union of India & Ors." 2019 SCC OnLine SC 73" to suggest that the 'Resolution Professional' has no adjudicatory powers, relevant portion of which reads as follows:

"RESOLUTION PROFESSIONAL HAS NO ADJUDICATORY POWERS.

85. It is clear from a reading of the Code as well as the Regulations that the resolution professional has no adjudicatory powers. Section 18 of the Code lays down the duties of an interim resolution professional as follows:

Company Appeal (AT) (Insol.) Nos.480, 531, 561, 612 & 613 of 2018 "18. Duties of interim resolution professional.--(1) The interim resolution professional shall perform the following duties, namely--

(a) collect all information relating to the assets, finances and operations of the corporate debtor for determining the financial position of the corporate debtor, including information relating to--

(i) business operations for the previous two years;

(ii) financial and operational payments for the previous two years;

(iii) list of assets and liabilities as on the initiation date; and

(iv) such other matters as may be specified;

(b) receive and collate all the claims submitted by creditors to him, pursuant to the public announcement made under Sections 13 and 15;

Company Appeal (AT) (Insol.) Nos.480, 531, 561, 612 & 613 of 2018

(c) constitute a committee of creditors;

(d) monitor the assets of the corporate debtor and manage its operations until a resolution professional is appointed by the committee of creditors;

(e) file information collected with the information utility, if necessary; and

(f) take control and custody of any asset over which the corporate debtor has ownership rights as recorded in the balance sheet of the corporate debtor, or with information utility or the depository of securities or any other registry that records the ownership of assets including--

(i) assets over which the corporate debtor has ownership rights which may be located in a foreign country;

(ii) assets that may or may not be in possession of the corporate debtor;

Company Appeal (AT) (Insol.) Nos.480, 531, 561, 612 & 613 of 2018

(iii) tangible assets, whether movable or immovable;

(iv) intangible assets including intellectual property;

(v) securities including shares held in any subsidiary of the corporate debtor, financial instruments, insurance policies;

(vi) assets subject to the determination of ownership by a court or authority;

(g) to perform such other duties as may be specified by the Board.

Explanation.--For the purposes of this section, the term ☐assets shall not include the following, namely--

(a) assets owned by a third party in possession of the corporate debtor held under trust or under contractual

arrangements including
bailment;

Company Appeal (AT) (Insol.) Nos.480, 531, 561, 612 & 613 of 2018

(b) assets of any Indian or foreign subsidiary of the corporate debtor; and

(c) such other assets as may be notified by the Central Government in consultation with any financial sector regulator."

86. Under the CIRP Regulations, the resolution professional has to vet and verify claims made, and ultimately, determine the amount of each claim as follows: □"10. Substantiation of claims.--The interim resolution professional or the resolution professional, as the case may be, may call for such other evidence or clarification as he deems fit from a creditor for substantiating the whole or part of its claim.

xxx xxx xxx □Company Appeal (AT) (Insol.) Nos.480, 531, 561, 612 & 613 of 2018

12. Submission of proof of claims.--(1) Subject to sub-

regulation (2), a creditor shall submit claim with proof on or before the last date mentioned in the public announcement.

(2) A creditor, who fails to submit claim with proof within the time stipulated in the public announcement, may submit the claim with proof to the interim resolution professional or the resolution professional, as the case may be, on or before the ninetieth day of the insolvency commencement date.

(3) Where the creditor in sub-

regulation (2) is a financial creditor under regulation 8, it shall be included in the committee from the date of admission of such claim:

Company Appeal (AT) (Insol.) Nos.480, 531, 561, 612 & 613 of 2018 Provided that such inclusion shall not affect the validity of any decision taken by the committee prior to such inclusion.

13. Verification of claims.--

(1) The interim resolution professional or the resolution professional, as the case may be, shall verify every claim, as on the insolvency commencement date, within seven days from the last date of the

receipt of the claims, and thereupon maintain a list of creditors containing names of creditors along with the amount claimed by them, the amount of their claims admitted and the security interest, if any, in respect of such claims, and update it.

(2) The list of creditors shall be-

Company Appeal (AT) (Insol.) Nos.480, 531, 561, 612 & 613 of 2018

(a) available for inspection by the persons who submitted proofs of claim;

(b) available for inspection by members, partners, directors and guarantors of the corporate debtor;

(c) displayed on the website, if any, of the corporate debtor;

(d) filed with the Adjudicating Authority; and

(e) presented at the first meeting of the committee.

14. Determination of amount

of claim.--(1) Where the amount claimed by a creditor is not precise due to any

contingency or other reason, the interim resolution professional Company Appeal (AT) (Insol.) Nos.480, 531, 561, 612 & 613 of 2018 or the resolution professional, as the case may be, shall make the best estimate of the amount of the claim based on the information available with him.

(2) The interim resolution professional or the resolution professional, as the case may be, shall revise the amounts of claims admitted, including the estimates of claims made under sub-regulation (1), as soon as may be practicable, when he comes across additional information warranting such revision."

87. It is clear from a reading of these Regulations that the resolution professional is given administrative as opposed to quasi-judicial powers. In fact, even when the resolution professional is to make a "determination" under Regulation 35A, he is only to apply to the Adjudicating Authority for Company Appeal (AT) (Insol.) Nos.480, 531, 561, 612 & 613 of 2018 appropriate relief based on the determination made as follows:

"35A. Preferential and other transactions.--(1) On or before the seventy-fifth day of the insolvency commencement date, the resolution professional shall form an opinion whether the corporate debtor has been subjected to any transaction covered under sections 43, 45, 50 or 66.

(2) Where the resolution professional is of the opinion that the corporate debtor has been subjected to any transactions covered under sections 43, 45, 50 or 66, he shall make a determination on or before the one hundred and fifteenth day of the insolvency Company Appeal (AT) (Insol.) Nos.480, 531, 561, 612 & 613 of 2018 commencement date, under intimation to the Board.

(3) Where the resolution professional makes a determination under sub-

regulation (2), he shall apply to the Adjudicating Authority for appropriate relief on or before the one hundred and thirty-

fifth day of the insolvency commencement date.

88. As opposed to this, the liquidator, in liquidation proceedings under the Code, has to consolidate and verify the claims, and either admit or reject such claims under Sections 38 to 40 of the Code. Sections 41 and 42, by way of contrast between the powers of the liquidator and that of the resolution professional, are set out herein below:

"41. Determination of valuation of claims.--The liquidator shall determine the value of claims admitted under Company Appeal (AT) (Insol.) Nos.480, 531, 561, 612 & 613 of 2018 Section 40 in such manner as may be specified by the Board.

42. Appeal against the decision of liquidator.--A creditor may appeal to the Adjudicating Authority against the decision of the liquidator accepting or rejecting

the claims within fourteen days of the receipt of such decision."

89. It is clear from these Sections that when the liquidator "determines" the value of claims admitted under Section 40, such determination is a "decision", which is quasi-judicial in nature, and which can be appealed against to the Adjudicating Authority under Section 42 of the Code.

90. Unlike the liquidator, the resolution professional cannot act in a number of matters without the approval of the committee of creditors under Section 28 of the Code, which can, by a two-thirds majority, replace one resolution professional with another, in case they are unhappy with his performance. Thus, the resolution professional is really a facilitator of Company Appeal (AT) (Insol.) Nos.480, 531, 561, 612 & 613 of 2018 the resolution process, whose administrative functions are overseen by the committee of creditors and by the Adjudicating Authority."

10. In view of the aforesaid position, on the ground that the 'Resolution Professional' has wrongly decided the claims of the Appellant Banks by rejecting their claims, the application under Section 60(5) was preferred by the Appellants, which according to the Appellants have not been properly adjudicated by the Adjudicating Authority.

11. Learned counsel appearing on behalf of the 'Resolution Professional' supported the action taken by him.

12. The impugned order dated 25th July, 2018 fell for consideration before this Appellate Tribunal in "Committee of Creditors of Amtek Auto Ltd. through Corporation Bank Vs. Mr. Dinkar T.Venkatasubramanian & Ors. etc.□Company Appeal (AT) (Insolvency) Nos. 219, 442 and 443 of 2019" wherein this Appellate Tribunal noticed that the plan which was approved in favour of 'M/s. Liberty House Group Pte Ltd.' ('Successful Resolution Applicant') was not acted upon. When the question of implementation of the approved 'Resolution Plan' of 'M/s. Liberty House Group Pte Ltd.' was taken up by the 'Resolution Professional', it was stated that in spite of e-mail sent on 5th September, 2018 and detailed e-mail on 12th September, 2018, no Company Appeal (AT) (Insol.) Nos.480, 531, 561, 612 & 613 of 2018 favourable response was received by 'M/s. Liberty House Group Pte Ltd.' whose plan has been approved by impugned order dated 25th July, 2018.

13. This Appellate Tribunal by its judgment dated 16th August, 2019 while taking into consideration the nature of the case and the provisions of the 'I&B Code', observed and held as follows:

"37. We have already observed that in case where the 'Resolution Plan' earlier approved within a reasonable period of 180 days or much before completion of 270 days, one may request the Adjudicating Authority to allow the 'Resolution Professional'/ 'Committee of Creditors' to consider the pending 'Resolution Plan(s)' or to call for fresh 'Resolution Plan'/ 'Revised Resolution Plan', in absence of any application under Section 33(3) filed by any person whose interest is prejudicially affected by contravention of the plan by the 'Corporate Debtor'.

However, as we have noted that more than 270 days have been completed much earlier and no case is made out to exclude any period, we hold that the Adjudicating Authority has no other option but to pass order of liquidation. Company Appeal (AT) (Insol.) Nos.480, 531, 561, 612 & 613 of 2018

38. It is made clear that once order of liquidation is passed, the liquidator is required to follow the procedure laid down under the 'I&B Code', including Sections 35, 36, 37, 38, 39 and 40 etc. as also the procedure laid down under Section 230 of the Companies Act, 2013 as held by this Appellant Tribunal in "Y. Shivram Prasad Vs. S. Dhanapal & Ors. □ Company Appeal (AT) (Insolvency) No. 224 of 2018".

14. In view of the fact that this Appellate Tribunal by its judgment aforesaid dated 16th August, 2019 has ordered for liquidation of 'Amtek Auto Limited'- ('Corporate Debtor') and has set aside the impugned order dated 25th July, 2018, the question of any decision on the claim of the Appellants is not required to be determined, which they may claim before the Liquidator.

15. The liquidator is now required to collate and settle the claim(s) as empowered under Section 35 (j), after access of information under Section 37 thereafter required to consolidate the claim under Section 38 and after verification of claims under Section 39 may either admit or reject the claim or part thereof under Section 40. Thereafter, if any person aggrieved Company Appeal (AT) (Insol.) Nos.480, 531, 561, 612 & 613 of 2018 against the decision of the liquidator may prefer an appeal under Section 42 before the Adjudicating Authority.

16. In view of the aforesaid development, now it is not required to pass any order on merit as the matter is required to be determined afresh by the liquidator. The Appellants are given liberty to file their respective claim before the liquidator and the liquidator will decide the same in accordance with the provisions, as referred to above, and in pursuance of the decision of the Hon'ble Supreme Court in "Swiss Ribbons Pvt. Ltd. & Anr." (Supra).

All the appeals stand disposed of with aforesaid observations and directions. No costs.

[Justice S.J. Mukhopadhyaya] Chairperson [Justice Bansi Lal Bhat] Member (Judicial) NEW DELHI
19th August, 2019 AR Company Appeal (AT) (Insol.) Nos.480, 531, 561, 612 & 613 of 2018