Between the lines...

VAISH ASSOCIATES ADVOCATES ESTD. 1971

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I. NCLT: Corporate debtor cannot be sent into liquidation just because liquidation value is more than the value of the resolution plan.

The National Company Law Tribunal, Kolkata ("**NCLT**") has in its order dated April 6, 2022, in the matter of ***CFM Asset Reconstruction Private Limited v. S. S. Natural Resources Private Limited and Another [IA No. 538/KB/2021 in CP (IB) No. 349/KB/2017]*** held that a corporate debtor cannot be sent into liquidation just because liquidation value is more than the value of the resolution plan.

Facts

Ramsarup Industries Limited ("**Corporate Debtor**") was admitted into corporate insolvency resolution process ("**CIRP**") under Section 10 of the Insolvency and Bankruptcy Code, 2016 ("**IBC**"). Subsequently, the resolution plan submitted by S. S. Natural Resources Private Limited ("**SRA/ Successful Resolution Applicant**") was approved by the committee of creditors ("**CoC**") and the adjudicating authority. Upon approval of the resolution plan, nine appeals were preferred before the National Company Law Appellate Tribunal ("**NCLAT**"). One of the appeals was preferred by SRA on the grounds that the adjudicating authority has materially changed and altered the plan by imposing additional financial obligations on SRA.

There was another appeal of interest, filed by Vanguard Credit and Holdings Private Limited ("**Vanguard**") before the Hon'ble Supreme Court ("**SC**") ("**Vanguard Appeal**"). Vanguard was claiming to be owner of the land on which factory of the Corporate Debtor is situated. During the pendency of Vanguard's appeal, the SRA did not take any steps for implementation of the plan and waited for the decision of the SC. The promoter of the Corporate Debtor also challenged the approval of the resolution plan.

The NCLAT by its common order dated March 4, 2021 ("**NCLAT Order**") dismissed the appeals. It directed the monitoring committee to start taking steps to implement the resolution plan. It further directed that in case of failure by SRA to implement the resolution plan, an application for liquidation of the Corporate Debtor should be moved before the adjudicating authority, without any further delay.

Vanguard and SRA, both preferred a civil appeal before the SC. However, SRA's appeal was dismissed, on May 4, 2021, on grounds of lack of substantial question of law. SRA decided to wait for the decision of the SC in Vanguard's Appeal. However, the appeal was dismissed by order dated July 2, 2021.

Pursuant to the NCLAT Order, the chairman of the monitoring agency, which was overseeing the implementation of the resolution plan, issued a notice calling for the seventh meeting of the monitoring agency. In that meeting, SRA expressed its willingness to implement the resolution plan subject to some conditions. Further, SRA was unwilling to release the upfront payment to the monitoring agency to meet the CIRP costs and also objected to utilisation of the performance security until the Vanguard Appeal was decided by the SC.

SRA in an e-mail drew attention to the aforesaid meeting, stating that the demand by the monitoring committee to compensate the financial creditors, on account of delay in implementation of the resolution plan, is unjustified. Further, SRA also contended that it should be permitted to deposit the CIRP costs in an escrow account and its disbursement be kept on hold. The disbursement of the performance security and the interest earned thereon should also be kept on hold till disposal of the Vanguard Appeal that was pending before the SC.

CFM Asset Reconstruction Private Limited ("**Applicant**") alleged that SRA had miserably delayed implementation of the resolution plan. Such delay had significantly depleted the time value of money and resulted in loss of business opportunity for the creditors and other stakeholders. Therefore, the creditors and stakeholders should be compensated adequately for such loss.

It was in this conspectus of facts that the interlocutory application was filed by the Applicant seeking (i) liquidation of the Corporate Debtor; (ii) direction against the monitoring agency to forfeit the performance security amount deposited by SRA; and (iii) seeking payment of interest by SRA from the date of approval of the resolution plan till the implementation of the resolution plan by SRA.

Issue

Whether a corporate debtor can be sent into liquidation just because liquidation value is more than the value of the resolution plan.

Arguments

Contentions raised by the Applicant:

The Applicant submitted that the adjudicating authority approved the resolution plan on September 4, 2019. Despite this, SRA went up in appeal challenging this approval. Ultimately, the NCLAT dismissed the appeal. Appeals were also preferred before the SC and the important fact is that on May 4, 2021, the SC dismissed SRA's appeal and affirmed the order of the NCLAT. Therefore, insofar as SRA was concerned, the approved resolution plan had become final and binding.

The Applicant further submitted that after the order of the SC, there were several meetings of the monitoring committee. However, no steps had been taken. SRA put in a condition that whatever money it puts in must remain in escrow. Whatever money it puts in for day-to-day operation is subject to the monies being refunded to SRA in the event of the success of the Vanguard Appeal. This condition has been imposed after the resolution plan had been challenged right up to the SC, which appeal was dismissed. Therefore, SRA does not appear to be interested in implementation, which is why the Applicant has now applied for liquidation.

Further, various observations were noted that proved that the real intent of SRA was to wriggle out from implementation of the approved resolution plan. In spite of this, the NCLAT gave SRA a second lease of life to implement the resolution plan, with a condition that if it fails, the Corporate Debtor should be sent into liquidation.

On May 23, 2021, a mail was sent by SRA, which was squarely in breach of the approved resolution plan. Conditions were sought to be brought in apropos the implementation of the resolution plan, among which was that (i) performance security amount of INR 35 crores (provided to the resolution professional), which was encashed by the CoC in January 2020, to not be disbursed; and (ii) the entire implementation of the resolution plan was now made conditional on the result of the Vanguard Appeal. According to the Applicant, this shows that SRA had acted in breach of the resolution plan, and that it sought to impose conditions on implementation of the resolution plan after its approval by the adjudicating authority, the appellate tribunal and the SC, which is not permitted in law.

Subsequently, an interim application was filed on June 8, 2021 for liquidation of the Corporate Debtor in view of non-implementation of the resolution plan by SRA. The Applicant submitted that the breach having been committed, the Corporate Debtor should now be sent into liquidation.

It was further submitted that SRA had made incorrect statements in its reply affidavit. SRA had averred that to demonstrate its *bona fide* intention, payments towards workmens' dues had been made. However, some of the items stated therein could not be treated as payments. When the breaches occurred, they were accepted as breaches by SRA.

The Applicant stated that SRA had delayed the implementation of the approved resolution plan by about 21 months, and now SRA is unwilling to implement the resolution plan unconditionally. The liquidation value in terms of the approved resolution plan was far more than the enterprise value for which the resolution plan of SRA had been approved. Since SRA had frustrated the entire exercise of the CIRP and the assets of the Corporate Debtor were depleting with time, it would leave all the stakeholders in a state of devastation.

Further, it was submitted that the resolution plan was approved in 2019 based on the valuation for the year 2018. Successive appeals by SRA should not be a ground for condonation of delay in implementation of the Resolution Plan. SRA had no reason to wait for the Vanguard Appeal to be decided by the SC.

Further, the Applicant submitted that one of the objectives of the IBC is maximisation of assets. If such maximisation lies in liquidation, then no advantage is to be gained by allowing implementation of a resolution plan after more than two years.

The Applicant also submitted that Section 33(4) of the IBC enjoins the adjudicating authority to pass an order of liquidation. The issue is to determine whether there is a default or not. The mandate of the statute is that if there is a default, the liquidation order must follow.

It is an accepted fact that after March 4, 2021, SRA did not comply with the timelines of the NCLAT Order or what was provided for in the resolution plan. In fact, right from March 4, 2021 to May 4, 2021, when SRA's appeal to the SC got dismissed, there was no step taken under the resolution plan.

SRA said that the IBC is concerned with resolution and not liquidation of the corporate debtors, on the basis that the preamble does not speak of liquidation. The Applicant conceded that this was true, but liquidation is the consequence of failure of resolution.

Section 33(4) of the IBC requires that a liquidation order shall be passed, if the adjudicating authority determines that the corporate debtor has contravened the provisions of the resolution plan. The Applicant submitted that the fundamental issue is whether the resolution plan and its implementation was resisted after the NCLAT Order. If the determination was that it was so, then that is the end of the matter. Even if the term "shall", occurring in Section 33(4) of the IBC, was to be read as "may," no discretion should be exercised in favour of SRA, because it did not comply with its obligations even though an appeal remained pending.

Contentions raised by SRA:

SRA submitted that Vanguard filed an appeal against the NCLAT Order, since it was the owner of the land in which the factory of the Corporate Debtor was situated. The resolution plan provided that the land will come to the Corporate Debtor. This was a key feature of the resolution plan.

SRA further submitted that in the case of ***Babulal Vardharji Gurjar v. Veer Gurjar Aluminium Industries Private Limited and Another*** ("**Veer Gurjar Judgment**")**,** the SC held that the primary focus of the IBC is to ensure revival and continuation of the corporate debtor and, as far as feasible, to save it from liquidation. The SC had reiterated that the IBC is not a mere recovery legislation for creditors. If that is the principle of the IBC, then a creditor who files an application for commencing liquidation proceeding after the resolution plan has been approved, and that too only for the purpose of realising a higher value, should be discouraged and such application ought not to be entertained by the adjudicating authority.

SRA further submitted that the Vanguard land is recognised in the NCLAT Order. Therefore, the Vanguard Appeal becomes important and central to the resolution plan, without which the implementation was in jeopardy. If Vanguard was allowed to pull out, then the resolution plan would have failed, since there would be no resolution plan to be implemented at all. Naturally, SRA waited for the Vanguard Appeal to be decided.

Furthermore, SRA submitted that when an appeal is filed from an order and the appeal is disposed of, the original order is no longer enforceable. Therefore, the enforceable order is only of March 4, 2021, since the order of the adjudicating authority had now merged in the order of the appellate tribunal. He submitted that the adjudicating authority cannot now look into the conduct of SRA. The same principle will apply once the statutory appeal is filed before the SC against the NCLAT Order. Automatically, the NCLAT Order will merge into the order of the SC. SRA submitted that if a statutory remedy is available, then the order of the appellate forum will hold the field. So, at least before the May 4, 2021 judgment of the SC in SRA's appeal, nothing survives. At this point, at best, the order dismissing Vanguard's Appeal survives. Hence, once an appeal is filed, the matter is no longer enforceable.

On July 2, 2021, the SC dismissed Vanguard's Appeal. SRA addressed an e-mail on the same day to the monitoring agency. On July 7, 2021, SRA offered to implement the entire resolution plan. However, at the meeting, the Applicant stated that unless interest was paid, it would oppose implementation of the approved resolution plan. Therefore, after July 7, 2021, all delay in implementation is attributable to the Applicant, which prevented the monitoring agency and SRA from implementing the resolution plan.

SRA urged the adjudicating authority to take a holistic picture. The adjudicating authority is not a forum for creditors to come and ask for interest for delay. The adjudicating authority must look at the conduct of the creditor, just as it must look at the conduct of SRA also. It pointed out that only one creditor, that is, the Applicant, is asking for interest, and that too after preventing the monitoring agency and SRA from implementing the resolution plan. Therefore, the creditor cannot use

the forum of the adjudicating authority to arm-twist SRA to part with additional interest.

Observations of the NCLT

The NCLT observed that it was absolutely clear that the land standing in the name of Vanguard was the centrepiece of the entire resolution plan. It further noted that SRA had requested that the payments made by SRA towards, *inter alia*, workmen's dues, be kept in an escrow account and not be distributed to the creditors because such distribution will cause irretrievable harm to SRA. The NCLT did not consider this to be an unreasonable request, or one that reflects any *mala fide* conduct on the part of SRA.

The NCLT further observed that, as judicially noticed by the SC in the Veer Gurjar Judgment**,** the preamble of the IBC lays a lot of emphasis on insolvency resolution within the timelines prescribed. Liquidation should be the last resort, when everything else has been attempted and failed. In the present case, there is a successful resolution applicant who is ready and willing to implement the approved resolution plan as it is. Although there were some delays in the insolvency resolution process of the Corporate Debtor, attributable to the fact that many appeals came to be filed right upto the SC, now there is a situation where SRA has parked the entire resolution amount in an account separately earmarked for this purpose. This amount is now ready and available for utilisation by various stakeholders.

The Applicant is admittedly pursuing its application for liquidation because the liquidation value is more than the enterprise value. That cannot be a ground for sustaining this application, nor is it in line with the objects of the IBC.

SRA was certainly at fault in not taking steps for implementation of the approved resolution plan after the NCLAT Order, coming up with the condition that until the Vanguard Appeal is decided, it is not in a position to implement the resolution plan.

Judgment

In light of the above observations, the NCLT noted that a mechanical interpretation that once a default is established, then liquidation should be the result, would not subserve the purposes of the IBC. Therefore, the NCLT directed that the management of the Corporate Debtor be transferred to SRA so that the resolution plan be completed. Accordingly, the interlocutory applications were dismissed by the NCLT.

VA View:

In this Judgement, the NCLT has very rightly interpreted and upheld the spirit of the IBC. The NCLT correctly observed that the liquidation value being more than the enterprise value cannot be a ground for sustaining the application, nor is it in line with the objects of the IBC. Sending the Corporate Debtor into liquidation just because the liquidation value is more than the enterprise value, would not be in keeping with the objectives of the IBC.

The IBC is not about maximising value at all costs if it means death of the corporate debtor. Liquidation should be the last resort, when everything else has been attempted and failed. A purposive interpretation is called for when it comes to construction of the terms used in various provisions of the IBC. The whole idea of the IBC is to put the corporate debtor back on its feet for the larger benefit of all the stakeholders and not just the creditors.

II. NCLAT: Nil payment to operational creditors is permissible under the resolution plan.

The National Company Law Appellate Tribunal ("**NCLAT**") has in the judgement dated April 7, 2022 ("**Judgement**"), in the matter of ***M/s. Genius Security and Allied Services v. Shivadutt Bannanje and Another [Company Appeal (AT) (Insolvency) No. 110 of 2021]*** held that nil payment to operational creditors is permissible under the resolution plan if the liquidation value is less than the admitted claims of the corporate debtor.

Facts

In the instant case, two appellants had approached the NCLAT under Section 61 (*Appeals and Appellate Authority*) of the Insolvency and Bankruptcy Code, 2016 ("**IBC**") against the impugned order dated January 29, 2021 ("**Impugned Order**") passed by the National Company Law Tribunal, Bengaluru ("**NCLT**"). Since two appellants had challenged the Impugned Order, the NCLAT disposed off both appeals by passing a common Judgement.

The appellants, namely M/s. Genius Security and Allied Services ("**Appellant No. 1**") and M/s. RCC Mix ("**Appellant No. 2**") provided security and housekeeping services for the projects undertaken by M/s. Fortuna Urbanscape Private Limited ("**Corporate Debtor**"). Appellant Nos. 1 and 2 are collectively referred to as "**Appellants**".

Upon initiation of corporate insolvency resolution process ("**CIRP**") against the Corporate Debtor, the Appellant Nos. 1 and 2, who formed part of the operational creditors, submitted their proof of claims in Form B specifying amounts of INR 8,77,317/- and INR 1,08,55,500/-, respectively, to Mr. Shivadutt Bannanje ("**Resolution Professional**") along with details of sales invoices and account statements.

The Resolution Professional duly approved the claim amount of Appellant No. 1 at INR 8,47,147/- by e-mail dated December 9, 2019, and the claim amount of Appellant No. 2 at INR 1,08,55,500/- by e-mail dated February 11, 2020.

M/s. Koncept Shelters, the successful resolution applicant of the Corporate Debtor ("**Resolution Applicant**") submitted a resoluton plan dated August 3, 2020 ("**Resolution Plan**"), which provided for a payment of INR 8,00,00,000/- to financial creditors as against a claim of INR 123,05,76,095/- and a provision was also made for homebuyers who formed part of the financial creditors. However, the Resolution Plan proposed nil payments to the operational creditors as against their admitted claims amounting to INR 99,50,075/-.

The committee of creditors ("**CoC**") of the Corporate Debtor by a majority of 95.07% approved the Resolution Plan of the Corporate Debtor and the said Resolution Plan also received approval of the NCLT on January 29, 2021.

Consequently, the Appellants (being operational creditors of the Corporate Debtor) challenged the Impugned Order of the NCLT approving the Resolution Plan of the Corporate Debtor on the ground that the Resolution Plan provided nil payment to the operational creditors.

Issue

Whether nil payment to operational creditors is permissible under the resolution plan.

Arguments

<u>Contentions raised by the Appellants</u>:

Firstly, the Appellants submitted that the security and housekeeping services provided by it to the Corporate Debtor were of due importance and aided timely completion of the Corporate Debtor's projects. Therefore, the dues payable to the Appellants were to be treated as an operational debt under the provisions of the IBC.

Appellant No. 1 contended that the Resolution Professional by e-mail dated December 9, 2019, had duly admitted its claim amount at INR 8,47,147/-, refusing a sum of INR 30,170/- being with respect to tax deducted at source (TDS). Appellant No. 2 submitted that its entire claim of INR 1,08,55,500/- was admitted by the Resolution Professional by e-mail dated February 11, 2020.

The Appellants submitted that the Resolution Applicant had deliberately kept the claims of the Appellants out of the purview of the Resolution Plan despite the Appellants claims being duly admitted by the Resolution Professional, thereby giving a clear indication on the part of the Resolution Applicant that the claims of the Appellants found no merit in the Resoluton Plan. The failure of the Resolution Applicant to verify and acknowledge the claims of the Appellants was in clear violation and contrary to the provisions of the IBC.

The Appellants submitted that, one Mr. Prakash, a real–estate allottee had also raised concerns with respect to the allocation of funds towards unsecured creditors (which included the Appellants), while considering the Resolution Plan during the 8th CoC meeting held on July 30, 2020.

Lastly, the Appellants contended that the Resolution Plan provided by the Resolution Applicant was not in conformity with Section 30(1) of the IBC and that the NCLT ought not to have approved the Resolution Plan provided by the Resolution Applicant despite the fact that it did not provide for any payments to the operational creditors. Further, the NCLT ought to have liquidated the Corporate Debtor on the ground that the Resolution Plan was not in conformity with Section 30(1) of the IBC. In view of the above, the Appellants prayed for setting aside the Impugned Order passed by the NCLT.

Contentions raised by the Resolution Professional:

The Resolution Professional (being the Resolution Professional in both appeals) submitted that the understanding of the Appellants that every creditor is required to be paid the entire amount due to it regardless of the nature of debt, the quantum of debt, the assets of the Corporate Debtor, and the total amount of investment being brought in by the Resolution Applicant, is fundamentally flawed and squarely contrary to the provisions of the IBC.

The Resolution Professional submitted that Section 30(2)(b) of the IBC mandates that the payment to operational creditors shall not be less than (a) the amount to be paid to them in the event of a liquidation under Section 53 of the IBC; or (b) the amount that would have been paid to them if the amount to be distributed under the resolution plan had been distributed in accordance with the order of priority under Section 53(1) of the IBC, whichever is higher. Therefore, in either of these two circumstances, if no sum would have been payable to the operational creditors, no sum needs to be earmarked in the Resolution Plan towards payment to operational creditors.

In the present case, it was evident that the liquidation value of the Corporate Debtor was far lower than the total admitted claims made against the Corporate Debtor and that in light of the waterfall mechanism set out in Section 53 of the IBC, no payment would be made to operational creditors in the event of liquidation of the Corporate Debtor.

Moreover, the Resolution Plan clearly stated that payment to operational creditors as a class was not contemplated at all due to the insufficiency of the liquidation value of the Corporate Debtor and that such non-payment to the operational creditors is permissible in accordance with Section 30(2)(b) read with Section 53(1) of the IBC.

The Resolution Professional further contended that the CoC had approved the Resolution Plan by majority vote of 95.07% after considering the feasibility and viability of the Resolution Plan. The said plan had also received approval of the NCLT by its Impugned Order. On account of the foregoing, the Resolution Professional prayed for dismissal of the appeals.

Contentions raised by the Resolution Applicant:

The Resolution Applicant (being the successful Resolution Applicant in both appeals) has contended for dismissal of the appeals on the ground that they were time barred debts. The Resolution Applicant making similar submissions as those of the Resolution Professional, stressed on the fact that the liquidation value of the assets of the Corporate Debtor were evidently lower than the total admitted claims made against the Corporate Debtor and in light of the waterfall mechanism set out in Section 53 of the IBC, no payment would be made to operational creditors in the event of liquidation of the Corporate Debtor.

The Resolution Applicant submitted that it had in its Resolution Plan, contemplated to invest a sum of INR 8,80,00,000/- inclusive of CIRP cost. Therefore, if these sums were to be distributed in accordance with the waterfall mechanism set out in Section 53 of the IBC, no amount would be payable to the operational creditors.

Further, the Resolution Applicant submitted that the Resolution Plan was approved by the CoC in their commercial wisdom.

Observations of the NCLAT

The CoC in its 8th meeting approved the Resolution Plan and declared that the Resolution Plan would be binding on the Corporate Debtor and its employees, members, creditors including the Central Government and any State Government.

The NCLT observed that out of the total claims filed by the operational creditors, claims aggregating to INR 99,50,075/- were verified and admitted for the purposes of CIRP by the Resolution Professional.

Further, with regard to payments to operational creditors, the following proposal was made in Schedule-4(xii) of the Resolution Plan:

> "*ii. The Liquidation Value is insufficient for payment to the Operational Creditors of the Company as the Liquidation Value is insufficient to satisfy the claims of even the Secured Financial Creditors in full and nil payment has been proposed under the Resolution Plan towards claims of Operational Creditors whether filed or not, whether admitted or not, whether asserted or not and whether or not set out in the balance sheets of the company or the profit and loss account statements of the Company or the List of Creditors and no source has been identified for such payment under this Resolution Plan.*"

Moreover, no claims in relation to workmens' dues were admitted by the Resolution Professional. Similarly, nil payments were proposed towards payment of any outstanding Government dues, taxes, etc. which were admitted as operational

creditor debt.

Schedule-4(iv) of the Resolution Plan earmarked a sum of INR 8,00,00,000/- for payment to financial creditors against a claim of INR 123,05,76,095/-. Further, a sum of INR 30,00,000/- was earmarked for payments to employees against a claim of INR 13,99,74,125/-, whereas a sum of INR 50,00,000/- was earmarked for payment towards CIRP cost.

The NCLAT observed that the Resolution Plan made only three categories of payments, that is, (i) CIRP cost, (ii) Employees dues, (iii) Financial creditor dues. No payments were earmarked to any other category including the operational creditors and were shown as nil.

The NCLAT observed that due procedure as contemplated under the IBC is to be followed to submit a resolution plan and that once the plan has received approval of the CoC followed by the approval of the adjudicating authority, the same becomes binding on a corporate debtor, its employees, members, creditors and other stakeholders.

Decision of the NCLAT

The NCLAT came to a resultant conclusion that the approval of the Resolution Plan was legal and valid and that there was no infirmity or illegality in the Resolution Plan approved by the CoC (by majority vote of 95.07%) and the NCLT. With respect to the allegation of the Appellants that a discriminatory treatment was made between the Appellants and similarly situated operational creditors, the NCLAT held that the question of discrimination would arise only when part of the operational creditors are paid their dues in exclusion of other operational creditors. In the present case, there is no discrimination amongst the operational creditors for the reason that no amounts were earmarked for any of the operational creditors of the Corporate Debtor.

Therefore, there being no grounds to interfere with the Impugned Order of the NCLT approving the Resolution Plan, the NCLAT dismissed the appeals filed by the Appellants.

VA View:

The NCLAT in this judgement has correctly observed that the Resolution Plan was neither in violation of any provision of the law nor made any discriminatory treatment towards the Appellants and similarly situated operational creditors. Pertinently, when no payments were made to any operational creditors including government dues, the question of dismininatory treatment towards the Appellants did not arise. Owing to the fact that the liquidation value of the assets were far lower than the total admitted claims made against the Corporate Debtor, no payments would have been made to the operational creditors even in the event of liquidation of the Corporate Debtor.

Affirming NCLT's decision, the NCLAT reiterated the well settled law that the commercial wisdom of the CoC cannot be interfered with by the NCLT/NCLAT. Therefore, it can be stated that, a resolution plan which takes into consideration the interest of 'all' the creditors and is not discriminatory against one or other operational creditor, is said to be in accordance with the provisions of the IBC.

The principle emerging from this NCLAT ruling is that resolution plan once approved by the NCLT becomes binding on operational creditors. Further, nil payment to operational creditors is permissible under the resolution plan.

III. NCLAT: A fresh resolution plan cannot be considered by committee of creditors.

The National Company Law Appellate Tribunal ("**NCLAT**") has in the judgement dated April 18, 2022 ("**Judgement**"), in the matter of ***Steel Strips Wheels Limited. v. Shri Avil Menezes, Resolution Professional of AMW Autocomponent Limited and Others [Company Appeal (AT) (Insolvency) No. 89 of 2022]*** held that a fresh resolution plan cannot be considered by committee of creditors of AMW Autocomponent Limited ("**CoC**").

Facts

The present appeal had been filed by the successful resolution applicant, that is, Steel Strips Wheels Limited ("**Appellant**") under Section 61 of the Insolvency and Bankruptcy Code, 2016 ("**Code**") challenging the order dated January 18, 2022 ("**Impugned Order**") wherein the National Company Law Tribunal, Ahmedabad, ("**NCLT**") had allowed an application filed by Triton Electric Vehicle, LLC ("**Respondent No. 3**") for consideration of its resolution plan.

Previously, by an order dated September 01, 2020, the corporate insolvency resolution process ("**CIRP**") was initiated against AMW Autocomponent Limited ("**Corporate Debtor**"). Consequent to negotiations undertaken with the CoC, the Appellant submitted its resolution plan on April 24, 2021 ("**Resolution Plan**") and an addendum dated August 27, 2021. The Resolution Plan was approved by the CoC with 98.55% voting share. The 'Letter of Intent' was issued by the respondent no.1, Mr. Avil Menezes ("**Resolution Professional**") to the Appellant on September 21, 2021. Pursuant to this, the Appellant submitted a bank guarantee of INR 20 Crores on September 23, 2021. On September 24, 2021, the Resolution Professional filed an application before the NCLT seeking approval of the Resolution Plan.

On December 13, 2021, the Resolution Professional received the request from Respondent No.3 for submitting a resolution plan. The Resolution Professional placed the request of the Respondent No.3 before the CoC. In the meeting of the CoC held on December 18, 2021 it was opined that the Resolution Plan had already been approved by the CoC and application for approval of the Resolution Plan had already been filed by the Resolution Professional before the NCLT, therefore, a fresh plan cannot be considered. The Resolution Professional by his e-mail dated December 22, 2021 conveyed CoC's decision to the Respondent No.3.

The Respondent No.3 filed an application before the NCLT wherein it was prayed that the Respondent No.3 be permitted to submit the Resolution Plan and that the Resolution Professional and the CoC be directed not to consider the Resolution Plan of the Appellant. The above application was allowed by the NCLT by Impugned Order. The Appellant, aggrieved by the Impugned Order, filed the present appeal.

Issue

If a resolution plan has already been approved, whether a fresh resolution plan can be considered by the CoC.

Arguments

Contentions raised by the Appellant:

The Appellant submitted that the Resolution Plan having been approved by the CoC and the application for approval of the Resolution Plan pending before the NCLT, there was no occasion for the NCLT to pass the Impugned Order. The period for submitting a resolution plan had long expired. Even otherwise, the name of the Respondent No.3 was not included in the final prospective list of the resolution applicants and it had no authority to submit any plan. The NCLT had no jurisdiction to permit the CoC to consider the resolution plan of the Respondent No.3 when the Resolution Plan of the Appellant has already been approved by the CoC and it fully complied with the provisions of the Code. Further, finality had been attached to the Resolution Plan of the Appellant as it was approved by the CoC, and the said finality could not have been taken away by the Impugned Order passed by the NCLT.

The Appellant submitted that the Impugned Order indicates that it was passed without even hearing the Resolution Professional and the CoC, since the order itself mentions "*Issue notice to RP and CoC*". The NCLT ought not to have passed the Impugned Order without hearing the affected parties. The Impugned Order deserved to be set aside on this ground alone.

The Appellant submitted that the NCLT was not made aware that the Resolution Plan had already been approved by the CoC and that previously, on December 18, 2021, the CoC had already declined the request of the Respondent No.3. The NCLT not being posted with the facts, has erroneously passed the Impugned Order directing the CoC to consider the Resolution Plan. The timeline under the Code cannot be breached. Further, the Respondent No.3 who was not part of the CIRP could not have been permitted to join at such a late stage.

Submissions by the Resolution Professional and the Respondent no.3:

The Resolution Professional submitted that, the Resolution Plan of the Appellant stood approved by the CoC and an application for approval of the Resolution Plan was pending before NCLT. As per CoC's instructions, it was communicated to the Respondent No.3 that the CIRP of the Corporate Debtor was at very advanced stage, hence, the CoC could not be able to consider the proposal at that stage. However, referring to reply filed by the CoC in the proceedings, it was noted that during the proceedings the CoC had shown its willingness to consider the plan of the Respondent No.3. It was further submitted that, keeping in mind the objects and reasons of the Code, the CoC subsequently, in its meeting dated March 05, 2022, deliberated and decided that the Respondent No.3 may be given an opportunity to present their resolution plan. The commercial wisdom of the CoC is to be given due credence. The Resolution Plan of the Appellant is neither binding nor irrevocable. The NCLT has all powers and jurisdiction to permit the CoC to consider the resolution plan of Respondent No.3.

The Respondent No.3 submitted a joint resolution plan with regard to Corporate Debtor as well as another sister concern. The Appellant itself had failed to submit the Resolution Plan before the final date of submission fixed by the CoC, that is, April 19, 2021. It was submitted that, the Respondent No.3 is a leading company in the auto component sector and the resolution plan of the Respondent No.3 will not only maximise the value of the assets of the Corporate Debtor, but also provide value maximisation and a timely exit to all stakeholders of the CIRP, including all the employees/ ex-employees of the Corporate Debtor. Keeping in mind the object and purpose of the Code and in the interest of the Corporate Debtor, the Respondent No.3 be permitted to submit the resolution plan.

Observations of the NCLAT

The NCLAT noted relevant facts and presentations made by the parties. The approval of the Resolution Plan was well within the CIRP period as extended by the NCLT. During the CIRP, two plans were placed for approval before the CoC and the Resolution Plan of the Appellant received 98.55% voting shares. Further, for the first time, the expression of interest was shown by Respondent No.3 by its e-mail dated December 13, 2021, by which time, entire CIRP of the Corporate Debtor was at an advanced stage including approval of the Resolution Plan of the Appellant which was pending consideration before the NCLT.

The NCLAT noted that the Hon'ble Supreme Court ("**SC**") in ***Ebix Singapore Private Limited v. Committee of Creditors of Educomp Solutions Limited and Another [2021 SCC OnLine SC 707]*** held that the resolution plan even prior to the approval of the NCLT, is binding *inter se* the CoC and the successful resolution applicant by virtue of the Code's framework. In the said case, it was noted that the report of the Bankruptcy Law Reforms Committee mentioned that, the resolution professional submits a binding agreement to the adjudicator before the default maximum date. Further, the SC had emphasised on the timeline.

Therefore, the NCLAT observed that the CoC, having approved the Resolution Plan of the Appellant, had rightly taken a decision that the resolution plan of the Respondent No.3 cannot be considered. The NCLAT noted that, the SC, in Ebix (supra) mentioned that the delays were attributable to:

1. the NCLT taking considerable time in admitting CIRPs;

2. late and unsolicited bids by resolution applicants after the original bidder becomes public upon passage of the deadline for submission of the plan; and

3. multiplicity of litigation and the appellate process to the NCLAT and the SC.

The NCLAT noted that such inordinate delays cause commercial uncertainty, degradation in the value of the corporate debtor and makes the insolvency process inefficient and expensive.

The NCLAT observed that, in view of the law laid down by the SC in Ebix (supra), there was no valid reason given by the NCLT for permitting the consideration of the resolution plan of the Respondent No.3 and that such consideration shall be breaching both timeline as well as the finality of the Resolution Plan of the Appellant.

Further, the NCLAT noted that in ***Chhatisgarh Distilleries Limited v. Dushyant Dave (Resolution Professional of Anand Distilleries Private Limited) [2020 SCC OnLine NCLAT 1078]***, it was observed that, the adjudicating authority *suo moto* cannot direct the CoC to consider the new resolution plan and re-consider the already approved resolution plan. The decision of the COC accepting or rejecting the resolution plan is limited to the grounds mentioned in Section 30(2) of the Code, and purely commercial decision of the COC cannot be adjudicated by the adjudicating authority. The NCLAT noted that the SC in ***Committee of Creditors of Essar Steel India Limited v. Satish Gupta [2019 SCC OnLine SC 1478]*** observed that, the adjudicating authority cannot direct the CoC to consider the second resolution plan submitted before the authority although the second resolution applicant is ready to invest more amount in comparison to first resolution applicant. The NCLAT noted that, the SC in the said judgment held that under Section 30(2) of the Code, decision of the committee of creditors is purely commercial and cannot be adjudicated by the adjudicating authority.

The NCLAT observed that, present case was not a case where issue of commercial wisdom of the CoC regarding approval or disapproval of the plan is under consideration. In exercise of commercial wisdom, the CoC has already approved the plan of the Appellant with voting share of 98.55%. Further, after approval of the Resolution Plan by the CoC by requisite vote and after expiry of CIRP, it is not open for the CoC to contend that it is ready to consider the plan of the Respondent No.3, which according to it may be a better plan having much higher value.

In the case of ***Kalinga Allied Industries India Private Limited v. Hindustan Coils Limited [2021 SCC OnLine NCLAT 51]***

the issue whether the adjudicating authority can direct the committee of creditors to consider the resolution plan of a person who was not part of the insolvency resolution process was dealt with as under:

"..., the Respondent No. 1 is not part of CIRP.. ... There is no provision in the code or regulation which provides that while exercising the power under Section 31 of the I&B Code the Adjudicating Authority can direct the COC to consider the Resolution Plan of such person who has not been part of CIRP. Otherwise also if such procedure is adopted then the CIRP will be frustrated. Once the Resolution Plan has been opened and fundamentals and financials of the Plan and offer made therein were disclosed to all the participants including RP... Therefore, no further fresh bid or offer could have been accepted or considered..."

It was noted by the NCLAT that, the CoC had extended the last date for submission of the resolution plan from time to time, and further, the CoC had granted one-time opportunity to all resolution applicants in the final list to submit a resolution plan or a revised plan till May 09, 2021. In view of the above, there was no substance in the submission of the Respondent No.3 that the Resolution Plan of the Appellant was also not submitted within the time fixed.

Decision of the NCLAT

The NCLAT held that the CoC could not as per existing law, consider the resolution plan of the Respondent No.3 after approval of the Resolution Plan of the Appellant. Further, there was no valid reason indicated in the Impugned Order for permitting the CoC to consider the resolution plan of the Respondent no.3, which was submitted after approval of the Resolution Plan. The Impugned Order was declared as unsustainable and was set aside. Consequently, the appeal was allowed. The NCLAT held that the NCLT had erroneously entertained the application and the resolution plan of the Respondent No. 3.

VA View:

The NCLAT in this Judgement has rightly observed that, the fact that the CoC was willing to consider the plan of the Respondent No.3 does not in any manner take away the finality of the Resolution Plan of the Appellant approved by the CoC. The NCLAT has reiterated that the CIRP is a time bound process with a specific aim of maximizing the value of assets of the Corporate Debtor. The Code and the regulations made thereunder lay down strict timelines which need to be adhered to by all the parties, at all stages of the CIRP.

It was observed that, delays are also a cause of concern because the liquidation value depletes rapidly, irrespective of the imposition of a moratorium. A delayed liquidation is harmful to the value of the Corporate Debtor, the recovery rate of the CoC and consequentially, the economy at large. Therefore, the NCLT cannot direct the CoC to consider a new resolution plan.

IV. Supreme Court: Application under Section 11(6) of the Arbitration and Conciliation Act, 1996 for the appointment of arbitrator can be filed only before high courts possessing jurisdiction.

The Hon'ble Supreme Court ("**SC**") has in the judgement dated March 24, 2022 ("**Judgement**"), in the matter of ***M/s. Ravi Ranjan Developers Private Limited v. Aditya Kumar Chatterjee [Civil Appeal Nos. 2394-2395 of 2022 (Arising out of SLP (C) Nos. 17397-17398 of 2021)]*** held that an application under Section 11(6) of the Arbitration and Conciliation Act, 1996 ("**Act**") for appointment of an arbitrator cannot be moved in any High Court in India, irrespective of its territorial jurisdiction.

Facts

The above case throws light on Section 11(6) of the Arbitration and Conciliation Act, 1996 ("**Act**"). The said case is an appeal by M/s. Ravi Ranjan Developers Private Limited ("**Appellant**") against the order dated August 13, 2021 ("**Impugned Order**") passed by the Calcutta High Court ("**CHC**") for the appointment of an arbitrator and an order passed on October 4, 2021 by the CHC rejecting a review application made by the Appellant in favour of Aditya Kumar Chatterjee ("**Respondent**"). Section 11(6) of the Act confers jurisdiction upon the court in case of non-compliance of the procedure for appointment of the arbitrator, as agreed upon by the parties.

The Appellant and the Respondent entered into a development agreement dated June 15, 2015 ("**Development Agreement**") for the development of a property based in Muzaffarpur in Bihar outside the jurisdiction of the CHC. The

Development Agreement contained an arbitration clause which stated clearly that in case of any dispute or difference between the Appellant and the Respondent arising out of the Development Agreement, the reference of such dispute would be made to an arbitrator appointed by both the Appellant and the Respondent and such arbitration would be conducted under the provisions of the Act and the sitting of the arbitral tribunal would be at Kolkata.

Due to differences between the Appellant and the Respondent, the Respondent terminated the Development Agreement on April 24, 2019, which was not accepted by the Appellant. The Respondent filed a petition under Section 9 *(Interim measures, etc., by Court)* of the Act in the Court of the District Judge, Muzaffarpur seeking interim protection in respect of the property.

The Respondent sent a notice to the Appellant invoking the arbitration clause under the Development Agreement. Further, the Respondent moved an arbitration petition in the CHC under Section 11(6) of the Act for the appointment of an arbitrator. In response to the same, the Appellant filed an Affidavit in Opposition questioning the territorial jurisdiction of the CHC to decide the application under Section 11(6) of the Act. By the Impugned Order, the CHC allowed the arbitration petition and appointed a sole arbitrator in the case. Subsequently, the Appellant filed an application for review of the Impugned Order, which was dismissed by the CHC. Aggrieved, the Appellant has brought the instant appeal before the SC.

Issue

Whether the CHC had jurisdiction to entertain the application filed by the Respondent and to appoint an arbitrator.

Arguments

<u>Contentions raised by the Appellant</u>:

The Appellant submitted that the counsel for the Appellant in the CHC gave consent without instructions from the Appellant. However, the CHC did not adjudicate the issue of territorial jurisdiction raised by the Appellant in its Affidavit in Opposition filed in the CHC.

The contentions that the Appellant raised in its application for review of the Impugned Order were as follows:

1. In the Impugned Order the objections of the Appellant pertaining to the CHC not having jurisdiction in the matter and the objections regarding non-arbitrability of the disputes involved, have not been considered by the CHC;

2. The CHC lacked jurisdiction to entertain the Respondent since the Hon'ble High Court at Patna had to be approached under Section 11 *(Appointment of arbitrators)* of the Act;

3. The CHC proceeded on the concession of counsel which was contrary to the instructions of the Appellant. The Appellant had not instructed counsel to concede and had, to the contrary, instructed counsel to oppose the petition and, therefore, consent of the counsel was without jurisdiction and void.

It was argued before the SC that an order without jurisdiction can be questioned at any time at any stage irrespective of any consent given by the counsel, without instructions of the Appellant. The Appellant submitted that the word 'Court' has been defined, in case of an arbitration other than international commercial arbitration, to mean the principal Civil Court of original jurisdiction in a district and would include the High Court in exercise of its ordinary original jurisdiction, having jurisdiction to decide the questions forming the subject matter of the arbitration, if the same had been the subject matter of the suit, but it does not include any Civil Court of a grade inferior to such principal Civil Court or any Court of small causes.

The Appellant emphasized on the mandatory nature of Section 42 *(Jurisdiction)* of the Act to argue that an earlier application for interim protection having been moved at the District Court at Muzaffarpur, the Respondent could not have invoked the jurisdiction of the CHC. It was submitted that the parties cannot by consent confer jurisdiction on a court which inherently lacked jurisdiction.

<u>Contentions raised by the Respondent</u>:

The Respondent contended that the CHC had the territorial jurisdiction to entertain the application under Section 11(6) of the Act as the seat of arbitration was Kolkata. The Respondent admitted to the fact that the above application was in relation to a property in Muzaffarpur and that the Development Agreement was executed outside the territorial jurisdiction of the CHC and, thus, the CHC had no jurisdiction in this regard. However, it was further submitted that though the Development Agreement was executed outside the jurisdiction of the CHC, the Development Agreement contained the

fact that if any dispute arises then the seat of arbitration would be at Kolkata and thus the CHC could exercise territorial jurisdiction.

The Respondent submitted that the word 'Court' has been defined in case of an arbitration other than international commercial arbitration to mean the principal Civil Court of original jurisdiction, having jurisdiction to decide the questions forming subject matter of the arbitration.

The Respondent argued that the initial order of appointment of arbitrator was passed by the CHC with consent of the Appellant, since the Appellant appeared in the arbitration proceedings. Therefore, the Appellant acquiesced to the reference of the disputes to the arbitrator appointed by the CHC.

Observations of the Supreme Court

The SC observed that the minutes of the proceedings before the arbitrator appointed by the CHC does not indicate that the Appellant willingly submitted to arbitration by the learned arbitrator. The Appellant only agreed to the fees of the arbitrator appointed by the CHC. The SC concurred with the argument made by the Appellant that an order without jurisdiction can be questioned at any time at any stage irrespective of any consent that may have been given by the counsel, without instructions of the Appellant.

Answering the issue about whether the CHC had territorial jurisdiction to pass the Impugned Order, in negative, the SC observed that the Development Agreement was admittedly executed and registered outside the jurisdiction of the CHC and the Development Agreement pertains to development of property located in Muzaffarpur, outside jurisdiction of the CHC. The Appellant has its registered office in Patna, outside the jurisdiction of CHC. The Appellant has no establishment and does not carry on any business within the jurisdiction of the CHC. Further, as admitted by the Respondent, no part of the cause of action had arisen within the jurisdiction of the CHC.

In case of an arbitration other than international commercial arbitration, 'Court' would mean the principal Civil Court of original jurisdiction in a district and would include the CHC in exercise of its ordinary original jurisdiction, having jurisdiction to decide the questions forming the subject matter of the arbitration, if the same had been the subject matter of the suit, but it does not include any Civil Court of a grade inferior to such principal Civil Court or any court of small causes. Subject to the pecuniary or other limitations prescribed by any law, suits for recovery of immovable property or determination of any other right to or interest in an immovable property or compensation for wrong to immovable property, is to be instituted in the court, within the local limits of whose jurisdiction, the property is situated. Certain specific suits relating to immovable property can be instituted either in the court within the limits of whose jurisdiction the property is situated, or in the court within the local limits of whose jurisdiction, the defendant actually or voluntarily resides or carries on business. All other suits are to be instituted in a court, within the local limits of whose jurisdiction, the defendant voluntarily resides or carries on business. Where there is more than one defendant, a suit may be instituted in the court within whose jurisdiction any of the defendants voluntarily resides or carries on business. A suit may also be instituted in a court within whose jurisdiction the cause of action arises either wholly or in part.

The SC observed that no suit could have been filed in any court over which the CHC exercises jurisdiction, since the suit pertains to immovable property situated at Muzaffarpur in Bihar, outside the territorial jurisdiction of the CHC. The Appellant neither resides not carries on any business within the jurisdiction of the CHC. It was observed that Section 11(6) of the Act has to be harmoniously read with Section 2(1)(e) of the Act and construed to mean, a High Court which exercises superintendence/supervisory jurisdiction over a court within the meaning of Section 2(1)(e) of the Act.

Section 42 of the Act is mandatory and has been enacted to prevent the parties to an agreement from being dragged into proceedings in different courts, when more than one court has jurisdiction. However, Section 42 of the Act cannot possibly have any impact on an application under Section 11(6) of the Act, which necessarily has to be made before a High Court, unless the earlier application was also made in a High Court. In the instant case, the earlier application under Section 9 of the Act was made in the District Court at Muzaffarpur and not in the High Court of Judicature at Patna. An application under Section 11(6) of the Act for appointment of Arbitrator, could not have been made in the District Court of Muzaffarpur. Therefore, Section 42 of the Act is not attracted.

The SC observed that the Appellant and the Respondent had not agreed to submit to the jurisdiction of the CHC, but had only agreed that the sittings of the arbitral tribunal would be in Kolkata. The SC relied on ***Union of India v. Hardy Exploration and Production (India) Inc. [13 SCC 472]*** wherein the SC had held that the sittings at various places are relatable to venue. It cannot be equated with the seat of arbitration or place of arbitration, which has a different connotation.

In the instant case, Kolkata was only the venue for sittings of the arbitral tribunal. It is well settled that, when two or more

courts have jurisdiction to adjudicate disputes arising out of an arbitration agreement, the parties to such agreement might, decide to refer all disputes to any one court to the exclusion of all other courts, which might otherwise have had jurisdiction to decide the disputes. The SC agreed with the argument of the Appellant that parties to an agreement cannot, by consent, confer jurisdiction on a court which inherently lacked jurisdiction.

In the instant case, the Appellant and the Respondent did not agree to refer their disputes to the jurisdiction of the courts in Kolkata. Kolkata was only intended to be the venue for arbitration sittings. Accordingly, the Respondent approached the District Court at Muzaffarpur, and not a court in Kolkata for interim protection under Section 9 of the Act. The Respondent having invoked the jurisdiction of the District Court at Muzaffarpur, is estopped from contending that the parties had agreed to confer exclusive jurisdiction to the CHC to the exclusion of other courts. Neither of the parties to the Development Agreement construed the arbitration clause to designate Kolkata as the seat of arbitration.

Decision of the Supreme Court

The SC held that the CHC inherently lacks jurisdiction to entertain the application of the Respondent under Section 11(6) of the Act. The CHC should have decided the objection raised by the Appellant, to the jurisdiction of the CHC, to entertain the application under Section 11(6) of the Act, before appointing an arbitrator. Thus, the SC allowed the appeal and set aside the Impugned Order and dismissal of the review application. The SC held that the appointment of the arbitrator was without jurisdiction and was therefore set aside.

Appointing a sole arbitrator to decide the disputes between the Appellant and the Respondent, the SC called for the *status quo* with regards to the property in question to be maintained for a period of 15 days from the date of the order so as to enable the respective parties to approach the arbitrator under Section 17 *(Interim measures ordered by arbitral tribunal)* of the Act, for interim relief in accordance with law.

VA View:

The SC through this Judgement threw light on the legislative intent of Section 11(6) of the Act. It has rightly held that an application under Section 11(6) of the Act for the appointment of an arbitrator or arbitral tribunal cannot be moved in any High Court in India, if such High Court lacks territorial jurisdiction. It could never have been the intention of Section 11(6) of the Act that arbitration proceedings should be initiated in any High Court in India, irrespective of whether the respondent resided or carried on business within the jurisdiction of that High Court, and irrespective of whether any part of the cause of action arose within the jurisdiction of that court, to put an opponent at a disadvantage and steal a march over the opponent.

Moreover, the SC has reiterated the well settled law that sittings at various places are relatable to venue, and cannot be equated with the seat of arbitration or place of arbitration, which has an entirely different connotation.

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