

DHIRAJLAL PARBATBHAI LAKKAD V. RAMESH KUMAR TOTALA & ORS.

Dhirjlal Prabhatbhai Lakkad

...Appellant

Versus

Ramesh Kumar Totala & Ors.

...Respondents

Case No: Company Appeal (AT) (Insolvency) No. 1326 – 1328 of 2022

Date of Judgement: 03.08.2023

Judges:

[Justice Ashok Bhushan]

Chairperson

[Mr. Barun Mitra]

Member (Technical)

For Appellant : Mr. Ninad Laud, Ms. Anshula Grover, Ms. Rashika

Narain, Ms. Ananyaa Mazumdar, Ms. Nitika Grover,
Mr. Mayan Prasad, Advocates.

For Respondent : Mr. Rajiv S. Roy, Mr. A. Chatterjee, Mr. Siddharth

Dhingra, Ms. Jayasree Saha, Advocates for R-2.

Mr. Kamal Agarwal, Advocate for R-1.

Facts:

CIRP initiated against Galaxy Cotton and Textiles Pvt Ltd on application of State Bank of Patiala u/s 7. Appellant filed appeal against admission order which was later withdrawn. RP issued Form G on 24.12.2019. Appellant submitted EOI after due

date on 24.01.2020. In 3rd CoC meeting held on 30.01.2020, resolution passed to liquidate corporate debtor. Appellant filed IA 186/2020 challenging admitted claims of financial creditor and IA 599/2020 against financial creditor u/s 65. RP filed IA 305/2020 for liquidation.

Court's Opinions:

1. Validity of liquidation decision: CoC has wide powers u/s 33 to decide liquidation with 66% voting share anytime during CIRP before resolution plan confirmation. Basis of CoC's decision was no EOI received despite Form G and company non-functional for 3-4 years. Appellant's delayed EOI sans EMD rightly rejected. Court didn't find any infirmity in CoC's commercial wisdom in deciding liquidation without awaiting valuation report.

2. Dismissal of proceedings u/s 65:

Appellant didn't establish fraudulent/malicious intent of financial creditor. Mere parallel SARFAESI proceedings doesn't indicate the same. Disclosure of SARFAESI recoveries not relevant to maintainability of Sec 7 application which was for dues exceeding Rs 35 crores. Claim amounts can be reconsidered at liquidation stage.

3. Other observations:

Appellant can submit scheme u/s 230 to liquidator for consideration. Liquidator to take steps w.r.t assets as per regulations.

Sections:

Sec 7, 33, 65 of Insolvency and Bankruptcy Code; Sec 230 of Companies Act

Laws referred:

Insolvency and Bankruptcy Code 2016; Companies Act; Liquidation Regulations 2016

In conclusion, appeal dismissed upholding NCLT's liquidation

order.

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Court

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Full Text of Judgment:

1. Heard Learned Counsel for the parties.
2. This Appeal has been filed against the judgment and order dated 29.08.2022 passed by the National Company Law Tribunal, Ahmedabad Bench, Court-II in I.A. No.186/AHM/2020 and I.A. No.599/AHM/2020 in CP (IB) 322/NCLT/AHM/2018.
3. Brief facts of the case necessary for deciding the Appeal are:-
 - i. CIRP against the Corporate Debtor M/s Galaxy Cotton and Textiles Pvt. Ltd. commenced by order of the Adjudicating Authority dated 10.08.2019. In pursuance of the commencement of CIRP which was on an application filed by the State Bank of Patiala under Section 7 of the Insolvency and Bankruptcy Code, 2016 (short for 'IBC'), publication was made. The Appellant filed an appeal challenging the admission order being Company Appeal No. 1341 of 2019. The Appeal filed by the Appellant challenging the admission order subsequently stood withdrawn. The RP issued Form-G on 24.12.2019. After the due date the Appellant submitted the EOI on 24.01.2020. Committee of Creditor held its 3rd meeting on 30.01.2020 and passed a resolution to liquidate the Corporate Debtor.
 - ii. Appellant thereafter, filed an I.A. No 186 of 2020 challenging the amount of dues admitted by Respondent No.5 qua the only Financial Creditor. RP filed an I.A. No. 305 of 2020 seeking order of liquidation. Appellant has also filed an I.A. No. 299 of 2020 inter-alia praying for appropriate order against the Respondent under Section 65 of the IBC.

iii. Replies to the I.As as well as Rejoinder were exchanged and Adjudicating Authority by the impugned order allowed the I.A. filed by the RP praying for liquidation and took the view that all claimants will be at liberty to refile their claims in appropriate form which shall be verified by the liquidator as per the provisions of the Code and prayer (a) of the Application does not require any consideration in paragraph 11.

iv. The Adjudicating Authority has considered the I.A. No. 186 of 2020 and disposed of the same. Coming to the I.A. No. 599 of 2020, the Adjudicating Authority observed that documents annexed by the applicant does not substantially establish the fraudulent and malicious intent of the respondent i.e. Financial Creditor State Bank of India, hence the application was rejected.

v. The Adjudicating Authority accepted the application filed by the Resolution Professional for liquidation and directed the moratorium shall cease to have its effect. Against the order passed by Adjudicating Authority, this appeal was filed.

4. This Tribunal vide its Interim Order passed on 10.11.2011 directed liquidator not to proceed any further in pursuance of the impugned order. The Replies have been filed both by the liquidator as well as State Bank of India to which rejoinder has been filed by the Appellant.

5. Counsel for the Appellant challenging the order impugned contends that in 1st and 2nd CoC meeting, Resolution Professional pointed out that valuation of the Corporate Debtor has to be undertaken. It is submitted that without awaiting the outcome of the valuation process, CoC in 3rd meeting took a decision to liquidate the Corporate Debtor which is not in accordance with law. He, further submitted that in Section 7 Application filed, State Bank of India did not disclose the amount which was already realised under SARFAESI the proceeding which itself indicate that application

was maliciously filed.

6. It is submitted that the Appellant is MSME and Appellant may be given an opportunity to revive the Corporate Debtor and by the order impugned, Adjudicating Authority has sent the Corporate Debtor into liquidation.

7. Learned Counsel for the Appellant further submitted that Cotton bags/bales were with the State Bank of India and by sale of the Cotton bales under SARFAESI proceeding, sufficient amount was recovered which is about 22 cores which is not mentioned in Section 7 Application.

8. Learned Counsel for the State Bank of India refuting the submissions of the Counsel for the Appellant submits that the Corporate Debtor was not running as a going concern for last 4 years which was taken note by the Committee of Creditors in 3rd CoC meeting and in pursuance of the Form-G issued by the Resolution Professional, no EOI was received which indicated that there was no intending bidders to take the Corporate Debtor after which decision was taken to liquidate the Corporate Debtor in which there is no infirmity.

9. In so far as, submissions of the Appellant, under Section 65 of the Code it is submitted that State Bank of India has filed the Section 7 Application for its due which were more than 75 crores plus interest and the application in no manner can be said to be malicious or fraudulent. It is submitted that with regard to 13(2) SARFAESI proceeding there was disclosure in the Section 7

Application and it was also mentioned that two auctions have already been held. It is submitted that Appellant has already filed an Application challenging the admission order where other issues were also raised which appeal was withdrawn by the Appellant hence he cannot be allowed to raise the issues again and again.

10. Learned Counsel for the Liquidator in reply in the

submissions of the Appellant contended that Appellant being MSME, if it intends to revive the Corporate Debtor it has opportunity to file a scheme under Section 230 of the Companies Act for reviving the Corporate Debtor as per the Liquidation Regulations, 2016. Learned Counsel for the Liquidator submits that there is no error in the order of Adjudicating Authority directing for liquidation.

11. We have considered the submissions of the parties and have and have perused the records.

12. The power of Committee of Creditors to take the decision for liquidation is very wide as per Section 33 of the IBC Code, 2016 which provides for liquidation and as per Section 33(2), the Committee of Creditors with 66% of the voting share can take a decision to liquidate the Corporate Debtor which decision can be taken at any time during the Corporate Insolvency Resolution Process but before confirmation of resolution plan. The 3rd CoC meeting resolved to liquidate the Corporate Debtor, which minutes has been brought on the record in the Appeal. On Agenda Item No. 6 of the minutes of the Committee of Creditors, following was recorded:-

"Agenda Item – A6

TO CONSIDER REPETITION OF EOI PROCESS – INCLUDING THE PROCESS AND TIMELINES – AND, IF NECESSARY THE REVISION IN ELIGIBILITY CRITERIA AND EVALUATION MATRIX OF RESOLUTION APPLICATION

The Resolution Professional informed the members of committee of creditors that he has not received single Expression of Interest till the last date of receipt of EOI, being, 08-01-2020. Further, Resolution Professional apprised to members of CoC

that he has received EOI on 24.01.2020 from Mr. Dhirajlal P Lakkad, director of the suspended board of directors without receiving any EMD and any documents as stated in minimum criteria and the same couldn't be accepted due to failure to comply with the conditions stated in minimum criteria and receipt of EOI after the last date of receiving EOI i.e,

08.01.2020.

During the discussion in the meeting, the CoC member concluded that no further EOI is retried to be published as the company is closed since last three to four years and no business was carried out since long. As there is no chance of reviving the company, CoC member requested to liquidate the Corporate Debtor."

13. The basis of the decision of the CoC as reflected in the minutes is that after last date of receiving EOI i.e. 08.01.2020 Appellant has given EOI without EMD and hence decision was taken not to call any further EOI and it was noted that company being closed since last 3 to 4 years and no business was carried out since long the present is the case where Form-G was published but in response to which no EOI was received and EOI which was given by the Appellant was after the due date.

14. Learned Counsel for the Appellant has placed reliance on the judgment of this Tribunal in Company Appeal (AT) (Insolvency) No. 13 of 2022 "Nikhil Tandon Versus Sanjeev Bindal Liquidator of Radhey Sham Tandon Manufacturing Pvt. Ltd. & Anr." and he has placed reliance on paragraph 18 of the judgment. In paragraph 18 of the Judgment itself this Tribunal has noted in the said case that the CoC had not taken any effort to issue any Form-G to find out as to whether there can be resolution of Corporate Debtor by Resolution Applicant. It was also noted that no valuation report was obtained. Counsel for the Appellant has also emphasised that in the present case in the two CoC meetings although RP pointed out that valuation has to be obtained but no steps were taken with that regard.

15. Be that as it may, the decision of the Committee of Creditors to liquidate is based on several factors. The important factor being that even after issuance of Form-G no EOI was received within time and further the Corporate Debtor was closed for 3 to 4 years, we do not find any infirmity in

the decision of the CoC resolving to liquidate. The submission of the Counsel for the Appellant that since valuation reports were not awaited, the decision of the Committee of Creditor to liquidate is erroneous does not commend as per the reasons expressed in the minutes. Coming to the submission of the Counsel for the Appellant that Application under Section 65 was not adequately considered by Adjudicating Authority, we are of the view that the said submission is not correct since in paragraph 12 of the order the said application was considered. In paragraph 12 following observation have been made.

"On perusal of IA No. 599/AHM/2020 it is noted that contentions made are similar averments made in IA 186/AHM/2020. The Ld. Counsel at the time of hearing on 16.06.2022 has pressed only for prayers (b) and incidental prayers (c) and (d). In prayer (b) the Applicant has sought to Pass appropriate order against the Respondents under section 65 of the IB Code. The documents annexed by the Applicant does not sufficiently establish the fraudulent and / or malicious intent of the Respondents, i.e. financial creditor State Bank of India and Resolution Professional Mr. Tejas Shah. Thus, prayer (b) is not maintainable. As regards prayer (c) and (d) we do not find any merit hence rejected. Accordingly, I.A. No. 599/AHM/2020 is rejected and disposed of."

16. More so, Section 7 Application was filed for dues of State Bank of India which were more than 35 crores. The mere fact that State Bank of India has also resorted to the SARFAESI proceeding, cannot preclude the bank to file a Section 7 application and the submission that there is no mention of the recoveries made by bank indicate their fraudulent and malicious intent also

not be accepted since in the application they have already mentioned that two auctions have already been held under SARFAESI proceeding. We thus are of the view that no different view can be taken to those which has been taken by Adjudicating Authority rejecting Section 7 Application. As far as challenge to the claim of the State Bank, Adjudicating

Authority had rightly observed that in the liquidation process claim will be invited afresh and it will be open for the appellant to file his objections. At this stage, we can observe that since the State Bank have already recovered certain amounts in SARFAESI proceeding, we have no doubt that when the claim will be filed by the State Bank of India that the said amount shall also be given set off in the claim and the claim in the liquidation shall be the claim existing on the date when the claim is filed.

17. In view of the aforesaid, we are of the view that the order impugned does not deserve any interference in exercise of our appellate jurisdiction. We however, observe that, as submitted by Learned Counsel for the Liquidator, that in the event the appellant submits a Scheme under Section 230 of the Companies Act, as is permitted under the Liquidation Regulation, 2016, the liquidator can consider the same in accordance with law.

18. Lastly Learned Counsel for the Appellant has also contended that observation in the minutes of the CoC that bales are obsolete, it is not for us in this appeal to express any opinion on the said aspect and it is for liquidator to take steps and make inventory of the assets and take proceeding in accordance with law.

The appeal is dismissed with above observations.