

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 899 of 2019

IN THE MATTER OF:

**Indian Renewable Energy Development
Agency Limited (IREDA)
Corporate Office:
3rd Floor, August Kranti Bhawan
Bhikaji Cama Place
New Delhi – 110066**

...Appellant

Versus

**Mr. T.S.N. Raja
(Resolution Professional of M/s VBC
Industries Limited)
6-2913/914, III Floor Progressive Towers
Khairatabad, Hyderabad – 500 004
Telangana**

...Respondent

Present:

**For Appellant : Ms. Varsha Banerjee and Mr. Kunal Godhwani,
Advocates
For Respondent : Mr. Ankur Khandelwal and Mr. Himanshu Handa,
Advocate**

O R D E R

03.02.2020 Heard Learned Counsel for the Appellant. This Appeal has been filed by the Appellant – Indian Renewable Energy Development Agency Limited (IREDA) against the Impugned Order dated 17th July, 2019 passed by the Adjudicating Authority (National Company Law Tribunal), Hyderabad Bench, Hyderabad. The Appellant had filed I.A. No.208 of 2019 because the Resolution Professional rejected the claim of the Appellant by sending e-mail dated 3rd February, 2019. The Appellant had moved the Adjudicating Authority for relief under Section 60(5) of IBC, but the Adjudicating Authority dismissed the Application upholding the order conveyed by the Resolution Professional.

2. Briefly put, the case of the Appellant is that the Appellant had extended Term loan of Rs.65 crores in favour of M/s Orissa Power Consortium Limited ('OPCL') on 18th November, 2015. Against the said loan, the Corporate Debtor – M/s VBC Industries Limited had created charge in favour of the Appellant by mortgaging its property situated at Plot No.76, Mouza Bhubaneswar Sahar, Unit No.7, Surya Nagar in G.A. Khurda District, Bhubaneswar, Odisha – 751001. The case of Appellant is that as CIRP proceedings got initiated against the Respondent – Corporate Debtor, the Appellant moved the Resolution Professional with a claim for the money yet to be recovered from Orissa Power Consortium Limited. It is admitted that 'OPCL' has not defaulted in payment of the instalments to the Appellant. Counsel states that because of this the Resolution Professional did not admit the claim of the Appellant. Grievance of the Appellant is that if the Resolution processes goes through and the claim of Appellant is not kept in view, tomorrow if there is default the benefit of having the mortgage in favour of the Appellant would be lost.

The Counsel for Appellant has argued on above lines.

3. Learned Counsel for the Resolution Professional refers to Section 3(6) of IBC, which reads as under:

“3(6). “Claims” means –

- (a) a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured;
- (b) right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to

a right to payment, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured.”

The argument of the Learned Counsel for the Resolution Professional is that there has been no default on the part of ‘OPCL’, and so no claim has arisen to file the claim with Resolution Professional. The Learned Counsel has taken us to the above provision to say that it would be claim only if the right to payment or right to remedy for breach of contract had already arisen. According to him as this contingency has not occurred, there is no existing right to file the claim and thus there is no liability on the Resolution Professional or the Resolution Applicant to take note of the claim of the Appellant.

4. Learned Counsel for the Appellant refers to Section 3(6) to submit that claim also means a right to remedy for breach of a contract, if such breach gives rise to a right to payment whether or not such right is matured.

5. The Hon’ble Supreme Court in the matter of Committee of Creditors of **“Essar Steel India Limited vs. Satish Kumar Gupta & Others”** Civil Appeal No.8766-67 of 2019 dated 15th November, 2019 observed in para 67 of the judgment as under:

“67. For the same reason, the impugned NCLAT judgment in holding that claims that may exist apart from those decided on merits by the resolution professional and by the Adjudicating Authority/Appellate Tribunal can now be decided by an appropriate forum in terms of Section 60(6) of the Code, also

militates against the rationale of Section 31 of the Code. A successful resolution applicant cannot suddenly be faced with “undecided” claims after the resolution plan submitted by him has been accepted as this would amount to a hydra head popping up which would throw into uncertainty amounts payable by a prospective resolution applicant who successfully take over the business of the corporate debtor. All claims must be submitted to and decided by the resolution professional so that a prospective resolution applicant knows exactly what has to be paid in order that it may then take over and run the business of the corporate debtor. This the successful resolution applicant does on a fresh slate, as has been pointed out by us hereinabove. For these reasons, the NCLAT judgment must also be set aside on this count.”

6. Keeping in view such observation of the Hon’ble Supreme Court, it is apparent that a Resolution Applicant who submits the Resolution Plan should not face any undecided claims after the Resolution Plan has been submitted by him. We put a question to the Learned Counsel for Respondent Resolution Professional as to what happens in case after the Resolution Plan has been approved and default is committed thereafter by OPCL and in which situation what would be the benefit Appellant having security of mortgage the Appellant has taken. Learned Counsel states that it would be only hypothetical and that the amount is not due and as such cannot be taken into account and the only remedy of the Appellant would be to proceed against the Principle Borrower.

7. Counsel for both side state that Resolution Plan has already been approved and the same is before the Adjudicating Authority and orders have been reserved.

8. In our view, considering the judgment of the Hon'ble Supreme Court and the facts of the present matter, that the Appellant, had extended loan to OPCL because the Corporate Debtor had mortgaged property, in which, default as such till now has not occurred, it would be appropriate to direct that the Successful Resolution Applicant should be made aware of the existing contingent right of the Appellant.

9. The Appellant may bring the contingent existing right to the notice of the Successful Resolution Applicant by filing Application before the Adjudicating Authority. The Successful Resolution Applicant be heard. The Adjudicating Authority should also note the said right of the Appellant while considering the Resolution Plan and then take decision after hearing the Successful Resolution Applicant.

10. With those observations we dispose the Appeal. No costs.

[Justice A.I.S. Cheema]
Member (Judicial)

[Justice Anant Bijay Singh]
Member (Judicial)

[Kanthi Narahari]
Member (Technical)

pks/md