

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT)(INS) No.05 of 2020

(Arising out of Order dated (10.12.2019) passed by the (National Company Law Tribunal) New Delhi Court - III in CA 862/CIII/ND/2019 in (IB)643(ND)2018]

IN THE MATTER OF:

**Ashish Chaturvedi
Ex-Director
A to Z Barter Pvt. Ltd.
Regd. Office : C-14, Mansarover Garden
New Delhi – 110 015**

...Appellant

Versus

**1.Inox Leisure Ltd.
ABS Towers, Old Padra Road
Vadodara – 390 007**

...Respondent No.1

**2.Anoop Kumar Goyal
IBBI/IPA-001/IP-P00563/2017-18/11039
Interim Resolution Professional
A to Z Barter Pvt. Ltd.
C-14, Mansarover Garden
New Delhi – 110 015**

...Respondent No.2

**3.A to Z Barter Pvt. Ltd.
C-14, Mansarover Garden
New Delhi – 110 015**

...Respondent No.3

Present:

**For Appellant: Mr. Manoj Kumar Garg, Mr. Ashutosh kr. Singh
And Mr.SidharthaPatra, Advocates.**

**For Respondents: Mr.Saransh Kumar, Advocate (R-1).
Mr. Anoop Kumar Goyal (Resolution Professional) (R2)**

J U D G M E N T

VENUGOPAL M.J.

1. The Appellant (Ex-Director of the A to Z Barter Pvt. Ltd) has filed the instant Company Appeal being aggrieved against the order dated 10.12.2019 in CA-862/C-III/ND/2019 passed by the Adjudicating Authority ('National Company Law Tribunal') New Delhi Bench - III.
2. The Adjudicating Authority ('National Company Law Tribunal') New Delhi Bench -III while passing the impugned order dated 10.12.2019 had observed the following:

“Resolution Professional viz. Mr. Anup Kumar Goyal is present. The Operational Creditor along with counsel is present. The Resolution Professional prayed for exclusion of the period of time from the date of the initial order dated 12.12.2018 till date on the ground that the order has not been communicated to him by the concerned and he came to know about the order very late due to which he has filed the present Application. It is further submitted that the Operational Creditor be directed to deposit an amount of Rs. Two Lakhs with the Applicant/IRP.

As seen from order dated 05.01.2018, it has been provided under Para 11 of the said order that a copy of the order shall be communicated to the IRP as well as to the Corporate Debtor by the Registry which has not been done due to inadvertence. Therefore, the Application is allowed. The period of 370 days is hereby excluded from the maximum period of CIR

Process by extending 180 days with effect from the date of passing of this order with the direction to the Operational Creditor to deposit of Rs. 2.50 lakhs with the IRP within a week's time. Therefore, within three days the IRP will make public announcement."

And resultantly disposed of the Application.

3. The Learned Counsel for the Appellant submits that the 'Adjudicating Authority' passed impugned order dated 10.12.2019 by overlooking essential facts of the case and wrongly allowed the application filed by the 'Insolvency Resolution Professional' for exclusion of time.
4. The Learned Counsel for the Appellant contends that the 'Adjudicating Authority' had failed to appreciate the pertinent fact that the Respondent Company/Operational Creditor had full knowledge of the impugned order dated 05.12.2018 for initiation of the 'Corporate Insolvency Resolution Process' of the 3rd Respondent Company.
5. The Learned Counsel for the Appellant takes stand that the email communication was sent on 12.11.2019 after lapse of eleven month and Seven days to the 'Insolvency Resolution Professional' for his appointment, after lapse of the period of 180 days for completion of the 'Corporate Insolvency Resolution Process'.
6. It is represented on behalf of the Appellant that even if it is assumed for a moment that the 'Insolvency Resolution Professional' had no knowledge for his appointment prior to the email communications made by the 1st Respondent Company, then it is for the said Company

to communicate the order dated 05.12.2018 to the 'Insolvency Resolution Professional' within the period of Limitation and if it was not made, then point out the exceptional grounds in this regard before the 'Adjudicating Authority' for the delayed communication sent to the 'Insolvency Resolution Professional', since the 1st Respondent Company had not deposited Rs.Two Lakhs to the 'Insolvency Resolution Professional', pursuant to the order dated 05.12.2018.

7. The other plea of the Appellant is that the impugned order dated 10.12.2019 was passed by the 'Adjudicating Authority' without providing any opportunity of 'Hearing' to the 3rd Respondent Company and as such impugned order is not valid one in the eye of law.
8. The Learned Counsel for the Appellant points out that the 'Adjudicating Authority' had failed to appreciate the judgment of the Hon'ble Supreme Court in *Committee of Creditors of Essar Steel India Limited through Authorised Signatory v. Satish Kumar Gupta & Ors.* (Civil Appeal No. 8766-67/2019) dated 15.11.2019, wherein it was clarified that in an exceptional cases, the 'Adjudicating Authority' can extend time on an 'Application' filed by the 'Insolvency Resolution Professional' if instructed by the 'Committee of Creditors' etc.
9. The Learned Counsel for the Appellant refers to the judgment of this Tribunal in CA(AT) (Insolvency) No. 185 of 2018 in *Quinn Logistics India Pvt. Ltd v.Mack Soft Tech Pvt. Ltd and ors.*, dated 08.05.2018, wherein at para 6 to 11 it is observed as under:

“Similar question fell for consideration before this Appellate Tribunal in “Quantum Limited (Corporate Debtor) vs. Indus Finance Corporation Limited – Company Appeal (AT) (Insolvency) No. 35of 2018” wherein this Appellate Tribunal observed as follows:

“3. Section 12 prescribes the ‘time limit for completion of insolvency resolution process’, which reads as follows:

12. Time-limit for completion of insolvency resolution process –

(1) Subject to sub-section (2), the corporate insolvency resolution process shall be completed within a period of one hundred and eighty days from the date of admission of the application to initiate such process.

(2) The resolution professional shall file an application to the Adjudicating Authority to extend the period of the corporate insolvency resolution process beyond one hundred and eighty days, if instructed to do so by a resolution passed at a meeting of the committee of creditors by a vote of seventy-five per cent of the voting shares.

(3) On receipt of an application under sub-section (2), if the Adjudicating Authority is satisfied that the subject matter of the case is such that corporate insolvency resolution process cannot be completed within one hundred and eighty days, it may by order extend the duration of such process beyond one hundred and eighty days by such further period as it thinks fit, but not exceeding ninety days:

Provided that any extension of the period of corporate insolvency resolution process under this section shall not be granted more than once.”

(4). From sub-section (2) of Section 12, it is clear that resolution professional can file an application to the Adjudicating Authority for extension of the period of the corporate insolvency resolution process, only if instructed to do so by a resolution passed at a meeting of the committee of creditors by a vote of 75% of the voting shares. The provision does not stipulate that such application is to be filed before the Adjudicating Authority within 180 days. If within 180 days including the last day i.e. 180th day, a resolution is passed by

the committee of creditors by a majority vote of 75% of the voting shares, instructing the resolution professional to file an application for extension of period in such case, in the interest of justice and to ensure that the resolution process is completed following all the procedures time should be allowed by the Adjudicating Authority who is empowered to extend such period up to 90 days beyond 180th day.

(5) In the present case, the Adjudicating Authority has not hold that the subject matter of the case do not justify to extend the period. It has not been rejected on the ground that the committee of creditors or resolution professional has not justified their performance during the 180 days. In such circumstances, it was duty on the part of the Adjudicating Authority to extend the period to find out whether a suitable resolution plan is to be approved instead of going for liquidation, which is the last recourse on failure of resolution process.

(6). For the aforesaid reasons, we set aside the impugned order dated 18th December, 2017 and extend the period of resolution process for another

90 days to be counted from today. The period between 181st day and passing of this order shall not be counted for any purpose and is to be excluded for all purpose. Now the Adjudicating Authority will proceed in accordance with law.”

7. In “Amar Remedies Ltd. (Through the Resolution Professional) vs. IDBI Bank Ltd. &Ors. – Company appeal (AT) (Insolvency) No. 59 of 2018” taking into consideration the justification of extension of the period, this Appellate Tribunal by judgment dated 5th March, 2018 extended the period for resolution process for another 90 days from the date of the order passed by the Appellate Tribunal. There are other cases wherein similar orders were passed, namely “M/s. Shilpi Cable Technologies vs. Macquarie Bank Ltd. – I.A. No. 30 of 2018 in Company Appeal (AT) (Insolvency) No. 101 of 2017”. Therein taking into consideration the fact that the Hon’ble Supreme Court has set aside the order passed by this Appellate Tribunal and restored the corporate insolvency resolution process as was initiated by

the Adjudicating Authority, passed the following order:-

4. We have heard learned counsel appearing on behalf of the 'Insolvency Resolution Professional' and learned counsel appearing on behalf of the Respondent Macquarie Bank Limited ('Operational Creditor') and perused the decision of the Hon'ble Supreme Court in "Macquarie Bank Limited Vs. Shilpi Cable Technologies Ltd." Taking into consideration the fact that because of the order passed by this Appellate Tribunal on 1st August, 2017, the 'Resolution Professional' could not function. Now, pursuant to the Hon'ble Supreme Court order as the 'Resolution Professional' has resumed the office on 3rd January, 2018 and allowed to function pursuant to this Appellate Tribunal's interim order dated 15th January, 2018, we hold that the period from 1st August, 2017 to 14th January, 2018 will not be counted for the purpose of counting total period of 180 days for completing the 'Resolution Process'. In case the 'Resolution Process' is not completed within 180 days, even after excluding

the period aforesaid, it will be open to the 'Committee of Creditors'/ 'Resolution Professional' to request the Adjudicating Authority for more time."

8. One or other Adjudicating Authority including Adjudicating Authority (Hyderabad Bench), Hyderabad, (Kolkata Bench), Kolkata and (Ahmedabad Bench), Ahmedabad have also passed the order excluding such period taking into consideration the facts and circumstances of each case. 9. From the decisions aforesaid, it is clear that if an application is filed by the 'Resolution Professional' or the 'Committee of Creditors' or 'any aggrieved person' for justified reasons, it is always open to the Adjudicating Authority/Appellate Tribunal to 'exclude certain period' for the purpose of counting the total period of 270 days, if the facts and circumstances justify exclusion, in unforeseen circumstances. 10. For example, for following good grounds and unforeseen circumstances, the intervening period can be excluded for counting of the total period of 270 days of resolution process:-

(i) If the corporate insolvency resolution process is stayed by 'a court of law or the Adjudicating Authority or the Appellate Tribunal or the Hon'ble Supreme Court.

(ii) If no 'Resolution Professional' is functioning for one or other reason during the corporate insolvency resolution process, such as removal.

(iii) The period between the date of order of admission/moratorium is passed and the actual date on which the 'Resolution Professional' takes charge for completing the corporate insolvency resolution process.

(iv) On hearing a case, if order is reserved by the Adjudicating Authority or the Appellate Tribunal or the Hon'ble Supreme Court and finally pass order enabling the 'Resolution Professional' to complete the corporate insolvency resolution process.

(v) If the corporate insolvency resolution process is set aside by the Appellate Tribunal or order of the Appellate Tribunal is reversed by the Hon'ble Supreme Court and corporate insolvency resolution process is restored.

(vi) Any other circumstances which justifies exclusion of certain period.

However, after exclusion of the period, if further period is allowed the total number of days cannot exceed 270 days which is the maximum time limit prescribed under the Code.

11. In the present case, as the corporate insolvency resolution process remained stayed for 166 days due to the interim order passed by the Adjudicating Authority on 15th September, 2017 which was vacated on 28th February, 2018, we hold that the 'Committee of Creditors' / 'Resolution Professional' rightly requested the Adjudicating Authority to exclude the period of 166 days for the purpose of counting the total period of 270 days. Taking into consideration the stand taken by the parties and the stage of corporate insolvency resolution process, we direct the Adjudicating Authority to exclude 166 days for the purpose of counting the period of corporate insolvency resolution process and thereby allow the Resolution professional / Committee of Creditors further 166 days with immediate effect

(i.e. 8th May, 2018) to complete the corporate insolvency resolution process.”

10. The Learned Counsel for the Appellant projects an argument that the ‘Adjudicating Authority cannot extend time period beyond 330 days as specified under the Second provision to Section 12(3) of the ‘Insolvency and Bankruptcy Code, 2016’ (inserted on 16.08.2019 pursuant to the ‘Insolvency and Bankruptcy Code (Amendment) Act, 2019) and it was mentioned in the Second Proviso to 12(3) of the Code that the ‘Corporate Insolvency Resolution Process’ shall mandatorily be completed within a period of three hundred and thirty days from the Insolvency commencement date (‘including any extension period of Corporate Insolvency Resolution Process’) and the time taken in legal proceedings in relation to such Resolution Process of the ‘Corporate Debtor’.
11. The Learned Counsel for the Appellant submits that because of the fact that the legal proceedings commenced from 01.06.2018 by the 1st Respondent/Operational Creditor by filing the Insolvency Application against the 3rd Respondent/Applicant before the ‘Adjudicating Authority’, three hundred thirty days including Legal proceedings in relation to Resolution process cannot be extended by ‘National Company Law Tribunal’ beyond 25.04.2019, viz, three hundred thirty days as mandated in Second proviso to Section 12(3) of the ‘Insolvency and Bankruptcy Code, 2016’.

12. The Learned Counsel for the Appellant contends that the 'Insolvency Resolution Professional' had not started any 'Corporate Insolvency Resolution Process' based on the order passed by the 'Adjudicating Authority' dated 05.12.2018 and his status was not changed from 'IRP' to 'RP' by the 'Adjudicating Authority' and, therefore, the ingredient of Section 12(2) of the IBC, 2016 is not applicable, because of the reason that 'Resolution Professional can only file an Application before the 'Adjudicating Authority' for extension of CIRP beyond one Hundred and Eighty days.
13. The Learned Counsel for the Appellant by adverting to Section 12 of the IBC, 2016 puts forth a plea that the 'Adjudicating Authority' has no power in this section to extend the time of maximum of 90 days beyond the expiry of 180 days for completion of CIRP, if CIRP has not commenced by the 'Insolvency Resolution Professional' duly appointed by the 'Adjudicating Authority' as per its order dated 05.12.2018.
14. Per contra, it is the specific case of the 2nd Respondent/IRP is that neither the Registry of the 'Adjudicating Authority' nor any other person had informed the IRP about passing of the order dated 05.12.2018 or commencement of 'CIRP' within the time period as mentioned in the order and hence he was unaware of the passing of the aforesaid order and could not start functioning as IRP of Corporate Debtor.
15. The 2nd Respondent/IRP in his 'Application before the 'Adjudicating Authority' had proceeded to mention that on 12.11.2019 he has

- received an email from the 'Operational Creditor' whereby he was informed that he was appointed as IRP by order dated 05.12.2018 and that the Operational Creditor further informed him that they wanted to revive the 'Insolvency Proceedings' against the 'Corporate Debtor' and required his willingness and eligibility to act as 'IRP', and that he confirmed his eligibility and willingness to act as 'IRP' and required the Operational Creditor to deposit a sum of Rs. 2,00,000/- as per direction of the Tribunal and furnished a declaration regarding his eligibility.
16. In the present case, it comes to be known that on receipt of the email dated 12.11.2019, the 'Operational Creditor' had informed the 2nd Respondent/Applicant that even though it was ready to deposit the amount, because of delay, a fresh order from the 'Adjudicating Authority' was required, and hence, the 2nd Respondent/Applicant had filed an 'Application' seeking fresh direction for the commencement of 'Corporate Insolvency Resolution Process' and certain order in permitting him to commence functioning as IRP in the present mandate and further that a mandate of 180 days for concluding CIRP may be granted.
17. It is to be noted that 'Speedy' is the gist for an effective, efficacious functioning of the Bankruptcy Code. As per Section 12(3) of the Code, the time period of 'CIRP is not to be extended more than once. It is to be borne in mind by the concerned authorities to adhere to the model

- timeframe envisaged in Regulation 40(A) of IBBI (CIRP for corporate person) Regulations 2016 as far as possible. In an extraordinary circumstance(s), the 'Adjudicating Authority' can extend the 'Corporate Insolvency Resolution Process' beyond the time limit adumbrated in Section 12(3) of the Code. The extension of time can be only on an application made by the Insolvency Resolution Professional on the basis of 'Committee of Creditors' as mentioned in sub-Section 2 and 3 of Section 12 of the IBC, 2016.
18. Section 60(5) of the IBC jurisdiction upon the 'Adjudicating Authority' to determine a 'Question of priorities' or any question of Law or Facts, arising out of or in relation to the Insolvency Resolution based on the issue involved in a given case. An Adjudicating Authority is to adhere to the procedural aspect mentioned in numerous sections of the Code. To put it precisely, an Adjudicating Authority as per Section 60(5) of the Code is empowered to deal with the claims pertaining to the 'Insolvency Resolution Process' (including the priorities issue) can find a solution. As regards any legal proceedings not pertaining to the purview of Section 60(5) of the Code, 2016, the Code permits a 'Resolution Professional' to institute proceedings at the behest of Corporate Debtor in other Forums/Courts, in terms of the ingredients of Section 25(2) (b) of the I&B Code.
 19. The 'Insolvency Resolution Professional' being a creature of the I&B Code is certainly entitled to project an application before an

‘Adjudicating Authority’ relating to the hardships/difficulties, he faces/faced during the ‘Resolution Process’.

20. A glance of the impugned order dated 10.12.2019 indicates that the order of the ‘Adjudicating Authority’ dated 05.12.2018 was not communicated to the IRP as well as to the ‘Corporate Debtor by the office of the Adjudicating Authority (NCLT III New Delhi), due to inadvertence.
21. In this connection, this Tribunal relatively pointed out that ‘Maxim’, ‘Actus’, ‘Curiae’, ‘Neminem’, ‘Gravabit’ i.e. Act of the Court shall harm no Home-Sapien. Owing to an inadvertent omission on the part of the ‘Registry’ of the ‘Adjudicating Authority’, the order dated 05.01.2018 of the said Authority was not communicated to the ‘IRP’ as well as to the Corporate Debtor. In this backdrop the ‘Adjudicating Authority’ (NCLT, New Delhi Bench –III) had rightly allowed the Application i.e. CA-862/C-III/ND/2019 filed by the 2nd Respondent by passing the impugned order dated 10.12.2019, which is free from any legal infirmities.
22. In fine, the present Appeal fails and the same is dismissed, but without costs.

[Justice Venugopal M.]
Member (Judicial)

[V.P.Singh]
Member (Judicial)

New Delhi

10th February, 2020

SS/