

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

I.A. NO.1140 OF 2018

IN

COMPANY APPEAL(AT) (INSOLVENCY) NO.264 OF 2018

IN THE MATTER OF:

Praveen Arjun Patel

Appellant

Vs

JK Lakshmi Cement Ltd

Respondent

AND IN THE MATTER OF

Haryana Construction,
E-149, Gamma-I,
Greater Noida (UP)

Applicant

I.A. NO.1141 OF 2018

IN

COMPANY APPEAL(AT) (INSOLVENCY) NO.264 OF 2018

IN THE MATTER OF:

Praveen Arjun Patel

Appellant

Vs

JK Lakshmi Cement Ltd

Respondent

AND IN THE MATTER OF

Ved Contracts Private Ltd,
U-158, Vats Complex,
Main Vikas Marg,
Shakarpur,
Delhi-110092.

Applicant

I.A. NO.1142 OF 2018

IN

COMPANY APPEAL(AT) (INSOLVENCY) NO.264 OF 2018

IN THE MATTER OF:

Praveen Arjun Patel

Appellant

Vs

JK Lakshmi Cement Ltd

Respondent

AND IN THE MATTER OF

Space Height Structure Pvt Ltd,
306 Block II
Ganga Shopping Centre,
Sector 29,
Noida 201303

Applicant

Present: -

Mr. Santosh Kumar and Mr. Sanjeev Arora, Advocates for the Appellant.

Mr. Pankaj Bhagat, Mr. Amitav Bachchan and Ms Tusharika Sharma,
Advocates for the Applicants.

Shri Amit P. Deshpandey, Advocate for the Respondent.

ORDER**BALVINDER SINGH, MEMBER (TECHNICAL)**

1. These three IAs being IA No.1140, 1141 and 1142 of 2018 has been filed by the respective applicants being aggrieved of the order dated 12.6.2018 passed by this Appellate Tribunal in Company Appeal (AT) (Ins) No.264 of 2018, Pravin Arjun Patel, through Ravi Kant Seth Vs J.K. Lakshi Cement Ltd.

In all these three IAs the applicants have sought the following reliefs:-

- a) Recall and/or modify the order dated 12.6.2018 to make the same in line or in sync with the mandate of Section 12A of the IBC in the manner as may be deemed fit, just, proper and in the interest of;
- b) Stay the operation of the order dated 12.6.2018 passed by this Appellate Tribunal till the disposal of the present application or direct

the Ld. Adjudicating Authority, Principal Bench, NCLT, Delhi not to pass any order permitting withdrawal of Section 9 Application by JK Lakshmi Cement Ltd, till the disposal of the present application;

c) pass ad-interim ex parte orders in terms of prayer (b) above.

d) Pass any other order as may be deemed fit and proper in the facts and circumstances of the case.

2. The brief facts in all the three IAs are similar. The applicants have stated that the National Company Law Tribunal, New Delhi was pleased to admit application under Section 9 of the Insolvency & Bankruptcy Code, 2016 filed by the operational creditor against the Corporate Debtor, namely, PAN Realtors Pvt Ltd. Accordingly an Interim Resolution Professional for the Corporate Debtor was appointed and claims from the Creditors of PAN Realtors Pvt Ltd were invited. Applicants herein filed their claims before the due date i.e. 4.6.2018 before the IRP. Applicants further stated that they enquired about the status of their claim from IRP and the IRP informed that Appellate Tribunal has passed an order on 12.6.2018 recording the settlement arrived at between the Operational Creditor and the Corporate Debtor and the IRP showed their inability to proceed further with the claims filed by the creditors including the present applicants. Applicants further stated that they obtained a copy of the order dated 12.6.2018 and came to know that the appeal filed by one Mr. Praveen Arjun Patel on behalf of the corporate debtor was listed on 30.5.2018 and was adjourned to 2.7.2018. It is further stated that the corporate debtor in connivance with the operational creditor filed an application for recording of settlement before the Appellate Tribunal which was listed before the Vacation Bench and the Bench ordered that in view of

the settlement arrived at, the parties were allowed to withdraw Section 9 application.

3. Being aggrieved by the said order dated 12.6.2018 the applicants have filed respective IAs thereby stating that on 6.6.2018 the Hon'ble President had promulgated the Insolvency & Bankruptcy Code (Amendment) Ordinance 2018 by which certain provisions of IBC have been amended and as per that amendment, Section 12 A of the IBC provides that the Adjudicating Authority may allow the withdrawal of application admitted under Section 7 or Section 9 or Section 10, on an application made by the applicant with the approval of ninety percent voting share of the committee of creditors, in such manner as may be prescribed.

4. In view of the above amendment in Section 12A of the IBC, the applicants have stated that the order dated 12.6.2018 passed by this Appellate Tribunal permitting unilateral withdrawal of Section 9 application by the operational creditor without the approval of the 90% of the voting share in the Committee of Creditors of the Corporate Debtor is contrary to the said mandate and deserves to be recalled/modified. The applicants have further stated that the order dated 12.6.2018 is against the letter and spirit of Section 12A of the IBC and the said order has caused serious prejudice to the other creditors of the Corporate Debtor including the present applicants herein. The applicants have further stated that the Corporate Debtor and Operational creditor have acted in connivance with each by settling the matter without knowledge/consent of the Committee of Creditors by-passing the provisions of law. The applicants further stated that the settlement arrived at between the parties is behind the back of the other creditors to their detriment and

prejudice. The applicants have further stated that the operational creditor and corporate debtor acted in hand in glove with each other and have not presented the true and correct legal position before this Appellate Tribunal when the order dated 12.6.2018 was passed. Further the Operational Creditor and Corporate Debtor got the date of hearing fixed by this Tribunal preponed and filed the application before the Vacation Bench without intimating the other creditors and even to IRP.

5. I have heard the learned counsel for the parties and perused the entire record.

6. Learned counsel for the applicants have argued that the operational creditor and corporate debtor in connivance with each other and without informing the Appellate Tribunal about the amendment in Section 12 A of the IBC persuaded it and the order dated 12.6.2018 have been passed in ignorance of the said amendment. Learned counsel for the applicants further argued that approval of 90 per cent voting share of committee of creditors have not been taken. Learned counsel for the applicants argued that the order dated 12.6.2018 passed by the Appellate Tribunal amounts to exceeding jurisdiction as the same has been passed in complete ignorance of the provisions and mandate of Section 12 A of the IBC 2016.

7. Learned counsel for the applicants rebutted the arguments of the corporate debtor that the order dated 12.6.2018 has been passed in the light of natural justice is misconceived as natural justice cannot take away vital rights accrued in favour of the applicants by virtue of Section 12 A of the IBC 2016. Learned counsel for the applicants further argued that without compliance of statutory provisions cannot be held to be for Natural Justice.

In the order dated 12.6.2018 the rights of the Committee of Creditors and all other applicants have been affected as the settlement is to the detriment of all the stake holders and the corporate debtor would suffer no injury. Learned counsel for the applicants argued that the reliance placed by the applicants in the case of International Recreation & Amusement Vs SR Construction is bad as the same is distinguishable both in facts and law. Learned counsel for the applicants argued that the said judgement is much prior to promulgation of Ordinance, 2018 and the issue before the Appellate Tribunal in the case of International Recreation case was that no notice was received by the corporate debtor therein. Learned counsel for the applicants argued that the order dated 12.6.2018 has been passed by non-compliance of statutory provisions.

8. Learned counsel for the appellant argued that the persons who are not parties to judgement/order have no locus standi to file the application for recall/modify of the order 12.6.2018. Learned counsel for the appellants further argued that the mere disagreement with view of the judgement/order cannot be ground for invoking jurisdiction of the Appellate Tribunal for recall of the order. Learned counsel for the appellants further argued that the application for recall of the order dated 12.6.2018 is not maintainable as the applicants have neither pleaded nor contended that glaring omission has crept. Learned counsel for the appellants further argued that application for recall of the order cannot be permitted to reopen a concluded matter.

9. Learned counsel for the appellants argued that the order dated 12.6.2018 does not create any embargo for applicants to move before Appropriate Forum. Learned counsel for the appellants argued that the remedy is available to the applicants to get adjudication of its grievance. The

applications moved by the applicants for recall of the order dated 12.6.2018 is abuse of the process of Court. Learned counsel for the applicants argued that Section 12 A of the IBC (Amendment) Ordinance 2018 is not applicable in the facts and conspectus of the case and is applicable to the Adjudicating Authority under the Statute. Learned counsel for the applicants argued that the committee of creditors was not formed, therefore, the pre-requisite condition of the applicability of Section 12 A of the IBC does not arise.

10. Having heard the arguments of both the parties it is to say that Section 12 A of IBC would be applicable when admission for insolvency resolution application has been admitted by the Adjudicating Authority and there is no challenge to the admission of the application. Subsequently the Adjudicating Authority may allow the withdrawal of application in terms of Section 12A and obviously the admitted application for withdrawal will have to meet the criteria as specified in the said Section. However, in this case admission of the application filed under Section 9 of the IBC Code was challenged before the Appellate Tribunal which has set aside the admission. Consequently, there is no valid admission of the application under IBC Code. In these circumstances the position for withdrawal of application will be in terms of Rule 8 of The Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules 2016. Therefore, there is no impact of Section 12 A on this decision in this case.

11. In terms of Section 9 of the Code any operational creditor can initiate insolvency resolution proceedings. Therefore, the applicants herein have their rights protected by IBC that they are entitled to initiate insolvency resolution

proceedings and withdrawal of this application by a third party does not impact their rights under the IBC.

12. In the light of the above observations, I do not find any merit in these applications and are accordingly dismissed.

(BALVINDER SINGH)
MEMBER (TECHNICAL)

NEW DELHI
DATED 21-8-2018

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