

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 206 of 2018

(Arising out of Order dated 24th April, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), Single Bench, Chennai, in MA/25/IB/2018 in CA/38/IB/2018 in CP/511(IB)/2017)

IN THE MATTER OF:

SKS Power Generation Chattisgarh Limited

...Appellant

Vs

**Mr. V Nagarajan,
Resolution Professional in respect of M/s. Cethar
Limited & Ors.**

....Respondents

Present:

For Appellant: Mr. Arun Kathpalia, Senior Advocate with Mr. Atul Shanker Mathur, Ms. Priya Singh, Mr. Samaksh Goyal and Ms. Sweta Singh, Advocates.

For Respondents: Mr. Arnav Dash, Ms. Mehak Huria, Mr. V. Nagarajan, Mr. Arnav Behera and Mr. J.P. Patri, Advocates for R-1.

Ms. Pooja M. Saigal, Mr. Akshay Gupta and Ms. Pooja Mehra, Mr. Jai Endlaw, Mr. Sunny Kadiyan, Advocates for R-2.

Mr. V. Nagarajan, R.P.

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

In the ‘Corporate Insolvency Resolution Process’ initiated against ‘M/s. Cethar Limited’ (‘Corporate Debtor’), the 1st Respondent- (‘Resolution Professional’) filed application being CA 38/IB/2018 in CP/511/(IB)/2017

under Sections 43, 45, 180 and 186 of the Insolvency and Bankruptcy Code, 2016 ('I&B Code' for short) with following prayers: -

“(a)(i) That the transactions of investment set out as made by the ‘Corporate Debtor’ pursuant to the agreement dated 15.03.2011 amended by agreement dated 06.04.2016 and read with resolution of CD’s Board of Directors dated 17.06.2016 in shares of the 1st and the 4th Respondent together with the sale thereof to 5th Respondent and payments there from to 6th to 9th Respondents be declared as null and ab-initio void and consequently set aside.

(ii) That 1st – 4th Respondents be directed to make repayment to the CD of the sum of Rs. 228.60 Crores with interest at 12% p.a from date of receipt of the funds from the CD and its subsidiary.

(a) That pending the hearing and final disposal of this application.

(i) The 1st -4th Respondents be restrained from dealing with or disposing off or parting with or alienating their assets, including by way of hypothecation, mortgage or of any kind, in any manner.

- (ii) *That 1st -4th Respondents be directed to place before this Hon'ble Tribunal all records of movement of funds between themselves from 1.04.2010 onwards till date including funds received by them from CD and its subsidiary to the extent of Rs. 228.60 crores.*
- (iii) *That the 1st-4th Respondents be directed to place adequate security by way of bank guarantee in respect of the amount due to the CD.*
- (iv) *That the affairs of the 1st-4th Respondents be directed to be investigated by the Serious Fraud Investigation Office (SFIO) or any other investigation agency that the Hon'ble Tribunal may deem fit and appropriate in this regard."*

2. The 'Resolution Professional' thereafter filed Miscellaneous Application being MA No. 25/IB/2018 with following prayer:

- (a) *An order permitting the Applicant to **amend** **CA/38/IB/2018** and thereby add the following as*

final relief a(i)(a), after Relief presently set out as a(i) as under:-

“a(i)(a) Direct R10 to repay to the Applicant a sum of Rs. 158.00 crores being the amount received by it from R1 whether as equity or loans or advances or whatever else limited to the maximum extent of funds provided by Applicant to R1.”

(b) An order restraining and injuncting Respondent No. 2 from in any manner realizing or seeking to realize the Bank Guarantee issued on behalf of the Corporate Debtor pending the final disposal of CA/38/IB/2018”

3. The Adjudicating Authority (National Company Law Tribunal), Single Bench, Chennai, on hearing the parties directed them to file reply to the application seeking amendment as sought for in MA 25/IB/2018.

4. The 1st Respondent- ‘Resolution Professional’ then forwarded an e-mail to the Appellant intimating that the matter relating to the amendment was listed on 24th April, 2018. Thereafter, the Adjudicating Authority, Single Bench, Chennai, by impugned order dated 24th April, 2018, passed following interim order and directions:

“RP along with his Counsel present. Counsel for R1, R2, R10 and R11 present.

Heard both the sides. The Counsel for the RP has pressed hard for grant of interim prayers, citing the reasons that in case the interim prayer is not granted, there will be irreparable loss to the assets of the Corporate Debtor.

Therefore, R10 is directed to repay to the Appellant a sum of Rs. 158 crores, being the amount received by him from R1, whether as an equity or loan or advance or whatever as limited to the maximum extent of funds provided by the Applicant to the R1. R2 is restrained from seeking to release the bank guarantee issued on behalf of the Corporate Debtor, pending the final disposal of CA/38/IB/2018 filed in CP/511/IB/2017.

The Counsel for the Applicant is directed to obtain a copy of this order and serve it on the Respondents with immediate effect. However, the Counsel for the Respondents is also directed to instruct the Respondents/clients to make compliance with this order in letter and spirit.

The Counsel for the Respondent is directed to file reply. Put up on 26.04.2018 at 10.30 A.M.”

5. The aforesaid order is under challenge in this appeal.

6. Learned Senior Counsel appearing on behalf of the Appellant submitted that the Adjudicating Authority in effect has allowed the main prayer as sought for in MA 25/IB/2018, though the main CA/38/IB/2018 is still pending.

7. It was submitted that the impugned order amounts to final order purported to have been passed under Section 43 read with Section 45 of the 'I&B Code'.

8. On 11th May, 2018, when we issued notice, raised the question of jurisdiction of the Adjudicating Authority to direct one or other third party by an interim order without impleading and hearing the third party. We stayed the operation of the impugned order dated 24th April, 2018 but allowed the 'Corporate Insolvency Resolution Process' to continue.

9. The Respondent- 'Resolution Professional' has appeared and filed reply affidavit and taken plea that the Appellant was the 10th Respondent who has been directed to repay a sum of Rs. 158 Crores as the amount was paid to it by the 'Corporate Debtor'. However, it is accepted that the impugned order was passed by way of an interim order without deciding the question of maintainability of application under Sections 43 and 45 of the 'I&B Code'.

10. As we find that the impugned order dated 24th April, 2018 was passed by the Adjudicating Authority without deciding question as to whether the

application under Sections 43 and 45 of the 'I&B Code' is maintainable or not and as impugned order is not a speaking/reasoned order, we set aside the impugned order and remit the matter to the Adjudicating Authority to decide the application on merit if not yet decided. The Appeal is allowed with aforesaid observations and directions. No cost.

[Justice S.J. Mukhopadhaya]
Chairperson

[Justice Bansilal Bhat]
Member (Judicial)

NEW DELHI

14th December, 2018

AR