

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 560 of 2018

IN THE MATTER OF:

Sanjay Kumar Ruia

...Appellant

Vs

Catholic Syrian Bank Ltd. & Anr.

....Respondents

Present:

For Appellant: Mr. Pankaj Jain, Mr. Sagar Bansal, Ms. Dhriti Sarin and Ms. Nitika Mangal, Advocates.

**For Respondent: Mr. Vishal Jain, CA, AR of CoC,
Mr. Ilam Paridi, Advocate for Respondent No. 1
Ms. Amisha Agarwal, Advocate for Respondent No. 2.**

ORDER

03.01.2019— This appeal has been preferred by Sanjay Kumar Ruia, erstwhile 'Resolution Professional' of 'S.N. Plumbing Private Limited' against the order dated 25th July, 2018 passed by the Adjudicating Authority (National Company Law Tribunal) Mumbai Bench, Mumbai, in MA No. 580 of 2018 (in CP(IB) No. 1268/MB/MAH/2017), whereby and whereunder, the Adjudicating Authority while extending the period of resolution process in exercise of power conferred under Section 55 of Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "I&B Code") treating the matter as 'Fast Track Corporate Insolvency Resolution Process' also determining the 'Corporate Insolvency Resolution Process fee' and the 'cost' incurred and payable to Appellant (Sanjay Kumar Ruia) to the tune of Rs. 23,69,064/- plus G.S.T.

2. Learned Counsel appearing on behalf of Sanjay Kumar Ruia, erstwhile 'Resolution Professional' of 'S.N. Plumbing Private Limited', submits that the 'Resolution Professional' has incurred expenditure against different heads and submitted professional bill totaling Rs. 1,45,92,064/- which was also approved by the 'Committee of Creditors'. Thereafter, the Adjudicating Authority while passing order under Section 55, without any basis, reduced the amount to the tune of Rs. 23,69,064/- plus G.S.T., which is not permissible in law.

3. It is further submitted that after completion of 270 days of the 'Resolution Process', the 'Committee of Creditors' had no power to replace the 'Resolution Professional' and the Adjudicating Authority had no power to extend the period beyond 270 days.

4. Mr. Ilam Paribi, appearing on behalf 1st Respondent- 'Financial Creditor' and Ms. Amisha Agarwal, learned Counsel appearing on behalf of 2nd Respondent another 'Financial Creditor', submit that the 'Committee of Creditors' never approved the claim of Rs. 1,45,92,064/-. However, this has been disputed by the learned Counsel appearing on behalf of Appellant- erstwhile 'Resolution Professional' of 'S.N. Plumbing Private Limited'.

5. Pursuant to application under Section 9, the 'Corporate Insolvency Resolution Process' was initiated against 'S.N. Plumbing Private Limited'- ('Corporate Debtor') which was admitted on 16th August, 2017. Thereafter, more than 270 days had passed. The 'Committee of Creditors', thereafter, wanted to charge the 'Resolution Professional', so the matter was placed before the

Adjudicating Authority, wherein the impugned order dated 25th July, 2018 was passed.

6. The questions arise for consideration in this appeal are:

- i. Whether in a 'Corporate Insolvency Resolution Process' triggered under Sections 7 or 9 or 10 of the 'I&B Code', the Adjudicating Authority has power to convert the 'Corporate Insolvency Resolution Process' as a 'Fast Track Corporate Insolvency Resolution Process' under Section 55 of the 'I&B Code'?
- ii. Whether 'Committee of Creditors' had jurisdiction to replace the 'Resolution Professional' after completion of 270 days? and;
- iii. Whether Adjudicating Authority is empowered to decide the resolution cost, including the resolution fee payable to the 'Resolution Professional'?

Issue No.1

7. Chapter IV of the 'I&B Code' deals with 'Fast Track Corporate Insolvency Resolution Process'. Section 55 of the 'I&B Code' reads as follows:

**“55. Fast track corporation insolvency
resolution process –**

*(1) A corporate insolvency resolution process
carried out in accordance with this*

Chapter shall be called as fast track corporate insolvency resolution process.

(2) An application for fast track corporate insolvency resolution process may be made in respect of the following corporate debtors, namely:-

(a) a corporate debtor with assets and income below a level as may be notified by the Central Government;

or

(b) a corporate debtor with such class of creditors or such amount of debt as may be notified by the Central Government; or

(c) such other category of corporate persons as may be notified by the Central Government.”

8. Sub-section (2) of Section 55 makes it clear that an application for ‘Fast Track Corporate Resolution Process’ can be made only against the following ‘Corporate Debtors’, namely: -

(a) a corporate debtor with assets and income below a level as may be notified by the Central Government; or

(b) a corporate debtor with such class of creditors or such amount of debt as may be notified by the Central Government; or

(c) such other category of corporate persons as may be notified by the Central Government.””

9. Section 55 provides that application for ‘Fast Track Corporate Insolvency Resolution Process’ should be completed within a period of 90 days.

10. In the present case, the application was not filed under Section 55 but under Section 9 of the ‘I&B Code’. In terms of Section 12 ‘Corporate Insolvency Resolution Process’ was required to be completed within 180 days from the date of admission. Sub-section (3) of Section 12 empowers the Adjudicating Authority to extend the period beyond 180 days but it cannot exceed 90 days. The provision (Section 12) 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.”

11. We, therefore, hold that the Adjudicating Authority has no jurisdiction to proceed with the ‘Corporate Insolvency Resolution Process’ beyond the period of 270 days having not empowered under the provisions of the ‘I&B Code’.

12. Sub-section (2) of Section 55 of the ‘I&B Code’ stipulates that an application for ‘Fast Track Corporate Insolvency Resolution Process’ can be made against (i) the ‘Corporate Debtor’ whose assets and income is below a level, as may be notified by the Central Government or (ii) the ‘Corporate Debtor’ with such class of creditors or (iii) such other category of corporate persons as may be notified by the Central Government.

13. Therefore, it is clear that the ‘Fast Track Corporate Insolvency Resolution Process’ is different from ‘Corporate Insolvency Resolution Process’ against such

‘Corporate Debtor(s)’ as may be notified by the Central Government in terms of clauses (a), (b) & (c) of sub-section (2) of Section 55.

14. Admittedly, the ‘Corporate Debtor’- ‘S.N. Plumbing Private Limited’ does not come within the category of ‘Corporate Debtor’ in terms of clauses (a) or (b) or (c) of sub-section (2) of Section 55, its assets and income being not below a level, notified by the Central Government nor having class of creditors or amount of debt as notified by the Central Government. Therefore, Section 55 cannot be invoked against the ‘Corporate Debtor’- ‘S.N. Plumbing Private Limited’.

15. We, therefore, hold that the Adjudicating Authority exceeded its jurisdiction by extending the period of 90 days after completion of 270 days of the ‘Corporate Insolvency Resolution Process’ wrongly exercising its power under sub-section (2) of Section 55 which is not applicable. Accordingly, the Issue No.1 is answered in negative.

Issue No.2

16. After completion of 270 days of ‘Corporate Insolvency Resolution Process’, the Adjudicating Authority can pass order under Section 31 of the ‘I&B Code’, if a ‘Resolution Plan’ has been approved by the ‘Committee of Creditors’. In absence of any ‘Resolution Plan’, the Adjudicating Authority is bound to pass order under Section 33 by initiating liquidation proceeding against the ‘Corporate Debtor’.

17. In the background of law as discussed above, we hold that after completion of 270 days, the ‘Committee of Creditors’ ceased to exist and thereby they have no jurisdiction to replace a ‘Resolution Professional’ under Section 22 of the ‘I&B

Code'. Even if the decision to replace the 'Resolution Professional' is taken prior to 270 days, in absence of any order passed by the Adjudicating Authority, such decision cannot be entertained on completion of 270 days. However, the ground taken by the 'Committee of Creditors' can be looked into by the Adjudicating Authority to decide whether the same 'Resolution Professional' should be allowed to continue as 'liquidator' of the 'Corporate Debtor'. The Issue No.2 is also answered in negative.

Issue No.3

18. Section 30(2)(a) of 'I&B Code' deals with resolution cost which includes the fee of the 'Resolution Professional' and actual expenses incurred by him. The 'Resolution Professional' is required to examine such 'Resolution Plan' which provides for payment of 'Insolvency Resolution Process Cost' in the manner specified by the Board in priority to the repayment of other debts of the 'Corporate Debtor', relevant of which reads as follows:

"30. Submission of resolution plan.

(1) A resolution applicant may submit a resolution plan to the resolution professional prepared on the basis of the information memorandum.

(2) The resolution professional shall examine each resolution plan received by him to confirm that each resolution plan -

(a) provides for the payment of insolvency resolution process costs in a manner specified by the Board in priority to the repayment of other debts of the corporate debtor;

- (b) provides for the repayment of the debts of operation creditors in such manner as may be specified by the Board which shall not be less than the amount to be paid to the operational creditors in the event of a liquidation of the corporate debtor under section 53;*
- (c) provides for the management of the affairs of the Corporate debtor after approval of the resolution plan;*
- (d) the implementation and supervision of the resolution plan;*
- (e) does not contravene any of the provisions of the law for the time in force;*
- (f) conforms to such other requirements as may be specified by the Board.*

3. The resolution professional shall present to the committee of creditors for its approval such resolution plans which confirm the conditions referred to in sub-section (2).

4. The committee of creditors may approve a resolution plan by a vote of not less than seventy five per cent of voting share of the financial creditors.

5. The resolution applicant may attend the meeting of the committee of creditors in which the resolution plan of the applicant is considered.

Provided that the resolution applicant shall not have a right to vote at the meeting of the committee of creditors unless such resolution applicant is also a financial creditor.

(6) The resolution professional shall submit the resolution plan as approved by the committee of creditors to the Adjudicating Authority.

19. Chapter IX of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 deals with 'Insolvency Resolution Process'. Regulation 31 relates to 'Insolvency Resolution Process Cost'; Regulation 33 relates to 'Costs of the Interim Resolution Professional' and Regulation 34 deals with 'Resolution Professional Costs', as under:

“31. Insolvency resolution process costs –

Insolvency resolution process costs under section 5(13)(e) shall mean-

(a) amounts due to suppliers of essential goods and services under Regulation 32;

(b) amounts due to a person whose rights are prejudicially affected on account of the moratorium imposed under section 14(1)(d);

(c) expenses incurred on or by the interim resolution professional to the extent ratified under regulation 33;

(d) expenses incurred on or by the resolution professional fixed under regulation 34; and

(e) other costs directly relating to the corporate insolvency resolution process and approved by the committee.”

xxx

xxx

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“33. Costs of the interim resolution professional –

(1) The applicant shall fix the expenses to be incurred on or by the interim resolution professional.

(2) The Adjudicating Authority shall fix expenses where the applicant has not fixed expenses under sub-regulation (1)

(3) The applicant shall bear the expenses which shall be reimbursed by the committee to the extent it ratifies.

(4) The amount expenses ratified by the committee shall be treated as insolvency resolution process costs.

“34. Resolution professional costs –

The committee shall fix the expenses to be incurred on or by the resolution professional and the expenses shall constitute insolvency resolution process costs.

Explanation – For the purposes of this Regulation, “expenses” mean the fee to be paid to the resolution professional and other expenses, including the cost of engaging professional advisors, to be incurred by the resolution professional.”

20. The Regulation 34 aforesaid makes it clear that the ‘Committee of Creditors’ is required to determine the expenses incurred on or by the ‘Resolution Professional’, which shall also constitute ‘Insolvency Resolution Process Costs’. *Explanation* below Regulation 34 indicates that “expenses” which includes the fee to be paid to the resolution professional and the other expenses, including the cost of professional advisors, to be incurred by the resolution professional.

21. Regulation 38 deals with mandatory contents of the ‘Resolution Plan’ and class of regulation. All ‘Resolution Plans’ are required to identify specific sources

of funds that will be used to pay ‘Insolvency Resolution Process Costs’ to be paid in priority and reads as under:

“38. Mandatory contents of the resolution plan –

(1) A resolution plan shall identify specific sources of funds that will be used to pay the –

(a) insolvency resolution process costs and provide that the insolvency resolution process costs will be paid in priority to any other creditor;

(b) liquidation value due to operational creditors and provide for such payment in priority to any financial creditor which shall in any event be made before the expiry of thirty days after the approval of a resolution plan by the Adjudicating Authority; and

(c) liquidation value due to dissenting financial creditors and provide that such payment is made before any recoveries are made by the financial creditors who voted in favour of the resolution plan.

(2) A resolution plan shall provide:

(a) the term of the plan and its implementation schedule;

(b) the management and control of the business of the corporate debtor during its term; and

(c) adequate means for supervising its implementation.”

22. On combined reading of Section 30 of the 'I&B Code' with Regulations 31, 34 & 38, it is clear that the 'Committee of Creditors' is required to determine the resolution cost to be incurred by 'Resolution Professional' including the fee which is to be incurred in the 'Resolution Plan' in terms of sub-section 2(a) of Section 30, which includes 'Insolvency Resolution Process' including i.e. the expenses to be incurred on failure of the 'Resolution Plan'. It is only thereafter when the Adjudicating Authority either approve(s) the 'Resolution Plan' under Section 31 of the 'I&B Code', the 'Resolution Professional' is entitled to know the actual expenses allowed, as approved by the 'Committee of Creditors' and the Adjudicating Authority. Once the 'Resolution Plan' is determined by the 'Committee of Creditors', the Adjudicating Authority cannot differ with the same nor can sit in appeal, except in cases where there is an arithmetical error.

23. In case 'Corporate Insolvency Resolution Process' fails and order of liquidation is passed under Section 33 in such case, the 'Resolution Professional' can be removed if it is found that he has violated Section 30(2) or otherwise he is to be allowed to function as 'liquidator'.

24. In the present case, as no order has been passed under Section 31, nor any order has been passed by the Adjudicating Authority under Section 33, we hold that the Adjudicating Authority had no jurisdiction to decide the resolution cost including the fee of the 'Resolution Professional'. Issue No.3 is answered accordingly.

25. We have already held that the Adjudicating Authority has no jurisdiction to convert 'Corporate Insolvency Resolution Process' under Sections 7, 9 or 10

of the 'I&B Code' as 'Fast Track Corporate Insolvency Resolution Process' proceeding under Section 55 of 'I&B Code' and therefore, we are of the view that the Adjudicating Authority was duty bound to pass order under Section 31 in absence of the 'Resolution Plan'.

26. For the reasons aforesaid, the impugned order dated 25th July, 2018 is set aside. The Adjudicating Authority is directed to pass order under Section 31 but if no 'Resolution Plan' has been approved, the Adjudicating Authority will pass order under Section 33 of the 'I&B Code', more than 270 days having expired.

27. Pursuant to the interim order of this Appellate Tribunal dated 24th September, 2018, a sum of Rs. 20 lacs, including GST has already been paid to the Appellant. In view of such payment, we direct that while 'Resolution Cost' will be determined by the Adjudicating Authority, the amount already paid should be adjusted. If further amount is payable, it should be paid to the Appellant. On the other hand, it is determined that less amount is payable, the Appellant will refund the excess amount immediately. The Appeal is allowed with aforesaid observation. No order towards cost.

[Justice S.J. Mukhopadhaya]
Chairperson

[Justice Bansi Lal Bhat]
Member (Judicial)

AR/Akc/Sk