

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL, PRINCIPAL BENCH,
NEW DELHI**

Company Appeal (AT) (Insolvency) No. 1050 of 2020

IN THE MATTER OF:

Mukul Kumar

Resolution Professional of
KST Infrastructure Ltd.
D-3/1034, The Legend, Sushant Lok-3,
Gurugram, Haryana- 1220011

...Appellant

Vs.

M/s RPS Infrastructure Ltd.

Having Its Registered Office At:
1117-1120, 11th Floor, Tower-B, DLF Tower,
Jasola District Centre,
New Delhi - 110025

...Respondent

Present:

For Appellant: Mr. Karan Valecha, Advocate

For Respondent: Mr. Rakesh Kumar, Advocate for Respondent

J U D G M E N T

Jarat Kumar Jain, J.

The Appellant 'Mukul Kumar' Resolution Professional (RP) of KST Infrastructure Ltd. has filed this Appeal under Section 61 of the Insolvency and Bankruptcy Code, 2016 (IBC) assailing the order dated 03.11.2020 passed by the Adjudicating Authority (National Company Law Tribunal, Principal Bench, New Delhi) in I.A. No. 4589 (PB)/2020 in CP (IB)-1757 (PB)/2018,

whereby allowed the Respondent's Application and directed the RP to consider the claim of Respondent on merits.

2. Brief facts of this case are that KST Infrastructure Ltd. (Corporate Debtor) is a real estate company engaged in the business of providing construction of real estate projects. The Corporate Debtor has floated prospectus for three projects (i) Sector 114, Gurgaon, (ii) Sector 89, Faridabad and (iii) KST Whispering Heights in Sector 88, Faridabad, Haryana. All the three projects were pending as the Corporate Debtor failed to complete the construction of projects and offer possession to the homebuyers who have invested their hard earned savings in the projects. Ms. Sonia Rani and five other allottees (Homebuyers) have filed the Application under section 7 of the IBC against the Corporate Debtor. Ld. Adjudicating Authority vide order dated 27.03.2019 admitted the Application and initiated CIRP against the Corporate Debtor 'KST Infrastructure Ltd.' and appointed Mr. Sandeep Chandna as Interim Resolution Professional (IRP). On 30.03.2019, the IRP issued a public announcement and invited claims from its creditors in the prescribed format as per Regulation 6. Upon receipt of claims, the erstwhile IRP constituted a Committee of Creditors (COC) on 06.11.2019. Thereafter, the IRP circulated the draft information memorandum and invited Expression of Interest (EOI) from prospective Resolution Applicants in the prescribed format. The prospective Resolution Plans were received from five Resolution Applicants including KST Whispering Heights Resident Welfare Association (RWA) i.e. a society duly incorporated under the appropriate law with the purpose of the general welfare of the members of the said projects. On 18.06.2020 on the

recommendation of the CoC, Mukul Kumar was appointed RP in place of IRP 'Sandeep Chandna'. The plans received were discussed in the meeting dated 11.07.2020 of the CoC. The plan submitted by the RWA was approved by the CoC by a majority vote of 80.74%. Thereafter, the RP has filed an Application on 08.09.2020 under Section 31 of the IBC for approval of plan by the Adjudicating Authority.

3. On 19.08.2020 pertinently after a delay of 287 days the Respondent through email sent a claim of Rs. 35,67,05,337 to the RP. According to the Respondent the claim is based on the arbitral award dated 01.08.2016 and the same was confirmed by the Additional District Judge Gurgaon vide its order dated 25.04.2019. The RP vide email dated 25.08.2020 informed the Respondent as under:-

"Dear sir,
The claim filed by your client is delayed. Please note that as of now the Resolution Plan of KST Infrastructure Ltd. has been passed with the requisite majority by the CoC members in the meeting dated 17.07.2020. As per the provisions of IBC, claims can be submitted within 90 days of the CIRP date. However, in various precedents Hon'ble NCLT/NCLAT has directed the RP to admit the claim as on the date when the Resolution Plan is put for voting by CoC. Therefore, I have collated and verified the claims as on 08.07.2020 i.e. before the Resolution Plan was put for voting by the CoC Members."

4. The Application for approval of Resolution Plan was filed on 08.09.2020 before the Adjudicating Authority. Thereafter, the Respondent has filed an Application I.A No. 4589(PB)/2020 before the Adjudicating Authority for directing the RP to consider the claim submitted by the Respondent. Ld. Adjudicating Authority by the impugned order allowed the Application and directed the RP to consider the claim of the Respondent on merits.

5. Being aggrieved by this order, Mukul Kumar (RP) has filed this Appeal.

6. Ld. Counsel for the Appellant submits that the Respondent submitted its claim on 19.08.2020 i.e. more than a year after the invitation of claims through public notice dated 30.03.2019. The extended time period for submissions of claims with proof was 90 days from the date of initiation of CIRP. This period expired on 06.11.2019. It is undisputed that the CoC had approved the Resolution Plan on 17.07.2020 much before the said claim was preferred before the RP. It is submitted that any interruption in the CIRP at this stage by including a delayed claim would have meant setting the clock back and sending the matter back to CoC and the RP. Furthermore, it cannot be ruled out that if the claim of the Respondent is accepted at such belated stage there could have been other Applicants too, who would have demanded accommodation on the same ground allowing late submissions of their claims. It is submitted that this would have meant a complete disruption of the CIRP and the timelines stipulated therein and such delay would defeat resolution as this would have resulted in the CIRP and approval of Successful Resolution plan to continue for an indefinite period of time. which is certainly not the intent and purpose of the IBC.

7. Ld. Counsel for the Appellant submits that as per the Respondent, claim arising out of arbitral award was passed way back on 08.01.2016 and the same was modified on 25.04.2019. The Respondent had been sleeping over his rights and failed to file its claim within time limit specified under the Code.

8. It is submitted that the Hon'ble Supreme Court in CoC of Essar Steel India Limited Vs. Satish Kumar Gupta & Ors (2019 SCC Online SC 1478)

clearly held that 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. All claims must be submitted to and decided by Resolution Professional so that a prospective Resolution Applicant knows exactly what has to be paid.

9. Ld. Counsel for the Appellant submitted that Ld. Adjudicating Authority erroneously on an extremist ground directed the RP to consider the claim of the Respondent on merits. Such a direction is against the proposition laid down by this Appellate Tribunal in the case of *Sr. Sidhivinayak Cotspin Pvt. Ltd. &Anr. Vs. Resolution Professional of Maruti Cotex Limited &Anr.* CA (AT) (Ins) No. 694 of 2020 and *Office of the Assistant State Tax Commission State Tax Department, Government of Maharashtra Vs. Shri Parthiv Parikh &Ors.* CA (AT) (Ins) No. 583 of 2020 and the same proposition was reiterated by this Appellate Tribunal in the case of *Harish Polymer Product Vs. Mr. George Samuel, RP for Jason Dekor Pvt. Ltd.* CA (AT) (Ins) No. 420 of 2021. Therefore, it is requested that the impugned order is liable to be set aside.

10. Per contra, Ld. Counsel for the Respondent submits that the Respondent engaged in a real estate business has a substantial claim of Rs. 35,67,05,337 against the Corporate Debtor. The claim amount is derived from the arbitration award. The Respondent was unaware of the public pronouncement, therefore, he could not file the claim on time. The RP has rejected the claim merely on the ground of delayed filing. In the matter of *Brilliant Alloys Pvt. Ltd. Vs. Mr. S. Rajagopal* (2018 SCC Online SC 3154) the Hon'ble Supreme court observed that the time stipulation is merely directory

and not mandatory. Ld. Adjudicating Authority in the case of Edelweiss Asset Reconstruction Co. Pvt. Ltd. Vs. Adel Lankmarks Ltd. observed that the rejection of claim on the ground of delay is not sustainable because the provisions of IBC have been held to be directory. It is also submitted that in this matter the Resolution Plan has only been approved by the CoC and is pending for approval before the Adjudicating Authority. In such a situation, the claim is to be adjudicated before any resolution plan is considered, for this purpose, he placed reliance on the Order passed by the principal bench of NCLT in the case of Alchemist Asset Reconstruction Company Pvt. Ltd. Vs. NIIL Infrastructure Pvt. Ltd. CA No. 260 of 2020. It is submitted that the Appellant in Appeal and Rejoinder has contended that he was unaware of any financial debt accruing towards the Respondent, since the books of accounts and other documents were not made available to the Appellant. It is to be noted that failure in discharging its duties diligently should not amount to rejection of claim of the Respondent. The Appellant (RP) was well aware of the judicial proceedings from which the claim of Respondent is derived despite that Appellant did not bother to cover the claim of the Respondent in the information memorandum as contingent liabilities.

11. Ld. Counsel for the Respondent submitted that Ld. Adjudicating Authority correctly observed that reconsideration of Respondent's claim will not prejudice the rights of the Appellant (RP) and the Resolution Applicant. It is settled law that no statutory provision can defeat the right of the party. It is to be noted that the Appellant is trying to bypass the claim of the Respondent at the behest of the Resolution Applicant. The Appeal is merely a technique to

evade from the claim of the Respondent which from the very inception of the CIRP is entitled to be accommodated in the Resolution Plan. In view of the aforesaid facts and circumstances it is prayed that the appeal may kindly be dismissed.

12. After hearing Ld. Counsels for the parties we have gone through the record.

13. From a bare reading of the impugned order it is apparent that Ld. Adjudicating Authority has allowed the Respondent's Application on following grounds.

(i). For inviting claims, service through paper publication is not proper service.

(ii). The RP has not made necessary efforts to get the records from ex-management.

(iii). The RP has not gathered information about the creditors of Corporate Debtor.

(iv). The RP has hurriedly wrapped up the company with a Resolution Plan.

(v). The RP should not have summarily rejected the claim of the Respondent on the ground that claim has not been filed within time and the Resolution Plan has already been approved by the CoC.

14. We have examined the findings of Ld. Adjudicating Authority in the light of aforesaid grounds one by one.

Ground (i)

15. Ld. Adjudicating Authority in the impugned order held that "Many a times there could be a possibility to the creditors not knowing about initiation of CIRP. It comes out through paper publication. In normal practice, service

through paper publication comes into picture when personal service is not effected. That occasion was not available. So, in a situation like this, there is every possibility of missing out the information but that cannot take away the primary right of realization against the debtor.”

16. In exercise of the powers conferred under Ss. 5, 7, 9, 14, 15, 17, 18, 21, 24, 25, 29, 30, 196 and 208 read with s. 240 of IBC, the Insolvency and Bankruptcy Board of India framed the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (Regulations). Regulation 6 provides the manner of public announcement. There is no allegation against the erstwhile IRP that he has not made a public announcement as per the manner provided in Regulation 6. There is no provision in the Regulations that for inviting claims, the IRP/RP is required to effect personal service.

17. The Respondent in Para 6 of his reply admitted that:

“It is correct that the Respondent filed its claim through the public notice, however, there are certain admitted debts which are part of the record of the Corporate Debtor. The non-filing of the claim, in view of the public notice does not entitle to the Appellant to extinguish the claim recorded in the books of Corporate Debtor.”

18. With the aforesaid admission, it is apparent that the Respondent is not disputing that the public notice is not a proper service. It is also to be noted that the Respondent on 19.08.2020 sent the claim through email to RP. Even in that email it is not stated that the Respondent was unaware of the public notice, therefore, he could not submit his claim in time (See Annexure –A4 Pg. 131-133 of Reply filed by the Respondent). Therefore, the finding of Ld. Adjudicating Authority that the paper publication is not a proper service and

it comes into picture when the personal service is not effected, is erroneous in view of the provisions of Regulation 6 of the Regulations.

19. Ld. Adjudicating Authority in the impugned order also held that “The claimant as soon as came to know of initiation of CIRP against the Corporate Debtor, in the month of August, 2020, has filed its claim before the RP.” The Respondent has submitted its claim on 19.08.2020 through email to the RP. In the email, it is not stated that the Respondent came to know of initiation of the CIRP against the Corporate Debtor only in the month of August, 2020. Even in the Application, it is not disclosed that from which source in the month of August, 2020 the Respondent came to know about initiation of CIRP against the Corporate Debtor. On the other hand, Appellant in its Rejoinder specifically mentioned that the Respondent on 26.07.2019 (i.e. after the confirmation of arbitral award by the Additional District Judge, Gurgaon vide its order dated 25.04.2019) issued a special power of attorney in favour of Corporate Debtor. (Copy of the same is R1 annexed with Rejoinder). This fact is not disputed by the Respondent. Therefore, such a story that the Respondent was unaware of the public notice cannot be accepted.

Ground (ii)

20. Ld. Adjudicating Authority held that “The RP has given a bland answer saying that records of the company are not available, if that is the situation, the RP’s duty was to obtain records of the ex-management and then to verify the claim and financial position and then take up Resolution Plan”

21. The pleadings of the Respondent that the RP has deliberately not collected information though he could have gathered it. It is not the case of

the Respondent that RP has deliberately acted so the rightful creditors may not be able to file their claims and thereby they may not become the member of CoC. It is pointed out that the RP has indeed made sincere efforts to procure the records of the Corporate Debtor. The IRP has also filed an Application under Section 19 of the IBC seeking proper direction of the Ld. Adjudicating Authority to the ex-management to provide all the records. This fact is not denied by the Respondent in his reply to the Appeal. Thus, we are unable to hold that the RP has failed to do his bounden duty as assigned in the IBC and Regulations.

Ground (iii)

22. Ld. Adjudicating Authority held that “It is the bounden duty of the RP to ascertain much more information as he could gather so that creditors entitled to their share are not left out.”

23. Ld. Adjudicating Authority is not pointing out that what type of efforts RP should make to ascertain the Creditors. Aforesaid finding is a general remark, therefore we cannot hold that the RP has failed to perform his duty assigned in the IBC and Regulations.

Ground (iv)

24. Ld. Adjudicating Authority held that “All this will be taken care of when RP, from day one put efforts to get the records from the ex-management. This is more important than hurriedly wrapping up the company with a Resolution Plan, then only wholesome justification could be done to the purpose for which this Code has come into existence.”

25. For appreciating the aforesaid finding, we would like to refer the dates and events:

Dates	Events
27.03.2019	The CIRP was commenced for the Corporate Debtor i.e. KST Infrastructure Ltd.
30.03.2019	Public announcement of the CIRP was issued by the then IRP.
06.11.2019	Claims were admitted upon verification and a committee of creditors was constituted by the then IRP.
14.02.2020	The Draft information memorandum, invited expression of interest from prospective resolution applicants in prescribed format were issued by the then IRP.
18.06.2020	The Present Resolution Professional was appointed to continue the CIRP of the Corporate Debtor.
02.07.2020	Resolution Plans were submitted by the prospective resolution applicants.
08.07.2020	The RP collated the claims of the creditors till 08.07.2020 and sent them to the CoC.
11.07.2020	The Resolution Plans were put to voting by the Resolution professional after due deliberations on the plans with the CoC.
17.07.2020	The Resolution Plan submitted by the KST whispering heights resident's welfare society was approved by the CoC.

08.09.2020	The Resolution professional filed an Application under Section 31 of the IBC with the Ld. Adjudicating Authority for the approval of the resolution plan.
19.08.2020	The claims of the Respondent was received by the resolution professional terms of the resolution plan by the resolution Applicant.
25.08.2020	The claim of the respondent was rejected on the grounds of delay as per provisions of IBC with the information that the same may be considered.
03.11.2020	The Respondent filed an Application which has heard by the Ld. Adjudicating Authority and further allowed.
03.12.2020	Hence, the present appeal.

26. With the aforesaid date and events, it is apparent that the CIRP was conducted by the IRP/RP as per the provisions of IBC and Regulations and there is nothing on record to presume that the IRP/RP have hurriedly wrapped up the company with the Resolution Plan.

Ground (v)

27. Ld. Adjudicating Authority held that “The RP should not have summarily rejected the claim of the Applicant solely on the ground that claim has not been filed within time and the Resolution Plan has already been approved by the CoC.”

28. Regulation 8 of Regulations provides that how the financial creditors shall submit claims to IRP/RP and Regulation 12 provides that the creditors

shall submit its claim with proof on or before the last date mentioned in the public announcement. Regulation 12(2) provides that if a creditor fails to submit its claim with proof within time stipulated in the public announcement may submit its claim with proof to the IRP/RP on or before the ninetieth day of the Insolvency commencement date. Regulation 13 provides that the IRP/RP shall verify every claim as on the Insolvency commencement date, within 7 days from last date of receipt of the claims and thereupon maintain a list of creditors containing names of creditors along with the amount claimed by them, the amount of their claims admitted and the security interest if any in respect of such claims and update it. Regulation 13 also provides that the list of creditors shall be available for inspection and it be displayed on website of the Corporate Debtor.

29. With the aforesaid it is apparent that the IRP/RP can accept the claim as per extended period as provided in Regulation 12(2). It means after extended period of 90 days of the insolvency commencement date the IRP/ RP is not obliged to accept the claim.

30. It is argued on behalf of the Respondent that the Regulations are directory but not mandatory and for this purpose, placed reliance on the Judgment of Hon'ble Supreme Court in the case of Brilliant Alloys Pvt. Ltd. (Supra). In this Judgment Hon'ble Supreme Court has dealt with the provision of Section 12(A) with the Regulation 30 and held that the stipulation in the Regulations can only be construed as directory depending on the facts of each case. There is no ratio of the Judgment that the Regulations are directory and not mandatory.

31. With the aforesaid, we are of view that whenever any claim is filed after extended period provided in Regulation 12 (2) of the Regulations, the RP should have rejected the claim. The Legislation has not provided any discretion to RP for admitting the claim after the extended period.

32. This Tribunal has dealt with such a situation when the CoC has approved the Resolution Plan thereafter the claim was filed. The coordinate bench of this Tribunal in the case of Office of the Assistant State Tax Commissioner State Tax Department, Government of Maharashtra (Supra) decided on 26.03.2021 held that:

14. In the present case the Operational Creditor - State Tax Department, Government of Maharashtra submitted its claim on 20.12.2019, more than about one year and one month after the invitation of claims through public notice on 2.11.2018. The extended time period for submission of claims with proof is ninety days from the date of initiation of the insolvency resolution process. This period also expired on 31.01.2019. It is undisputed that the RP had filed the Resolution Plan as approved by the Committee of Creditors to the Adjudicating Authority, much before the said claim was preferred before the RP, and the Adjudicating Authority was actively considering the Resolution Plan for necessary approval. After rejection of claim of Appellant by RP, its appeal was filed before the Adjudicating Authority on 21.02.2020 under Section 60(5) of the IBC.

15. Thus, it is clear that much water had flown under the bridge from the date of issue of public notice (on 02.11.2018) and the extended time period of ninety days as provided under Regulation 12(2) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 and the Resolution Plan as approved by the COC was submitted to the Adjudicating Authority for necessary approval under Section 30. Any interruption in the CIR Process at this stage by including a delayed claim/s would have meant setting the clock back and sending matter back to COC & RP. It cannot be ruled out that if the claim of the Operational Creditor State Tax Department, Government of Maharashtra was accepted at such a late stage, there could have been other such applicants too, who would have demanded accommodation on the same ground allowing late submission of their claims once this window would have opened.

It would be trite to emphasise the fact that this would have meant complete disruption of the CIRP and the timelines stipulated therein. Delay would defeat Resolution as this would have resulted in the CIRP and approval of successful Resolution Plan to continue for an indefinite period of time, which is certainly not the intention of IBC. A real hazard in such an event could be liquidation, and corporate death, of an otherwise functional and corporate debtor, with which Resolution Plan approved is set to come out of the Red

33. This Tribunal in the case of Harish Polymer Product (Supra) decided on 18.06.2021 held that:

7. It is pertinent to mention herein that the Resolution Plan has already been received by the CoC as apprised by the RP and it is at the final stage of approval of the CoC (as per RP). At this belated stage, if such types of applications are allowed, the Resolution Plans already received by the CoC from the prospective Resolution Applicants, may get failed, as those are filed on the basis of Information Memorandum (IM). The prospective Resolution Applicants submitted their Resolution Plan on the basis of their financial capacity and availability of funds. There is every likelihood that, if the claims of the different creditors are being accepted in a phase manner and / or on such belated stage, that too after the stipulated time, so provided for submitting claims, in that event, the Resolution Plans can never get materialized and there would be no resolution of Corporate Debtor which is main object of the IB Code, more so, when CIRP is to be completed in a time bound manner. If such claim is accepted, then the Resolution Applicants have to make corrections in their plans, that apart, RP has to make corrections in the IM and its report, correction in the stakeholders list, etc., for which RP has to take permission from this Adjudicating Authority, which may further delay the CIRP. Moreover, CIRP cannot be allowed / extended beyond upper limit of 330 days, in that event the corporate debtor would be compelled to go for liquidation. Further, if the resolution Applicants have infused money or have taken financial assistance from other sources, in that event, they will have to approach for enhancement of the loan/ infusion of money, which practically takes a longer time and by the time they would complete all these processes, the period of CIRP will be over, not to speak about further amendment of the Resolution Plan and re-voting thereon by the CoC with requisite percentage. That apart, the asset of the corporate debtor may get deteriorated, which will affect the maximization of the value of the asset of the corporate debtor.

8. Further, if such a practice is allowed, keeping abeyance the stipulated period, that too after extended time period of 90 days, in that event, it would be difficult to complete the CIRP process, which has to be completed in time bound manner. There may be a number of creditors, who might have filed their claim beyond the prescribed period of 90 days, they may approach before this Adjudicating Authority, citing the example of this case. In that event, even if there is any chance of getting Resolution Plan(s), the Resolution Applicants may avoid filing the Resolution Plan(s). However, in the instant matter, prospective Resolution Applicant may withdraw himself.

9. It is also pertinent to mention herein that this is not an isolated claim, there is one more application pending for adjudication, who filed its claim before the RP in much belated stage and now approached this Adjudicating Authority for condonation of delay, when the Resolution Plan is at the verge of approval. If this application is allowed, then, there is every likelihood that the Resolution Applicants may withdraw their plan, as it will be a burden 8 Company Appeal (AT) (Insolvency) No. 420 of 2021 with other huge claims of the creditors, which they might have not planned earlier, while giving the resolution plan based on the IM. Thus, under such situation, the Corporate Debtor may be pushed for liquidation.

34. With the aforesaid, we are of the view that when the Resolution Plan has already been approved by the CoC and it is pending before the Adjudicating Authority for approval, at this stage, if new claims are entertained the CIRP would be jeopardized and the Resolution Process may become more difficult. Keeping in view the object of the IBC which is resolution of Corporate Debtor in time bound manner to maximize the value, if such request of claimant is accepted the purpose of IBC would be defeated. Hon'ble Supreme Court in the case of CoC of Essar Steel India Ltd. (Supra) held as under:-

88. 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.

35. With the aforesaid we are of view that the Ld. Adjudicating Authority has erroneously directed the RP to consider the claim of the Respondent which is apparently filed after a delay of 287 days, before that the CoC has already approved the Resolution Plan. Thus, the impugned order is not sustainable in law, therefore, it is hereby set aside and the Appeal is allowed, however, no order as to costs.

[Justice Jarat Kumar Jain]
Member (Judicial)

(Dr. Ashok Kumar Mishra)
Member (Technical)

New Delhi
30th July, 2021
SC