

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 295 of 2021

[Arising out of order dated 09.03.2021 in I.A. No. 143 of 2021 in Company Petition (IB) 2083 (ND) 2019 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi Bench-V]

IN THE MATTER OF:

M/s Sardar Ji Di Hatti Departmental Store Pvt. Ltd.

CIN: U52100DL2011PTC214820

(Through its Director: Gurjit Singh

Having Registered Office At:

1/7, Double Storey, Tilak Nagar

New Delhi 110018

Email ID: sjdh.uniform@gmail.com

....Appellant.

Versus

Sunil Kumar Agrawal

(Resolution Professional)

Registered Address At:

E-29, South Extension II, New Delhi 110049

Also At:

904, GF, Sector 7C, Faridabad, 121006 (Haryana)

And Email IDs:

irpkpg2020@gmail.com, and

aggarwalsk21@yahoo.com

....Respondent.

Present:

For Appellant: Mr. Sandeep Thukral and Mr. Gurjit Singh, Advocates.

For Respondent: Mr. Manoj Kumar Garg, Advocate for RP.

J U D G M E N T
(7th September, 2021)

Justice Anant Bijay Singh;

This appeal has been preferred by the Appellant (Operational Creditor) being aggrieved and dissatisfied by the order dated 09.03.2021 in I.A. No. 143 of 2021 in Company Petition (IB) 2083 (ND) 2019 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi Bench-V whereby and where under the Application filed by the Appellant (herein) - 'Operational Creditor' under section 60 of the Insolvency and Bankruptcy Code, 2016 (**for short IBC**) and read with Rule 11 of the NCLT Rules, 2016 and has prayed following reliefs is hereunder:

- “ a) *Allow the instant application of the Applicant;*
- b) *Issue necessary instructions to the RP to consider the claim without having any regard to the delay;*
- c) *Pass an order to admit the claim of the Applicant before RP;*
and
- d) *In the meanwhile, direct the RP not to proceed with the adoption of Resolution Plan (not been approved till today and the approval of which would render the present application infructuous), without the admission of the instant claim of the applicant as the claim was duly presented before the RP at an appropriate stage which warranted admission as per the settled law.*

e) Pass any other order this Hon'ble Tribunal deems fit in the facts and circumstances of this case.”

2. The Ld. Adjudicating Authority rejected the Application filed by the Appellant (herein) – ‘Operational Creditor’ with holding as follows:

“ 16. For the reasons discussed above, we are of the considered view that, in view of Regulation 12(2), the prayer of the applicant is not liable to be accepted. Hence, we, hereby, unable to give any direction to the RP to consider the claim of the applicant. Accordingly, the prayer of the applicant is rejected.”

3. The facts giving rise to the instant Appeal is as under:

i) That ‘Corporate Insolvency Resolution Process (**for short CIRP**) Proceeding commenced against the one M/s KPG International Pvt. Ltd. - ‘Corporate Debtor’ vide order dated 27.01.2020 and one Mr. Sunil Kumar Agrawal – (Respondent herein) appointed as Interim Resolution Professional (**for short IRP**).

ii) The IRP invited claims from creditors vide publication dated 31.01.2020 till 12.02.2020 against the Corporate Debtor.

iii) The Appellant herein - M/S Sardar Ji Di Hatti Department Store Pvt. Ltd. missed this publication and was totally unaware of the same. The Appellant though contacted one of the Directors of the ‘Corporate Debtor’ – Mr. Gaurav Mahendru for payment of the due and outstanding amount owed by the ‘Corporate Debtor’ to the Appellant but was surreptitiously kept in the

dark by the said Director. The Said Director, however, left for Australia sometime in March 2020.

iv) Further case of the Appellant due to Covid-19 pandemic in March 2020 which prompted the Hon'ble Supreme Court passed the order dated 23.03.2020 in Suo Motu Writ Petition (Civil) No. 3 of 2020 to suspend limitation period in all petitions, suits, applications, appeals and all other proceedings whether under General Law of Limitation or under Special Laws (Both Central and States) with effect from 15.03.2020 till further orders. The copy of the order of the Hon'ble Supreme Court as marked as Annexure- A-4 at page 38 to 39 of the Appeal Paper Book.

v) The further case of the Appellant is that the Director of the Appellant – Mr. Gurjit Singh, became aware of the 'Corporate Insolvency Resolution Process' against the 'Corporate Debtor' during a candid discussion within the business circles in December, 2020 only and was absolutely shocked to know about the fact of CIRP having been initiated against the 'Corporate Debtor'.

vi) The Appellant immediately consulted a lawyer for understanding about the CIRP in general and then decided to submit its claim to the RP for the due and legit outstanding amount of Rs. 43,45,844/0 owed to it by the 'Corporate Debtor' in the prescribed format – 'Form-B' along with Affidavit and proof of claim – i.e. invoices, E-way bills, certified copy of statement of Account of the 'Corporate Debtor' in its books of accounts, GST returns, etc. vide speed post dated 22.01.2020 and also vide email on 24.12.2020.

vii) The Resolution Professional vide email dated 31.12.2020 replied to the application of the Appellant simply with a remark "Your claim documents is not received with in time as per IBC, 2016". It was further mentioned in the

reply that the Form G for EOI has issued and the Resolution Plan is under process.

viii) The Appellant followed up with a reply email on 03.01.2021 thereby requesting the Resolution Professional for admission of the claim, along with citations and rulings passed by the Hon'ble NCLAT Principal Bench, wherein the amended Regulation 12(2) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 had been held to be directory and not mandatory and that the claim of the Appellant ought to have been admitted in view of the settled law as the CIRP was still in progress and no Resolution Plan had been approved / finalized till date.

ix) Further case of the Appellant is that the time response was received from an Advocate Manoj Kumar Garg on behalf of RP vide email dated 05.01.2021. while again rejecting the claim, the reason was cited as under:

“ Your claim can not be accepted as it was filled/ submitted by delay to RP & already resolution plan was submitted by one Resolution Applicant to RP which is pending for consideration by COC”

x) The Appellant thereafter filed the Application bearing I.A. No. 143 of 2021 in Company Petition (IB) 2083 (ND) 2019 before the Ld. Adjudication Authority and the Ld. Adjudicating Authority under its order dated 09.03.2021 rejected the same after hearing the parties. Hence this Appeal.

Submissions on behalf of the Appellant

4. The Learned Counsel for the Appellant during the course of the argument while referring to the provisions of the Regulation 12 of Insolvency

and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 reads hereunder:

“12. Submission of proof of claims. - (1) Subject to sub-regulation (2), a creditor shall submit [claim with proof] on or before the last date mentioned in the public announcement.

(2) A creditor, who fails to submit claim with proof within the time stipulated in the public announcement, may submit the claim with proof to the interim resolution professional or the resolution professional, as the case may be, on or before the ninetieth day of the insolvency commencement date.”

5. Learned Counsel for the Appellant submitted that order dated 01.05.2019 passed by Ld. Adjudicating Authority, NCLT, New Delhi, Principal Bench in (IB)-737(PB)/2018 have held that the Regulation 12 (2) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 had already been declared directory and not mandatory.

6. Learned Counsel for the Appellant further relied on order dated 13.06.2019 passed by Ld. NCLT New Delhi, Principal Bench in (IB)-1083(PB)/2018 (Edelweiss Asset Reconstruction Co. Ltd. V/s Adel Landmarks Ltd.) whereby the Ld. Adjudicating Authority had held the provisions of Section 12(2) of IBC is directory and not mandatory.

7. It is further submitted that the Ld. Adjudicating Authority has failed to consider these judgments and also fact on which the claim of the Applicant

was filed before the Resolution Professional on 22.01.2020 and rejected the same vide email dated 31.12.2020 with a remark the claim as per the IBC, 2016 is time barred. In much as the Ld. Adjudicating Authority has failed to apply judicial mind and passed the impugned order, so it is fit to be set aside and Appeal be allowed.

Submissions on behalf of the Respondent.

8. Learned Counsel for the Respondent during the course of argument and his Reply Affidavit submitted that as per the own version of the Appellant that on 12.02.2020 was the last day for submission of claim.

9. It is further submitted that the paragraph 7 (E) of the Appeal Paper Book the Appellant himself has admitted that the Appellant missed this publication and was totally unaware of the same.

10. It is further submitted that the Appellant though contacted one of the Directors of the 'Corporate Debtor' – Mr. Gaurav Mahendru for payment of the due and outstanding amount owed by the 'Corporate Debtor' to the Appellant but was surreptitiously kept in the dark by the said Director. The Said Director, however, left for Australia sometime in March 2020.

11. It is further submitted that in paragraph 7 (H) of the Appeal Paper Book the Appellant himself has admitted that the about the CIRP in general and then decided to submit its claim to the RP for the due and legit outstanding amount of Rs. 43,45,844/0 owed to it by the 'Corporate Debtor' in the prescribed format – 'Form-B' along with Affidavit and proof of claim – i.e. invoices, E-way bills, certified copy of statement of Account of the 'Corporate

Debtor' in tis books of accounts, GST returns, etc. vide speed post dated 22.01.2020 and also vide email on 24.12.2020 which was rejected by the Resolution Professional by email dated 31.12.2020.

12. It was further submitted that the Appellant also aware of the CIRP proceeding which is the apparent from the averments made in the paragraphs 7 (E), (G), (H), (I), (J) & (K) of the memo of Appeal.

13. It is further submitted that the CIRP against the Corporate debtor was initiated on 27.01.2020 and Mr. Sunil Kumar Agarwal, IRP (Respondent herein) is appointed.

14. It is further submitted that the IRP has made the public announcement for inviting claims from creditors upto 12.02.2020 in the newspapers on 31.01.2020 against the Corporate Debtor.

15. It is further submitted that the Corporate Insolvency Resolution Process is a time bound process and there is a specific time period for submitting the claim on date of publication which was not followed by the Appellant herein. Moreover, Regulation 12(2) of the Insolvency and Bankruptcy (Insolvency Resolution Process for Corporate Person) Regulation, 2016, provide the claim can be admitted after the commencement of the Corporate Insolvency Resolution Process within a period of 90 days, but in the present case this statutory time period is also expired. So the Appellant cannot take the benefit of the above said Regulation.

16. It is further submitted that the Appellant is well aware about the insolvency and Bankruptcy Code, 2016 Laws then the Appellant also know

that this is a time bound process and time line have to be followed and has despite have been knowledge of the CIRP, the Appellant failed to submit his claim within stipulated time. Therefore, the Ld. Adjudicating Authority has rightly been rejected the Application i.e. I.A. No. 143 of 2021.

17. It is further submitted that the Corporate Debtor received a proposed Resolution Plan (Revised) on 04.01.2021 by the Resolution Applicant namely, Rama Gupta and the same was approved by the majority of the Committee of Creditors holding 80.43% voting share on 13.01.2021 in the 6th COC meeting (at pages 130 to 150, relevant as 136 of the convenience compilation filed by Respondent No. 2 in Company Appeal (AT) (Insolvency) No. 444 of 2021).

18. It is further submitted that the taking all these facts have been mentioned in the analogous Appeal i.e. Company Appeal (AT) (Insolvency) No. 444 of 2021 (Sunil Kumar Agrawal, Resolution Professional, KPG International Pvt. Ltd. V/s Committee of Creditors, KPG International Pvt. Ltd. & Anr.) which was heard along with this Appeal.

19. It is further submitted that the Appellant taking recourse of the different orders of the NCLT which have been passed in the facts of the case holding that the period of 90 days as per above Regulation is directory and not mandatory, and the Appellant filed the I.A. No. 143 of 2021 before the Adjudicating Authority taking ground of Covid -19 Pandemic Lockdown.

20. It is further submitted that the Ld. Adjudicating Authority has considered all the aspects of the matter and rejected the I.A. No. 143 of 2021. So, there is no merit in the Appeal and the Appeal is fit to be dismissed.

FINDING

21. We have perused the records of the case, considered the arguments advanced on behalf of the parties and also Reply Affidavit filed on behalf of the Respondent. The following facts are admitted.

- That on 27.01.2020 (IB) No. 2083/ND/2019 was admitted in respect of M/s KPG International Pvt. Ltd. - (Corporate Debtor).
- That on 31.01.2020 public announcement of commencement of CIRP was made in the Newspapers namely Financial Express and Jansatta.
- That on 01.02.2020 the IBBI and ICSI IIP were informed of the Commencement of CIRP against the Corporate Debtor.
- That on 03.02.2020 IRP sent the communication to the Corporate Debtor and its Directors about the commencement of CIRP in respect of Corporate Debtor and sought related documents and information from them.
- That the intimation of IRP commencement to Financial Institutions / Bank via letter dated 03.02.2020 to Modern Credit Pvt. Ltd. (Financial Creditor) regarding commencement of CIRP.
- The appellant submitted claim to the Resolution Professional for the aforesaid dues but the Resolution Professional vide email dated 31.12.2020 informed that *“Your claim documents is not received within in time as per IBC, 2016 ”*.
- That the Resolution Professional has also informed that the Form G of EOI has issued and the Resolution Plan is under process.

- Paragraph 2(ix) of the impugned order it has also been recorded by the Ld. Adjudicating Authority that the applicant (Appellant herein) again on 03.01.2021 requesting for admission of the claim along with the decisions of the NCLT in which amended Regulation 12(2) of the IBBI (Insolvency Resolution for Corporate Persons) Regulations, 2016 has been held to be directory and not mandatory.
- Paragraph 2(x) of the impugned order it has also been recorded by the Ld. Adjudicating Authority that the Counsel of the Resolution Professional sent an email dated 05.01.2021 stating that the claim cannot be accepted as it was submitted by delay to RP and resolution plan was submitted by one resolution applicant to RP which is pending for consideration by the CoC.
- In view of the admitted facts and submissions advanced on behalf of the Respondent and further also averments made by the Learned Counsel for the Appellant in paragraphs 7 (E), (G), (H), (I), (J) & (K) of the memo of Appeal which categorically established that the Appellant was having full knowledge of the CIRP and deliberately not submitted his claim within time and after expiry of 90 days filed the claim which was rightly rejected by the Resolution Professional.

ORDER

22. In view of the above discussion, there is no illegality committed by the Ld. Adjudicating Authority and rightly rejected the I.A. No. 143 of 2021 filed by the applicant (Appellant herein) in Company Petition (IB) 2083 (ND) 2019. There is not merit in the Appeal. Accordingly, the order dated 09.03.2021 in I.A. No. 143 of 2021 in Company Petition (IB) 2083 (ND) 2019 passed by the Company Appeal (AT) (Insolvency) No. 295 of 2021

Adjudicating Authority (National Company Law Tribunal), New Delhi Bench-V, is hereby affirmed. The Appeal is dismissed. No order as to costs.

23. Registry to upload the Judgment forthwith on the website of this Appellate Tribunal.

24. Registry is directed to send the copy of this Judgment to the Adjudicating Authority, National Company Law Tribunal, Bench - V, New Delhi, forthwith.

[Justice Anant Bijay Singh]
Member (Judicial)

[Ms. Shreesha Merla]
Member (Technical)

New Delhi

7th September, 2021

R. Nath.