NATIONAL COMPANY LAW APPELLATE TRIBUNAL, PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 221 of 2021

IN THE MATTER OF:

MR. K. SRINIVAS KRISHNA

Suspended Director of

M/s C-Tel, Infosystems (P) Ltd.

DSM361 – 362, DLF Tower, Shivaji Marg

New Delhi - 110015 **...Appellant**

Versus

1.SHYAM ARORA

Interim Resolution Professional

of the Corporate Debtor

96, Aravali Apartment, Alaknanda,

New Delhi – 110019

2. STATE BANK OF INDIA

Hitech City Branch,

Quadrant-1, Fist Floor, Cyber Tower

Madhapur, Hyderabad – 500081

3. PVM INNVENSYS PVT. LTD.

Plot No. C-5, Road No. 2, Vikrampuri Colony

Kakaguda, Secunderabad

Hyderabad – 500001 **...Respondents**

Present:

For Appellant : **Mr. P Nagesh, Sr. Advocate with Mr. Srinivas Kotni, Mr. Shantam Gorwara, Advocates and Mr. Srinivas Krishna, in person.**

For Respondents : **Mr. Shyam Arora, Respondent No. 1 in person, Mr. Sharad Tyagi, Mr. K. Gayatri, Advocates for Respondent No. 1.**

Mr. Sanjay Kapur, Mr. V M Kannan, Ms. Shubhra Kapur, and Mr. Arjun Bhatia, Advocates for Respondent No. 2.

Dr. Laxhmi Narashimha, Advocate for RP.

J U D G M E N T

Jarat Kumar Jain: J.

The Appellant "Mr. K. Srinivas Krishna" Suspended Director of Corporate Debtor has filed this Appeal against the order dated 18th February, 2021 passed by the Adjudicating Authority (National Company Law Tribunal) New Delhi, Bench-V in I.A. No. 4639/2020 and in I.A. No. 5317/2020 in (IB) No. 295(ND)/2019 whereby dismissed the application filed u/s 12A of 'IBC' read with Regulation 30A of Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (Regulations) filed by Mr. Shyam Arora, IRP Respondent No. 1.

2. The Brief facts of this case are that Operational Creditor "PVM Innvensys Pvt. Ltd." filed an Application under Section 9 of the IBC against the C-Tel Infosystems (P) Ltd. which was admitted vide order dated 23.01.2020 by the Adjudicating Authority and initiated 'Corporate Insolvency Resolution Process' (CIRP) against C-Tel Infosystems Pvt. Ltd. (Corporate Debtor) and Shyam Arora was appointed as 'Interim Resolution Professional' (IRP).

3. Mr. K. Srinivas Krishna, Suspended Director of Corporate Debtor has filed the Company Appeal (AT) (Ins.) No.205/2020 against the order of

admission dated 23.01.2020 passed by the Adjudicating Authority before this Appellate Tribunal.

4. This Appellate Tribunal vide order dated 25th September, 2020 held that the claim of 'Operational Creditor' i.e. PVM Innvensys Pvt. Ltd. for Rs. 50,32,028/- is not tenable. However, amount of another claim of Rs. 3,67,200/- has been paid to the 'Operational Creditor'(OC). Thus, the Appeal was disposed of and the interim stay passed by this Tribunal was vacated and IRP was directed to take further action with regard to CIRP. Thereafter, 'Committee of Creditors' (CoC) was constituted by the IRP on 05th October, 2020 with the sole claim of 'Financial Creditor' (FC) viz. State Bank of India of Rs. 12,66,000/-. Subsequently, the 'Corporate Debtor' has satisfied the claim of State Bank of India then the CoC approved the resolution for withdrawal of application under Section 9 of the IBC by 100% voting share and IRP was authorized to do necessary acts in this regard.

5. Pursuant to the said resolution of CoC, the Interim Resolution Professional filed an application in I.A. No. 4639 of 2020 u/s 12A read with Regulation 30A of the Regulations. In response of the said Application the Operational Creditor has raised some objections. Therefore, the IRP has filed another Application I.A.No. 5317 of 2020 for clarification of the objections raised by the Operational Creditor.

6. The IRP stated that the objections raised by the Operational Creditor are that (i) the IRP has not considered Operational Creditor's claim in entirety (ii)

the application filed in contravention of Section 12A read with Regulations 30A of the Regulations and (iii) form FA has been filed wrongly by the IRP. (iv) The IRP has not taken into consideration the claim of 'Axis Bank' while constituting the CoC. In response, the IRP submitted that the Operational Creditor had two claims one for Rs. 50,32,028/- and another claim for Rs. 3,67,200/-.

7. The Adjudicating Authority vide order dated 23rd January, 2020 had accepted only one claim of the OC for Rs. 3,67,200/- and directed that the other claim to be examined by the IRP. The IRP had examined the claim of Rs. 50,32,028/- and found the claim not to be in order. It is also stated that this Appellate Tribunal in CA (AT) (Ins.) No. 205/2020 vide order dated 25.09.2020 observed that the said claim is not maintainable.

8. It is also stated that the form FA is an Application for withdrawal of CIRP. Such form should be signed by the Applicant (Operational Creditor), the IRP had sent the email dated 17th October, 2020 to the Operational Creditor for his signing the form FA but no response was received by the IRP for the said email.

9. The Operational Creditor had not signed the form FA. Therefore, the IRP has filed the form FA alongwith the Application under Section 12A of the IBC pursuant to the resolution of CoC.

10. The non-inclusion of 'Axis Bank' in the CoC as the claim form submitted by the 'Axis Bank' was defective which was communicated to the Bank vide

email dated 01st October, 2020 by the IRP, the CoC was constituted on 05th October, 2020. By that time, the response of Axis Bank was not received.

11. The Ld. Adjudicating Authority after considering the objections raised by the Operational Creditor rejected the application on the ground that the application u/s 12A is not filed by the Applicant(OC) on whose application CIRP was initiated. Therefore, the application is dismissed as not maintainable.

12. Being aggrieved with this order, the Suspended Director of the 'Corporate Debtor' Company has filed this Appeal seeking relief that the impugned order may be set aside.

13. Ld. Counsel for the Appellant submitted that the Corporate Debtor has paid the admitted amount to the Operational Creditor and the claim of Rs. 50,32,028/- was not supported with documents, therefore, IRP has not admitted the same and this Appellate Tribunal in CA (AT) (Ins) No. 205 of 2020 held that the said claim is not maintainable, thereafter, the CoC has taken decision for withdrawal of the CIRP by 100% voting share. The IRP has sent a form FA to Operational Creditor for signature, however, the Operational Creditor has deliberately not signed the form. Therefore, the IRP has filed Application under Section 12A of the IBC r/w Regulation 30A of the Regulations, however, Ld. Adjudicating Authority has without considering the peculiar facts and circumstances of the case, dismissed the Application on the

ground that the Application for withdrawal under Section 12A of the IBC is not filed by the Applicant i.e. Operational Creditor.

14. It is submitted that the Hon'ble Supreme Court in the matter of Brilliant Alloys Pvt. Ltd. Vs. Mr. S. Rajagopal SLP (C) No. 31557 of 2018 held that the Regulation 30A can be construed as directory. Hon'ble Supreme court in another Judgment of Uday Shankar Triyar vs Ram Kalewar Prasad Singh & Anr Civil Appeal No. 6701 of 2005 held that procedural highper technicalities cannot defeat the very purpose of the statute and hence, this Appellate Tribunal shall act in compliance with the same and allow the Appeal.

15. Ld. Counsel for the Appellant submitted that the Operational Creditor has refused to sign the FA form on the basis of its illegal claim which is rejected by this Appellate Tribunal and the Corporate Debtor has already satisfied the admitted claim of the Operational Creditor, therefore, continuance of CIRP is misused the process when the resolution has already been came to an end. It is settled law that the Operational Creditor cannot use the CIRP as a recovery mechanism as held by the Hon'ble Supreme Court in the case of Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software Pvt. Ltd. 2018 (1) SCC 3533.

16. Ld. Counsel for the Appellant submitted that the Adjudicating Authority rejected the withdrawal application on the hyper technical ground that the same has not been signed by the Operational Creditor. Particularly, when after satisfying admitted claim of the Operational Creditor nothing survives in the CIRP. The Operational Creditor has acted with malafide and has refused to

signed form FA. Hence, the Adjudicating Authority should have interpret section 12A of the IBC r/w Regulation 30A of the Regulations using purposive interpretation, particularly in such cases where literal interpretation may not serve the purpose. For this preposition, cited the Judgment of Hon'ble Supreme Court in the case of Shailesh Dhairyawan vs Mohan Balkrishna Lulla (2016) 3 SCC 619. Thus, the impugned order is liable to be set aside.

17. The Respondent No. 1 (IRP) present in person supports the argument advanced by the Ld. Counsel for the Appellant and submitted that he has filed the Application for withdrawal under Section 12A of the IBC as per resolution passed by the CoC. Ld. Adjudicating Authority on the technical ground that the form FA is not signed by the Operational Creditor, erroneously dismissed the Application.

18. Per Contra, Ld. Counsel for the Respondent No. 3 (Operational Creditor) submitted that Operational Creditor's claim for Rs. 50,32,028/- is still under dispute and need to be resolved. Hence, the entire amount of claim is not paid to the Operational Creditor. Ld. Adjudicating Authority has rightly held the Application is filed by the IRP on behalf of the Corporate Debtor which is not maintainable since there is no exit route for the IRP or the Corporate Debtor. For this purpose, he placed reliance on the Judgment of Hon'ble Supreme Court in the case of Swiss Ribbons Pvt. Ltd. Vs. Union of India (2019) 4 SCC 17 and Maharashtra Seamless Limited V Padmanabhan Venkatesh reported in 2020 (11) SCC 467. Ld. Counsel for the Respondent No. 3 further submitted

that this Appellate Tribunal in CA (AT) (Ins) No. 205 of 2020 held that the claim for Rs. 50,32,028/- is not maintainable, against that order the Respondent has filed the Civil Appeal No. 1689 of 2021 which is pending before the Hon'ble Supreme Court.

19. It is submitted that language of Section 12A of the IBC is clear that the Applicant who has filed Application under Section 7, 9 or 10 alone can file withdrawal application then there is no scope to add something and interpret that the IRP can file the Application for withdrawal. The facts of the case of Brilliant Alloys (Supra) are totally distinguishable from the facts of the present case and hence, the ratio of the Judgment is not applicable. Therefore, it is prayed that the Appeal may be dismissed with costs.

20. After hearing Ld. Counsel for the parties we have minutely gone through the record and considered the submissions advanced by the Ld. Counsel for the parties.

21. It is admitted fact that the Operational Creditor has filed Application under Section 9 against the Corporate Debtor for two claims one of Rs. 50,32,028/- and another claim for Rs. 3,67,200/-. The amount of Rs. 3,67,200.- has been paid to the Operational Creditor. The IRP has not admitted the another claim as it is not supported by any reliable documentary evidence. Against that rejection the Operational Creditor has filed I.A. No. 3874 of 2020 before the Adjudicating Authority. It is also admitted fact that CIRP admission order has been challenged by the suspended director by way of CA (AT) (Ins)

No. 205 of 2020 before this Appellate Tribunal, while deciding the Appeal, this Appellate Tribunal observed that the claim of Rs. 50,32,028/- is not tenable and vide order dated 25.09.2020 the Appeal was disposed of and the IRP was directed to take further action with regard to CIRP. Thereafter, the CoC was constituted by the IRP on 05.10.2020 with the sole claim of Financial Creditor viz State Bank of India for Rs. 12,66,000/-. Subsequently, the Corporate Debtor has satisfied the claim of State Bank of India then the CoC approved the resolution for withdrawal of the Application under Section 9 of the IBC by 100% voting share and IRP was directed to do necessary acts in this regard.

22. it is admitted fact that this Appellate Tribunal held in CA (AT) (Ins) No. 205 of 2020 vide order dated 25.09.2020 that the claim of Rs. 50,32,028/- is not maintainable against that order the Operational Creditor has filed Civil Appeal No. 1689 of 2021 before the Hon'ble Supreme Court challenging the observations made by this Appellate Tribunal. Hon'ble Supreme court vide order dated 09.08.2021 has dismissed the Appeal. Thus, it is finally decided by the Hon'ble Supreme Court that the claim of Rs. 50,32,028/- is not maintainable under Section 9 of the IBC application. The Operational Creditor has not signed form FA solely on the ground that its said claim has not been considered. But now, the Hon'ble Supreme Court has finally ruled that the said claim is not maintainable. Thus, the Operational Creditor has no ground to contest the withdrawal Application.

23. Ld. Adjudicating Authority has rejected the Application on the ground that the Application Section 12A of the IBC is not filed by the Applicant (Operational Creditor) on whose instance CIRP initiated against the Corporate Debtor. No doubt, as per Section 12A of the IBC, the Application must be filed by the Applicant and Regulation 30A of the Regulations provides the procedure and format of the Application i.e. FA. Now the question arises that when the admitted claim of the Operational Creditor and other creditors are satisfied by the Corporate Debtor and CoC approved the resolution for withdrawal of the Application by 100% voting share and the Corporate Debtor has provided a bank guarantee as per sub-Regulation 2 of Regulation 30-A even though the Operational Creditor (Applicant) misusing his position, refused to sign the form FA and does not file Application under Section 12A of the IBC.

24. In aforesaid peculiar facts and circumstances of the case no cause of action survives in favour of the Operational Creditor to proceed with CIRP. Thus, exercising the inherent powers under Rule 11 of National Company Law Appellate Tribunal, Rules, 2016 to prevent abuse of process, we hereby set aside the impugned order as well as the order of initiating CIRP against the Corporate Debtor. Resultantly, the Corporate Debtor Company is released from the rigours of the CIRP and is allowed to function through its Board of Directors from immediate effect. The IRP shall hand over the records to the Board of Directors.

25. The matter is remitted back to the Ld. Adjudicating Authority to decide the fees and costs of CIRP payable to IRP which shall be borne by the Corporate Debtor.

Thus, the Appeal is allowed as indicated above. However, no order as to costs.

[Justice Jarat Kumar Jain]
Member (Judicial)

[Dr. Ashok Kumar Mishra]
Member (Technical)

New Delhi
02nd September, 2021
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