

Ms. Veneet Trehan, Advocate for Intervenor.

J U D G M E N T
(23rd September, 2022)

Justice Anant Bijay Singh;

The present Appeal has been filed by the Appellant under Section 61(1) of the Insolvency and Bankruptcy Code, 2016 (**for short IBC**) being aggrieved and dissatisfied by the order dated 10.03.2021 passed by the Adjudicating Authority (National Company Law Tribunal, Ahmedabad Bench, Ahmedabad Court 2) in I.A. No. 246 of 2020 in C.P. (IB) No. 441/NCLT/AHM/2019, whereby and whereunder the Appellant filed the application under Section 60(5)(c) of the IBC with a following prayer:

- a) To direct the Resolution Professional to restore the claim of the applicant as it was lodged in accordance with the arbitration award.*
- b) To direct the RP to provide details, documents and information sought by the applicant in stipulated time period.*

By which the Adjudicating Authority dismissed the Application filed by the Appellant.

2. The facts giving rise to this Appeal are as follows:

- i) The Respondent- Corporate Debtor had availed loan facilities from the Appellant. The Appellant had sanctioned three loans by issuing three sanction letters on 22.05.2012 to which Corporate Debtor assented by counter signing the same and subsequent to which loan agreement were executed.

ii) Further case is that terms of Sanction Letters were mutually agreed terms and one of the terms of sanction 'Clause 11' was specifically dealing with collateral security retained by Appellant. As per the terms agreed, interest on said collateral security is not payable at the end of tenure if the loan account if foreclosed, terminated or borrower defaults, the clause 11 is hereunder:

“11. Additional Collateral Security:

Cash collateral Securities 33.75% of the loan amount i.e. INR 1,01,25,000/- amount of SD. The Collateral money bears interest of 7.00% P.A. and will be payable at the end of the tenure of terms loan facility and after all dues including instalments and other charges, if any, are fully repaid to and subject to tax deduction at source as per I.T. Act, 1961 and rules there under.”

iii) The Corporate Debtor had defaulted in repayment of financial assistance sanctioned, thus Arbitration / Loan Recall Notices were issued on 23rd May, 2015 for default committed by corporate debtor towards his Loan account no. LNAHM00612-130001371, LNAHM01112-130001372 and LNAHM01112-130001373. Simultaneously Arbitration was also initiated as per the mandatory arbitration 'Clause 32' of the loan Agreements, the relevant clause is hereunder:

“32. ARBITRATION

32. 1 Any conflict, difference, controversies, or disputes arising between the parties shall be resolved amicably at the first instance. Unresolved disputes, if any, shall be submitted/referred to the arbitration of the Sole Arbitrator. The Sole Arbitrator shall be either the Director or Head-Commercial Business of INTEC Capital Limited or any other person nominated by him/them. The Arbitration shall be conducted in

accordance with the provisions of Arbitration and Conciliation Act, 1996, Rules thereunder any amendments thereto and the language of the Arbitration shall be English. The decision/award of the Arbitrator shall be final/conclusive and binding on the parties. The seat of Arbitration shall be Delhi.”

iv) The Appellant also issued a Section 13(2) notice under SARFAESI Act, 2002 on 15.02.2019 seeking recovery of Rs. 3,50,46,561/-

v) Further case is that the Ld. Arbitrator passed an award dated 04.04.2016 (Annexure 10 at page 304 to 336, Vol.- II of the Appeal) in favour of the Appellant in all three cases. The Corporate Debtor received ample opportunities to make his representation before the Ld. Arbitrator but it chooses not to participate for reasons best known to them as recorded by Arbitrator in Paragraphs 5, 6 & 7 of the Award, which is hereunder:

“5. On 27.07.2015 my office received a letter dated 21.07.2015 from Respondent party no. 1 & 2 requesting that the arbitration proceedings be held in the end of September, 2015. The request was made on the basis that the party was unable to attend the hearing on 25.07.2015 and also till 15.09.2015 because he was going abroad. In view of the request of the Respondent parties, on the next date being 08.08.2015, the matter was not proceeded ex-parte. Respondent parties were granted the opportunity to authorize a representative to attend the proceedings before this Tribunal.

6. Thereafter, on 22.08.2015 Claimant party filed statement of Claim. Thereafter proof of service was also filed on 11.09.2015. By order dated 11.09.2015 Respondent parties were again notified that in view of the request of the Respondent party

matter was not proceeded ex-parte despite the earlier order dated 25.07.2015. However, at the request of the Respondent party since sufficient time was allowed to them, on the next date being 24.10.2015 Respondent parties were directed to attend the arbitration proceedings failing which the matter was to be proceeded ex-parte.

7. As despite repeated service and despite sufficient time being allowed to the Respondent parties, when the Respondent parties again failed to appear on 24.10.2015 the matter was proceeded ex-parte.”

vi) Further case is that the erstwhile Board of the Corporate Debtor also challenged the award in Ahmadabad, under Section 34 of the Arbitration and Conciliation Act. The same came to be dismissed due to want of jurisdiction. The Corporate debtor again went on to challenge the awards before the District Court, Delhi which was also dismissed on the ground of want of prosecution. Thereafter, the award dated 04.04.2016 has attained finality on 1st November, 2019.

vii) Thereafter, the Appellant filed C.P. (IB) No. 148 of 2019 under Section 9 of the IBC. However, during its pendency, an application of another creditor M/s Devsaria Iron and Steel Co. Pvt. Ltd. was allowed on 30.09.2019 and Corporate Debtor was admitted to Corporate Insolvency Resolution Process (*For short CIRP*) and Resolution Professional was appointed. In the light of the above, the Appellant withdrew its petition under Section 9 of the IBC vide order dated 26.11.2019. Further, the Appellant filed its claim on 15.10.2019 as total of Rs. 4,51,96,588.08/- with the Respondent- Resolution Professional. The said claim was admitted provisionally by the Respondent. There was no issue raised by the

erstwhile board of management also on the claim of the Appellant. However, on 12.12.2019 in the 2nd CoC meeting, the claim of the Appellant was reduced from Rs. 4,51,96,588.08/- to Rs. 94 lacs without any basis.

viii) The Appellant was shocked by such reduction and therefore a series of e-mail communications ensued between the Appellant and the Resolution Professional, in order to explain to him the calculation done by Appellant in respect of claim. However, without appreciating the explanation provided by the Appellant to substantiate its claim, the Resolution Professional again made a drastic reduction in the claim of the Appellant to the tune of Rs. 69 lacs only. Vide its email dated 03.02.2020, the RP provided completely erroneous calculation, based on selective reading of the arbitral award, sanction letter and the RBI email which adversely reduced the voting share of Appellant from approximately 19.56% to only 3.63%.

ix) Thereafter, the Appellant filed an Application under Section 60(5) of the IBC before the NCLT against the decision of the Resolution Professional of reducing the claim of the Appellant and after hearing the parties the Tribunal dismissed the said Application. Hence this Appeal.

3. The Ld. Sr. Counsel for the Appellant during the course of argument and in his memo of Appeal along with written submissions submitted that the claim initially on the basis of loan documents and sanction letters, however, when the arbitral awards attained its finality when the appeal against the arbitral awards

preferred by Corporate Debtor was dismissed on 01.11.2019. The claim calculations based on arbitral awards were shared with Resolution Professional.

4. It is further submitted that the Adjudicating Authority has failed to consider the judgment passed by the Hon'ble Supreme Court in the matter of '*Dena Bank Vs. C. Shivkumar Reddy & Anr., Civil Appeal No. 1650 of 2020 dated 04.08.2021*' held that a final judgment and/or decree of any Court or Tribunal or any Arbitral Award for payment of money, if not satisfied, would fall within the ambit of a 'financial debt', enabling the creditor to initiate proceedings under Section 7 of the IBC.

5. It is further submitted that the Resolution Professional wrongly adjudicated upon and reduce the claim of the Appellant from Rs. 4,51,96,588.08/- to Rs. 69,38,050.38/- causing thereby huge prejudice as well as reduction in CoC voting power of the Appellant from 19.56% to 4.80% which is in total disregard to amount of the financial debt of Rs. 5,84,43,439/- in terms of the Audited balance sheet of the Corporate Debtor, *inter alia*, for the year ended 31st March, 2017, duly acknowledging the amount payable by the Corporate Debtor in terms of he admitted sanction letters and loan agreements as also arbitral awards and amount as shown in execution application filed before the Hon'ble City Civil & Sessions Court at Ahmadabad on 02.08.2016.

6. It is further submitted that the Resolution Professional has re-evaluated and effectively adjudicated upon the claims, albeit wrongly, with following submissions:

- The Ld. Arbitrator has not granted the Collateral /security benefit to the Corporate Debtor. Thus, outstanding as per awards is Rs. 5,84,43,439/- but Resolution Professional while calculating as per awards is himself giving benefit of collateral security to the Corporate Debtor as evident from calculation given by Resolution Professional.
- The Sanction Letter (Clause 11) it is clearly mentioned that no interest will be payable on collateral in case of premature termination yet Resolution Professional has given benefit to Corporate Debtor without considering the fact that Ld. Arbitrator completely ignored the same.
- The Sanction Letter and Loan Agreement clearly states the penal interest to be 3% per month which amounts to 36% per annum yet the Resolution Professional calculated the claim by taking 18% per annum while admitting the claim irrespective the method of calculation.

7. It is further submitted that Resolution Professional be directed to admit claim as per mutually agreed terms of sanction or as per Arbitral Awards which comes out to be Rs. 5,84,43,439/-. Based on these submissions the impugned order is set aside and the Appeal be allowed.

8. The Ld. Counsel for the Respondent during the course of argument and in his reply affidavit along with written submissions submitted that the Company Petition was filed under Section 9 of the IBC and the same was admitted by the Adjudicating Authority vide order dated 30.09.2019 and further public announcement has been made by the respondent RP on 07.10.2019 for submission of claims before 18.10.2019. Pursuant to that, the Appellant on

15.10.2019 lodged his claim under Form-C as financial creditor for the amount of 4,51,96,588.08/- and the same was provisionally admitted and a report was submitted for constitution of CoC in which it was clearly mentioned that in the absence of the financial statement for the year 2018-19 the claims are provisionally admitted which are subject to change.

9. It is further submitted that after the 1st CoC meeting it was observed that the arbitration award dated 04.04.2016 passed by the Ld. Sole Arbitrator provided interest at the rate of 18% per annum to payable to the Appellant as opposed to 36% as mentioned in sanction letter of the Appellant, the same is attached in the appellant Appeal memo as Annexure 10. Accordingly, the claim of Appellant was verified and notified on 06.12.2019 through mail by the Resolution Professional (page 6 of the Reply). The 2nd CoC meeting dated 12.12.2019 the CoC was informed of the reconstituted shares. Pursuant to above, a mail was received from Mr. Vasant Modi, member of suspended Board of Director requesting the Respondent to inquire the Appellant whether it has deposited the interest of Rs. 56.26 lakhs in account of Corporate Debtor at the time of NPA and then final the claim of Intec Capital Ltd. to which reply was also made on 30.01.2020 (Annexure C of the reply).

FINDINGS

10. We observe that subsequent to the RBI complaint an email was written to the Appellant on 04.01.2020 (Annexure D of the reply) that the interest on Rs. 2,70,00,000/- @ 7% is not credited in Corporate Debtor account. However, it is

considered that the interest credit in the loan account on Security Deposit @ 7% whereby the Respondent called for explanation from the Appellant. In response to the mail, the Appellant sent mail dated 07.01.2020 alleging that RBI mail is wrongly interpreted and erred in calculating Appellant's claim and asked to have meeting to discuss and understand each and every figure of appellant's claim after that the meeting was scheduled on 15.01.2020 to discuss and finalise the appellant's claim after this a mail has been sent on 03.02.2020 (Annexure E of the reply) in which it is informed that the claim of Rs. 4,51,96,588.08/- is received against Perfect Boring Pvt. Ltd., admitting the appellant claim of Rs. 69,38,050.38/- as per calculation.

11. We observe that in the 4th CoC meeting held on 17.02.2020, the Respondent informed the CoC about revised claim of the Appellant i.e. Rs. 69,38,050/-. However, objection has been raised by the Appellant on the reduction of the claim and asked to consider some points at page no. 11 and 12 of the reply for accepting the claim and further in response to it the Respondent informed that the arbitration award considered at 18% interest instead of 36% and further the interest amount of security deposit was never credited in Corporate Debtor bank account and also the TDS Certificate (26 AS) of Perfect Boring Pvt. Ltd. for the Financial year 2012-13, 2013-14, 2014-15 are evident. The interest on security deposit has been deducted by 'Intec Capital Ltd.' but interest was not credited to 'Perfect Boring Pvt. Ltd.', therefore, the claim of the Appellant has been verified and admitted based on the information and

documents available. The claim was verified based on the arbitration award and revised accordingly.

12. We observe that the Respondent admitted the claim based on calculation of the Appellant wherein the Appellant itself has given treatment to the security deposit by deducting it from the outstanding amount, the interest rate as per the arbitration award dated 04.04.2016 was @ 18% which is also not disputed by the Appellant and further treatment also has been given to the information provided by the RBI on 19.12.2019 with respect to the interest on the security deposit, which again has been admitted by the Appellant before the RBI. The Resolution Professional has therefore not adjudicated but only has collated the information provided by the Appellant, Corporate Debtor and the RBI. Hence, we are of the view that there is no merit in the Appeal, the instant Appeal deserves to be dismissed.

13. We are of the view that the Adjudicating Authority has considered the submissions made by the Appellant and have held that the Hon'ble Supreme Court in the case of "*Essar Steel India Limited*" relied by the Resolution Professional, wherein it is observed that it is the responsibility of the Resolution Professional to collect, collate and finally admit claims of all creditors, the role of the Resolution Professional is not adjudicatory but administrative. Further in paragraph 19 of the impugned order, the Adjudicating Authority have come to the conclusion that the Resolution Professional has already collated the genuine claim of the Appellant based on the documents filed by the Appellant.

- Perusal of the order dated 30.04.2021 passed by this Appellate Tribunal it appears that the Ld. Counsel for the Appellant informed that on 16.03.2022 Resolution Plan which was submitted and approved by CoC has further been approved by Adjudicating Authority, it was ordered that any outcome of the Resolution Plan/implementation of the Resolution Plan will be subject to result of this Appeal.
- Taking all the facts aforementioned above, we find that no reason to disagree with the finding given by the Adjudicating Authority, therefore, the Adjudicating Authority has rightly passed the impugned order. The Impugned order dated 10.03.2021 passed by the Adjudicating Authority (National Company Law Tribunal, Ahmedabad Bench, Ahmedabad Court 2) in I.A. No. 246 of 2020 in C.P. (IB) No. 441/NCLT/AHM/2019 is hereby affirmed. The Appeal is hereby dismissed.

14. Registry to upload the Judgment on the website of this Appellate Tribunal and send the copy of this Judgment to the Adjudicating Authority (National Company Law Tribunal, Ahmedabad Bench, Ahmedabad Court 2), forthwith.

**[Justice Anant Bijay Singh]
Member (Judicial)**

**[Ms. Shreesha Merla]
Member (Technical)**

**New Delhi
23rd September, 2022**
R. Nath.