

NATIONAL COMPANY LAW APPELLATE TRIBUNAL

PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Ins.) No. 425 of 2022

IN THE MATTER OF:

Rakesh Kumar Jain

....Appellant

Resolution Professional
HBN Homes Colonizers Pvt. Ltd.
1670/120, Ground Floor,
Shanti Nagar, Tri Nagar, Delhi- 110035.

Vs.

1. Jagdish Singh Nain & Ors.

....Respondents

Resolution Professional of
HBN Foods Ltd.
3rd Floor, 8/28, WEA, Abdul Aziz Road,
Karol Bagh, New Delhi- 110005.

2. HBN Dairies and Allied Ltd.
Through its Liquidator Mr. Rohit Sehgal
E-10A, Kailash Colony,
Greater Kailash-1, New Delhi-110048

3. Complete News & Entertainment Broadcast (P) Ltd.
Business Unit No. 527, 5th Floor,
HBN Office, D-Mall, Plot D, District Centre
Paschim Vihar, West, N.D-87.

4. HBN Entertainment & Broadcasting Pvt. Ltd.
Business Unit No. 527A, 5th Floor,
HBN Office, D-Mall, Plot D, District Centre
Paschim Vihar, West, New Delhi- 87.

5. Exotic Eats Pvt. Ltd.
Business Unit No. 526A, 5th Floor,
HBN Office, D-Mall, Plot D, District Centre
Paschim Vihar, West, New Delhi- 87.

6. Viraman Buildcon & Developers Pvt. Ltd.
Business Unit No. 530, 5th Floor,
HBN Office, D-Mall, Plot D, District Centre
Paschim Vihar, West, New Delhi- 87.

7. Fusion Taste Pvt. Ltd.
Business Unit No. 519, 5th Floor,
HBN Office, D-Mall, Plot D, District Centre
Paschim Vihar, West, New Delhi- 87.

8. True Blue Finlease Ltd.
Ansal Utility Commercial Complex
S-2-A, 2nd Floor, Paschim Vihar, New Delhi- 63.

9. HBN Hospitality Pvt. Ltd.
Business Unit No. 526D, 5th Floor,
HBN Office, D-Mall, Plot D, District Centre
Paschim Vihar, West, New Delhi- 87.

10. Shuvam Colonizers Pvt. Ltd.
HBN Sunrise City, Mansa Road,
Bhatinda, Punjab- 151001.

11. Ambreen Projects & Infrastructure Pvt. Ltd.
HBN Sunrise City, Mansa Road,
Bhatinda, Punjab- 151001.

12. Smriti Buildcon Pvt. Ltd.
B-53, B-1 Block, Community Centre
Janakpuri, N.D.- 58.

13. HBN Credit Cooperative Society Ltd.
B-53, B-1 Block, Community Centre
Janakpuri, N.D.- 58.

14. Prosper Housing Finance Ltd.
Ansal Utility Commercial Complex
S-2-B, 2nd Floor, Paschim Vihar,
N.D.- 63.

15. Mr. Amardeep Singh Sran
C-602, Lake View Apartment
Paschim Vihar, N.D.-87.

16. Mr. Harminder Singh Sran
C-602, Lake View Apartment
Paschim Vihar, N.D.-87.

17. Mrs. Manjeet Kaur Sran
C-602, Lake View Apartment
Paschim Vihar, N.D.-87.

18. Mr. Bohar Singh Dhillon
House No. 264, Kapur Singh to Buta Singh
De Ghar Tak, Village Bhalu, Tehsil Bhaga Purana
District Moga, Punjab- 142038.

19. Mr. Jagrup Singh Sandhu
Village and post office Bhaloor
Bagha Purana, Distt. Moga, Punjab-151207

20. Mr. Gurpreet Singh Gill
House No. 167, Village Bhalour
Distt. Moga, Punjab-142001

21. Birla Financial Distribution Ltd.
Unit No. 102, 1st Floor, Morya Landmark II
New Link Road, Near Infinity Mall,
Andheri (W), Mumbai, Maharashtra-400053.

Present:

For Appellant: Mr. Mohit Nandwani, Advocate

For Respondents: Mr. Abhishek Naik (for R-1) and Ms. Gulafsha Kureshi, Advocates.

J U D G M E N T

[4th August, 2022]

(Per Hon'ble Mr. Justice M. Satyanarayana Murthy)

Aggrieved by the order in I.A. No. 2844/2020 in CP (IB) 1359/ND/2019 dated 13.12.2021, this appeal is preferred by Mr. Rakesh Kumar Jain, Resolution Professional of HBN Homes Colonizers Ltd., the Adjudicating Authority decided the I.A. No. 2844/2020 filed under Section 66 of IBC in CP (IB) 1359/ND/2019 issues the following directions:

"26. In sequential to above, we are, therefore, of the considered view that Respondent Nos. 2 to 21, the suspended board of directors of the corporate debtor and other related persons were carrying on business with intent to defraud the creditors of the corporate debtor or with fraudulent purpose and accordingly, they misappropriated Rs. 2687.27

lacs and diverted to their own use with intent to defraud the creditors. Therefore, they are liable to make such contribution to the assets of the corporate debtor.

27. Accordingly, we direct the Respondent Nos. 2 to 21 to make contribution of Rs. 2687.27 lacs (Two Thousand Six Hundred Eighty Lakhs and Twenty Seven Thousand) jointly or severally to the assets of the corporate debtor with a period of maximum 02 (two) months from the date of this order, And if they fail to pay the aforesaid amount within the prescribed period, then same shall be realised from their property/ properties.

28. Apart from that the applicant is also directed to institute a criminal prosecution against the Respondent Nos. 2 to 21 under Section 69 of IBC 2016 in accordance with the provision of law.”

The Appellant is a corporate insolvency resolution professional of HBN Homes Colonizers Ltd. and whereas the 1st Respondent is Mr. Jagdish Singh Nain Resolution Professional of HBN Foods Ltd. The Appellant is looking after the insolvency resolution process, questioned the above order on the ground that during moratorium imposed under Section 14 of IBC, the Adjudicating Authority is not competent to issue such direction impugned in the Appeal, thereby, committed a serious error in issuing such direction and sought to set aside the directions issued by the Adjudicating Authority in I.A. No. 2844/2020, filed under Section 66 of the IBC.

Few facts are necessary for deciding the real controversy in this present appeal. Tricolite Electrical Industries Ltd. (Operational Creditor) filed Company Petition No.IB-82/PB/2018 to initiate insolvency resolution process and the petition filed under Section 9 of IBC was admitted by Judgment dated 24.07.2019, in other CP (IB)

1359/ND/2019 was filed by Financial Creditor against HBN Foods Ltd. and other petition by Jagdish Singh Nain was appointed as resolution professional for completing insolvency resolution process of HBN Homes Colonizers Ltd. During the process of insolvency resolution, the Appellant herein and other respondents in the main petition 3 to 21 indulged in fraudulent trading and business and sought different reliefs.

During Covid-19 lockdown, the appellant was served a copy of application of I.A. No. 2844/2020 filed under Section 66 of IBC but, the Appellant could not keep a track of such application, could not represent itself during the proceeding. The Adjudicating Authority forfeited the right of the Appellant to file reply by order dated 13.07.2021, thereafter the impugned order was passed by the Adjudicating Authority which came to the knowledge of the Appellant on 18.12.2021 when the 1st respondent served a copy of the impugned order on the Appellant.

It is contended that the Adjudicating Authority committed a grave error in passing the impugned order since the Resolution professional of HBN Homes Colonizers Pvt. Ltd., he was appointed by the order dated 24.07.2019 by Adjudicating Authority in CP (IB)-82/2019, a moratorium was also imposed in accordance with Section 14 of IBC, therefore, no proceeding could be initiated against the Appellant/ HBN Homes Colonizers Pvt. Ltd. The Adjudicating Authority passed the impugned order without applying its mind and

the appellant being represented by resolution professional, passing impugned order by Adjudicating Authority is *ex-facie* erroneous and against law. Hence, the order is unsustainable and requested to allow the appeal setting aside the impugned order.

The respondent filed a detailed reply contending that the Corporate Debtor entered into fraudulent transactions which is against the interest of operational and financial creditors. The appellant did not choose to file the counter despite affording reasonable opportunity, thereby, the appellant is not competent to raise any plea in the absence of any pleading. It is specially contended that the appellant was represented by an advocate, on 19.08.2020, 21.08.2020, 02.09.2020, 12.10.2020 and 28.10.2020 but did not choose to file counter without any reasonable cause.

It is further contended that Section 14 (1) (a) of IBC has no application to the present facts of the case and on other hand Section 60 (5) of IBC permits to adjudicate such issue pertaining to fraudulent transactions during the currency of insolvency resolution process or liquidation process. Thus, bar under Section 14 (1) (a) is not applicable and consequently the contention of the appellant is to be rejected and finally requested to dismiss the appeal affirming the order passed by the Adjudicating Authority.

During hearing the learned counsel for the appellant raised a serious objection about the legality of the order passed during currency of moratorium in the insolvency resolution process or

liquidation process. The only ground raised before the Tribunal is that when moratorium is in operation, during insolvency resolution process or liquidation process, issue of such direction for contribution of Rs. 2687.27 lacs, making the Respondent Nos. 2 to 21 responsible jointly and severally to assets of corporate debtor within two months from the date of order and to institute a criminal prosecution against the Respondent Nos. 2 to 21 under Section 69 of IBC is illegal and vitiated by irregularity.

Whereas the counsel for the Respondent submitted that Section 14 (1) (a) is not a bar to pass appropriate order under section 66 of IBC. Section 66 permits the Adjudicating Authority to pass appropriate order during pendency of insolvency resolution process or liquidation proceedings on the application of any person, if, it is found that any business of the corporate debtor has been carried on with an intent to defraud creditors of the corporate debtor or for any fraudulent purpose. Thereby the order is in accordance with law and warrants no interference of this Tribunal while exercising power under Section 60 (5) of IBC. Section 14 does not bar passing any order against resolution professional and suspended Directors so also related parties.

Considering rival contentions, perusing the order under challenge and connected material, the point need be answered by this Appellate Tribunal is as follows:

“Whether the Adjudicating Authority is competent to pass order under Section 66 of IBC during currency of moratorium under Section 14 of IBC? If, so whether the order in I.A. No. 2844/2020 dated 13.12.2021 is sustainable?”

The dispute is between resolution professional of the Corporate Debtor, the appellant herein and the operational creditor is represented by its resolution professional. The corporate debtor is undergoing process of insolvency resolution and it is alleged that during the process of insolvency resolution the appellant herein representing HBN Homes Colonizers Pvt. Ltd. entered into fraudulent transaction and the same is supported by audit report called for by the Adjudicating Authority. The legality of the report or otherwise is not challenged by the appellant in the present appeal, however, the appellant limited his submissions as to the legality of the order passed under Section 66 of the IBC during currency of moratorium under Section 14 of IBC, therefore, we find it appropriate to confine ourselves to the limited question as to the legality of the order passed by Adjudicating Authority during currency of moratorium. In view of the limited challenge it is apposite to extract Section 14 (1) (a) for proper appreciation and it is extracted hereunder:

14. Moratorium – (1) Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely:-

(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of

any judgement, decree or order in any Court of law, tribunal, arbitration panel or other authority;

Section 14 (1) (a) of IBC interdicts institution of suits are continuation of pending suits are proceedings against the corporate debtor including execution of any judgment decree or order of any court of law, Tribunal, Arbitration Panel or other authority. Thus, it prohibits institution and prosecution of any proceedings against the corporate debtor but does not prohibit passing any order by the Adjudicating Authority during insolvency resolution process or liquidation process against resolution professional and its suspended Directors or related parties. The counsel for the appellant contended that it applies to transfer of any amount from corporate debtor to the assets of financial or operational creditors. No doubt prohibition is only against the proceedings in any other courts or Tribunals etc. but not a prohibition against passing of any order in the pending insolvency or liquidation process against the Corporate Debtor. On the other hand, Section 66 permits the Adjudicating Authority to pass appropriate orders on application of any person when any transaction was entered into fraudulently. Section 66 of IBC reads as follows:

***“66. Fraudulent trading or wrongful trading-** (1) If during the corporate insolvency resolution process or a liquidation process, it is found that any business of the corporate debtor has been carried on with intent to defraud creditors of the corporate debtor or for any fraudulent purpose, the Adjudicating Authority may on the application of the resolution professional pass an order that any persons who were knowingly parties to the carrying on of the business in such manner shall be liable to make such contributions to the assets of the corporate debtor as it may deem fit.*

(2) On an application made by a resolution professional during the corporate insolvency resolution process, the Adjudicating Authority may by an order direct that a director or partner of the corporate debtor, as the case may be, shall be liable to make such contribution to the assets of the corporate debtor as it may deem fit, if-

(a) before the insolvency commencement, date, such director or partner knew or ought to have known that there was no reasonable prospect of avoiding the commencement of a corporate insolvency resolution process in respect of such corporate debtor; and

(b) such director or partner did not exercise due diligence in minimizing the potential loss to the creditors of the corporate debtor.

(3) Notwithstanding anything contained in this section, no application shall be filed by a resolution professional under subsection (2), in respect of such default against which initiation of corporate insolvency resolution process is suspended as per section 10A.”

A bare reading of Section 66 of IBC it is clear that the Tribunal is competent to pass appropriate orders against suspended board of director or resolution professional and related parties, in terms of clause 2 of Section 66 of IBC, when fraudulent transaction was entered into by the corporate debtor through its resolution professional or suspended Directors.

The core contention of the appellant is that the prohibition under Section 14 (1) (a) is applicable to Section 66 of IBC also. This contention cannot be accepted for the reason that these two provisions are independent, incorporated for different purposes. Section 14 of IBC is intended to prevent fictitious claims by 3rd parties to realise the amount by execution of the orders decrees etc. whereas Section 66 of IBC is intended to prevent fraudulent trading or business by corporate debtor through its corporate insolvency resolution professional or suspended directors, during insolvency

resolution process or liquidation process. These two provisions have to be read independently to achieve the object of the enactment.

While interpreting the provisions, the statute must be construed to make it effective and workable. The Courts/ Tribunals strongly lean against a construction which reduces the statute to a futility, vide judgment of Apex Court in **M. Pentiah Vs. Veeramallappa Muddala**¹. A statute or any enacting provision therein must be so construed as to make it effective and operative 'on the principle expressed in the maxim: *ut res magis valeat quam pereat*', vide judgment of Apex Court in **CIT Vs. S. Teja Singh**². On application of the principles that courts while pronouncing orders upon the constitutionality of a statute start with a presumption in favour of constitutionality and prefer a construction which keeps the statute within the competence of the Legislature, vide judgment of Apex Court in **Corporation of Calcutta Vs. Liberty Cinema**³.

In view of the settled principle of law both the provisions referred above should be construed harmoniously to give effect to the intendment of the code and to make it workable. Even otherwise the Court must interpret the provisions harmoniously to avoid inconsistency or repugnancy. It has already been seen a statute must be read as a whole and one provision of the Act should be construed with reference to the other provisions in the same Act, so, as to make

¹ AIR 1961 SC 1107

² AIR 1959 SC 352

³ AIR 1965 SC 1107

a consistent enactment, of the whole statute. Such a construction has the merit of avoiding any inconsistency or repugnancy either within a section or between a section and other parts of the statute. It is the duty of the courts to avoid “a head on clash” vide **Raj Krushna Vs. Binod Kanungo**⁴, **Sultana Begum Vs. Premchand Jain**⁵, **Kailash Chandra Vs. Mukundi Lal**⁶. between two sections of the same Act and, “whenever it is possible to do so, to construe provisions which appear to conflict so that they harmonise” vide **University of Allahabad Vs. Amritchand Tripathi**⁷ Accordingly, the provisions of the Maharashtra Regional and Town Planning Act, 1966, were read together by the Supreme Court after noting the purpose of the Act. The Act was held not to envisage a situation of conflict, and therefore, the edges were required to be ironed out to read those provisions of the Act which were slightly incongruous, so that all of them are read in consonance with the object of the Act, which is to bring about orderly and planned development vide **Manohar Joshi Vs. State of Maharashtra and Ors.**⁸

Applying the principles laid down by the Apex court in the above judgments it is the duty of this Tribunal to construe Section 14 (1) (a) and Section 66 of IBC harmoniously to make the enactment effective and workable.

⁴ AIR 1954 SC 202

⁵ AIR 1997 SC 1006

⁶ AIR 2002 SC 829

⁷ AIR 1987 SC 57

⁸ (2012) 3 SCC 619, P.676

In the present facts of the case there is absolutely no inconsistency or repugnancy between Section 14 (1) (a) and Section 66 of IBC. Section 14 of IBC is a bar against institution and prosecution of any suits or proceedings or execution of orders and decrees in other courts or Tribunals but not a bar to pass appropriate order in the pending proceedings against the resolution professional or suspended directors and related parties, before the Adjudicating Authority, during the insolvency resolution process or liquidation process. On the other hand, Section 66 of IBC empowered the Tribunal to pass appropriate orders when the suspended directors or insolvency professional of the Corporate Debtor carried on fraudulent trading or business during resolution process. Therefore, the Adjudicating Authority passed the impugned order only by exercising power that conferred on it by Section 66 of IBC. Hence, the contention that during moratorium, the Adjudicating authority shall not pass an order impugned in this appeal is unsustainable, without any merit. If such contention is accepted by this Tribunal, Section 66 of IBC would become otiose or redundant.

The impugned order was passed directing the Respondent Nos. 2 to 21 to contribute Rs. 2687.27 lacs to the assets of Corporate Debtor. Respondent No. 2 is resolution professional of HBN Homes Colonizers Ltd. and not a Corporate Debtor, the other respondents or related parties viz. different companies, thus the order was passed

against insolvency resolution professional and other companies who indulged in fraudulent trade or business to defeat the rights of creditors of corporate debtor, as they are jointly and severally liable for such fraudulent trading or business. Therefore, we find no illegality in order passed by the Adjudicating Authority in I.A. No. 2844/2020 of CP (IB) 1359/ND/2019 dated 13.12.2021.

In addition to the above discussion, Section 60 (5) (a) of IBC permits the Adjudicating Authority to pass any order on any application or proceeding by or against the corporate debtor or corporate person notwithstanding anything to the contrary contained in any other law for the time being in force. Non-obstante clause contained in Section 60 (5) authorizes the Tribunal to pass such orders and the present order is one such order passed under Section 66 of IBC, exercising power under Section 60 (5) (a) of IBC.

On overall consideration of the facts and law and on harmonious construction of Section 14 (1) (a), Section 66 read with Section 60 (5) (a), to make the statute (IBC) effective and workable, we hold that the order passed by the Adjudicating Authority is in accordance with law, warrants no interference of this Tribunal. As the appeal is devoid of merits, consequently the appeal is liable to be dismissed. Accordingly, the point is answered against the appellant and in favour of the Respondents.

In the result, the Appeal is dismissed confirming the order passed by the Adjudicating Authority in I.A. No. 2844/2020 in CP (IB) 1359/ND/2019 but in circumstances without costs.

**[Justice Ashok Bhushan]
Chairperson**

**[Justice M. Satyanarayana Murthy]
Member (Judicial)**

**[Barun Mitra]
Member (Technical)**

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