

NATIONAL COMPANY LAW APPELLATE TRIBUNAL

PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No.800 of 2020 &

I.A. NO. 289 of 2021

(Arising out of Impugned Order dated 12.08.2020 in IA (IB) No. 602/KB/2020 passed by the Adjudicating Authority/National Company Law Tribunal, Kolkata in CP (IB) No. 767 of 2020).

In the matter of

Rishima SA Investments LLC

1st Floor, Wing A,

Cyber Tower 1,

Ebene Cybercity, Mauritius

... Appellant

Vs.

Sarga Hotel Private Limited,

(Previously known as “Shristi Hotel Pvt. Ltd.”)

Registered Office:

Plot No. X-1,2 & 3, Block-EP,

Sector – v, Salt Lake,

City, Kolkata, West Bengal-700091.

(Corporate Debtor before Adjudicating Authority)

... Respondent No. 1

Shristi Infrastructure Development Corporation Ltd.

Plot No. X-1,2 & 3, Block-EP,

Sector – v, Salt Lake,

City, Kolkata, West Bengal-700091.

...Respondent No. 2

Universal International Creation Limited,

Flat 609A, 6F, Fookcheong Building,

63, Hoi Yuen Road,

Kwun Tong, Kowloon, Hong Kong.

(Operational Creditor before Adjudicating Authority)

...Respondent No. 3

CA (AT) (Ins.) No.800 of 2020 & I.A. NO. 289 of 2021 and CA (AT)(Ins.) No. 892 of 2020

Present

For Appellant: Mr. Raj Shekhar Rao, Senior Advocate with Mr. Abhijeet Sinha, Ms. Rhea Verma, Mr. Rahul Jain, Advocates.

For Respondent: Mr. Rishav Banerjee, Mr. Ritoban Sarkar, Advocates for R-1, Ms. Savita Agarwal (RP)

Mr. Krishnendu Datta, Senior Advocate with Mr. Arijit Mazumdar, Mr. Shambo Nandy, Advocates for R-2.

Mr. Joy Saha, Senior Advocate with Mr. Aishwarya Kumar Awasthi, Advocate for R-3.

Mr. Ramji Srinivasan, Senior Advocate with Mr. Raunak Dhillon, Ms. Rajshree Chaudhary, Mr. Shivkrit Rai, Advocates in Impleadment Application.

And

Company Appeal (AT)(Ins) No. 892 of 2020

In the matter of:

**M/s. Shristi Infrastructure Development Corporation Ltd., a company registered under the Companies Act, 1956,
Registered Office:
Plot No. X-1,2 & 3, Block-EP,
Sector – v, Salt Lake,
City, Kolkata, West Bengal-700091.**

...Appellant

Versus

**Sarga Hotel Private Limited,
(Previously known as “Shristi Hotel Pvt. Ltd.”)
Registered Office:
Plot No. X-1,2 & 3, Block-EP,
Sector – v, Salt Lake,
City, Kolkata, West Bengal-700091.
(Corporate Debtor before Adjudicating Authority)**

...Respondent No. 1

**Universal International Creation Limited,
Flat 609A, 6F, Fookcheong Building,
63, Hoi Yuen Road,
Kwun Tong, Kowloon, Hong Kong.
(Operational Creditor before Adjudicating Authority)**

...Respondent No. 2

**Rishima SA Investments LLC
1st Floor, Wing A,
Cyber Tower 1,
Ebene Cybercity, Mauritius**

...Respondent No. 3

Present

**For Appellant: Mr. Krishnendu Datta, Senior Advocate
with Mr. Arjit Mazumdar, Mr. Shambo
Nandy, Advocates.**

**For Respondents: Mr. Rishav Banerjee, Mr. Ritoban
Sarkar, Ms. Rajarshi Banerjee,
Advocates for R1.
Ms. Savita Agarwal (RP)**

**Mr. Joy Saha, Senior Advocate with Mr.
Aishwarya Kumar Awasthi, Advocate for
R2.**

**Mr. Raj Shekhar Rao, Senior Advocate
with Mr. Abhijeet Sinha, Ms. Rhea
Verma, Mr. Rahul Jain, Advocates for
R3.**

Judgment

(Date: 27.8.2021)

{Per: Dr. Alok Srivastava, Member (T)}

1. This judgment relates to two appeals viz. Company Appeal (AT)(Ins) No. 800 of 2020 and Company Appeal (AT)(Ins) No. 892 of 2020, both filed assailing the Impugned Order dated 12.8.2020 in IA (IB) No. 602/KB/2020 in CP(IB) No.767 of 2020 of the Adjudicating Authority (National Company Law Tribunal, Kolkata) and both appeals are filed under Section 61 of the Insolvency and Bankruptcy Code (hereinafter called IBC). Company Appeal (AT) (Ins.) No. 800 of 2020 is filed by Rishima SA Investments LLC (hereinafter called Rishima) against Respondents Sarga Hotel Private Limited (hereinafter called Sarga Hotel), Shristi Infrastructure Development Corporation Ltd. (hereinafter called SIDCL) and Applicant-Operational Creditor of Application u/s 9 of IBC Universal International Creation Ltd. (hereinafter called UICL). Company Appeal (AT)(Ins.) No. 892 of 2020 has been filed by SIDCL against three respondents -Corporate Debtor Sarga Hotel represented by the Resolution Professional, Rishima and UICL.

2. Since both appeals have been filed against the same Impugned Order and the subject matter of both the appeals are the same, therefore they were heard together and are being disposed by this judgment. We shall refer to the documents and

CA (AT) (Ins.) No.800 of 2020 & I.A. NO. 289 of 2021 and CA (AT)(Ins.) No. 892 of 2020

arguments submitted to Company Appeal (AT)(Ins) No. 800 of 2020 for purpose of this judgment unless indicated otherwise.

3. In CA (AT)(Ins) No. 800 of 2020, Appellant Rishima has claimed that application under Section 9 of IBC was filed by Respondent No. 3 UICL at the behest of, and in collusion with, Respondents No. 1 and 2 Sarga Hotel and SIDCL respectively, with *malafide* intention to frustrate the Appellant Rishima's rights arising out of a final arbitration award dated 12.07.2020, partial award dated 30.04.2019 and under the Share Subscription and Shareholders Agreement dated 07.08.2008 (hereinafter called SSHA) and its Addendum dated 31.08.2008. The Appellant Rishima has claimed to be a 35% shareholder and Respondent No. 2 SIDCL is 65% shareholder of the corporate debtor Sarga Hotel with both being financial creditors of the corporate debtor Sarga Hotel.

4. In CA (AT) (Ins.) No. 892 of 2020, the Appellant SIDCL has submitted that the debt in default claimed by Respondent No.2 UICL as operational creditor is barred by limitation as the related invoices pertain to the years 2014 to 2016. He has further argued that no opportunity was given to the corporate debtor to file a proper reply in defence which tantamount to denial of natural justice, and the Impugned Order was passed in haste. He has claimed that the proceedings under IBC have been initiated by the operational creditor only to recover his dues, which is not the objective of the IBC.

5. In oral arguments the Ld. Counsel for Rishima has alleged that it had various disputes with the corporate debtor Sarga Hotel

regarding the failure of the corporate debtor to complete the project in time and improper conduct of the meetings of the Board of Directors of the corporate debtor. The Ld. Counsel has stated that in this background, and because the corporate debtor and SIDCL contravened the SSHA and clauses in its Addendum, Rishima invoked the arbitration clause in the contract and filed a request for arbitration with the International Chambers of Commerce. A partial award was given by the Arbitral Tribunal in favour of Rishima on 30.04.2019 wherein SIDCL was directed to pay a certain amount to Rishima and further required Rishima to transfer its shareholding in the corporate debtor to SIDCL. After this award, on a petition filed by Rishima, the Hon'ble Delhi High Court passed interim order in OMP (EFA) Comm. No. 5 of 2019 restraining SIDCL and Sarga Hotel from creating any third-party interest in the hotel or parting with its possession. The Hon'ble Supreme Court confirmed the restraint order on 19.7.2020. Further, final Arbitral Award dated 12.7.2020 was also given in favour of Rishima and the execution of the arbitral award is pending.

6. It is further argued by the Ld. Counsel for Rishima that SIDCL filed a petition under Sections 241 & 242 of the Companies Act, alleging oppression and mismanagement by nominee Directors of Rishima (who are on the Board of the corporate debtor Sarga Hotel) which was dismissed. SIDCL's challenge to Partial Arbitral Award before the ICC was also dismissed.

7. The Ld. Counsel for Rishima has alleged that in this background a fraudulent application under Section 9 of IBC was filed before the Adjudicating Authority on behalf of operational

creditor UICL, who sought initiation of Corporate Insolvency Resolution Process (CIRP) of the corporate debtor Sarga Hotel mainly to frustrate the efforts of Rishima for execution of the arbitral award. He has claimed that this application filed on behalf of an offshore supplier, was neither filed by a director of the operational creditor nor by any properly authorized person and the board resolution and the letter of authorization which were passed/executed in a foreign country were not notarized/apostilled as required under law. He has also alleged that the document placed on record is a single-page board resolution of Operational Creditor UICL appointing Rabindra Kumar Jha as authorized representative for pursuing the case under IBC and while the document is in English it is signed in a foreign language with no authorized English translation provided.

8. Expanding on his arguments, the Ld. Counsel for Rishima has alleged that application under Section 9 of IBC was filed on 22.7.2020 when the Corporate Debtor Sarga Hotel and SIDCL were faced with a final arbitral award and were seeking to somehow subvert the process of execution of the arbitral award. In furtherance of this objective, the operational creditor made a request for urgent mentioning in his application u/s 9 vide email dated 9.8.2020 to the Registry of NCLT, Kolkata Bench. On 10.8.2020, the Registry of NCLT Kolkata Bench directed the Corporate Debtor to forward a short Defence Note of 15-20 lines. Such a note, it is claimed by him, was sought by the Registry without the urgent mentioning having taken place and without any orders after mentioning passed by the Adjudicating Authority. Thereafter, on 12.08.2021 the admission order was passed on the Section 9 application in haste, without giving a full and proper

opportunity of hearing to the corporate debtor. He added that it was quite strange that the corporate debtor, instead of responding to the allegations regarding the debt and opposing the application to avoid the effect of CIRP, proceeded to admit the debt. This, according to him, is a clear sign of collusion between the corporate debtor and its other shareholder SIDCL.

9. The Ld. Counsel of Rishima has also alleged that the Resolution Professional appointed in the case is linked to a company which is part of the Kanoria Group of companies of which SIDCL is also a part, and this is another pointer to collusion between corporate debtor and SIDCL.

10. The Learned Counsel for SIDCL (Respondent No.2 in Company Appeal 800 of 2020) has stated that a hotel by the name of Westin is run by corporate debtor Sarga Hotel in which the Appellant Rishima and SIDCL are shareholders. He has stated that SIDCL is aggrieved by the impugned order but vehemently denies the allegation of SIDCL's collusion with the other respondents and hence opposes any initiation of proceedings against SIDCL under section 65 of IBC as the issue regarding action under Section 65 is to be raised before the Adjudicating Authority and not before the Appellate Tribunal in the first instance. He has also claimed that the default in the payment by the Corporate Debtor Sarga Hotel Pvt. Limited pertain to the invoices of the years 2014 to 2016 and any exchange of letters between the operational creditor and corporate debtor cannot be taken to extend the period of limitation, and hence the application u/s 9 is barred by limitation.

11. The Ld. Counsel for SIDCL has further urged that the

impugned order should be set aside as no proper and complete reply was sought from the corporate debtor, yet the Adjudicating Authority proceeded to hear the matter on merits without even giving a proper notice to the corporate debtor so it could defend the application made against it.

12. The Ld. Counsel for SIDCL has also claimed that Rishima has tried to derail the business of the corporate debtor. As evidence of such conduct of Rishima, he has pointed to the non-cooperation by Rishima in signing annual accounts of the corporate debtor.

13. In his written reply, the operational creditor UICL has denied the allegations of Rishima stating that the allegations made by Rishima are baseless and it had received purchase orders from the Corporate Debtor pursuant to which it supplied the said marble slabs of specified dimensions. Thereafter it raised multiple bills/invoices during the years 2014 to 2016 and a running and continuous account was maintained regarding the payments. It has added that the last payment was made by the corporate debtor on 7.6.2017 and after adjusting the payments received by the operational creditor from the corporate debtor, a principal amount of US\$ 324,021.71 (US Dollars Three Lakh Twenty Four Thousand Twenty One and Cent Seventy One only) due and payable by the Corporate Debtor, which amounts to Rs.2,30,06,458.39 (Rupees Two Crore Thirty Lakh Six Thousand Four Hundred Fifty Eight and Paise Thirty Nine only) being the exchange value of the debt due and payable as on date of issue of statutory demand notice. He has claimed to have sought payment on several occasions without success.

14. The Operational Creditor UICL has further claimed that having come to know from various sources that the corporate debtor was trying to sell and/or transfer and/or encumber its assets and create third party rights in order to pay some selected creditors, he filed an application u/s 9 of IBC, which has been admitted by the Adjudicating Authority.

15. Arguments have been put forth by the Ld. Counsels of Rishima and SIDCL (both being financial creditors) which indicate the existence of dispute between them as also between Rishima and the corporate debtor. Since the appeals that are being considered in this judgment assail the admission order u/s 9 of IBC, we will confine ourselves to examining the appropriateness of admission order.

16. We also heard the Ld. Counsel for the Intervener Yes Bank, who has prayed vide IA no. 289 of 2020 to be impleaded as a party being a financial creditor in one of the appeals. He has urged that the stay order of this tribunal dated 21.09.2020 be vacated and the appeal be dismissed so that the Committee of Creditors can function and CIRP proceed in accordance with the admission order. Thus all the parties in both appeals viz. CA (AT) 800 of 2020 and CA (AT) 892 of 2020 and Yes Bank, which has sought intervention, were heard by us.

17. The issue to be seen in these appeals is whether the Section 9 application is legally maintainable in view of the claim that documents are of doubtful origin annexed with the application, and whether the Section 9 application is within limitation. In addition, it is also to be seen whether the Adjudicating Authority

adopted a legally sustainable and sound procedure of providing sufficient opportunity to the corporate debtor which is required by the principle of natural justice to put up a proper defence before passing the Impugned Order.

18. The Appellant Rishima has raised doubt about the veracity and authenticity of the documents attached with the demand notice dated 19.12. 2019 issued under section 8 of IBC. Various purchase orders have been annexed at Annexure A, invoices at Annexure B of the demand notice (attached at pp.91-113 of the Appeal Paperbook in CA (AT)(Ins) 800 of 2020). In all a total of 4 invoices have been attached in Annexure B which are dated 22.11.2014, 20.1.2016, 21.1.2016 and 23.1.2016. The last payment has been claimed to have been made by the corporate debtor on June 7, 2017 as per a document showing 'details of payment' but which is of doubtful origin.

19. We find substance in the argument of Appellant Rishima that the documents that are attached with the demand notice and application u/s 9 were sent by the operational creditor UICL 'BY HAND/FAX', but no transmission or receipt report is attached with any of the documents.

20. The Operational Creditor has relied on a document titled 'details of payment'(attached at pg. 118 of the Appeal Paperbook in CA(AT) No. 800 of 2020) to show that the application u/s 9 which was filed on 21.7.2020 is within limitation of three years since the last payment was made in 2017. The statement purported to be 'details of payment' does not mention of the particulars of the payee or the payer, nor there is a title and signature to it. This

document appears to be of doubtful origin and it does not inspire confidence. It cannot be taken to extend limitation for the debt in default.

21. Two letters sent by the corporate debtor dated 9th January 2018 and 10th January 2018 (attached at pp. 78-79 in the Appeal Paperbook of CA (AT)(Ins) No. 892 of 2020) are purportedly sent by the corporate debtor but there is neither a receipt stamp of this letter nor any indication of the date of its receipt. These letters are of importance as they are supposedly sent from corporate debtor situated in India and received by the operational creditor located in Hong Kong. They are filed by Operational Creditor without being notarized/apostilled by the notified authority before filing with the application u/s 9.

22. We have also perused the bank statements of HSBC Bank dated 27.12.2019, 24.1.2020 27.2.2020 upto 27.6.2020 produced by the operational creditor (attached at pp 128-144 of the reply of the operational creditor Respondent No. 3 in CA No. 800 of 2020, Diary No. 23160 dated 3.11.2020). These bank statements have entries in a foreign language with no English translation provided. It is difficult to make out what these statements convey and hence we cannot rely on them to provide any admission/existence of debt and date of part payment by the corporate debtor.

23. In the light of the above discussion, we can, at best, take the date of default as 23.1.2016, which is the date of the last invoice produced by the operational creditor, if we give the benefit of doubt regarding the authenticity of the related invoice. Since the application under Section 9 was made on 21.7.2020, we do not

find that the application was made before the Adjudicating Authority within limitation period as required under law.

24. Insofar as the allegation of Appellant Rishima (in CA (AT)(Ins) No. 800 of 2020) regarding the reliability of the purported authorized representative of UICL Rabindra Kumar Jha is concerned, we have perused documents submitted by the operational creditor such as the board resolution authorizing Rabindra Kumar Jha and the Letter of Authority.

25. The purported board resolution dated 15.12.2017 adopted by the Board of Directors of UICL which is Hong Kong based (attached at pg. 57, Reply of Respondent No. 3 UICL in CA(AT)(Ins) No. 800 of 2020, Dy. No. 23160 dated 3.11.2020) is a single page document. The name of director signing the resolution is not mentioned nor complete minutes of the said board meeting, which are usually recorded and which contain names of all the participants in the meeting, the relevant agenda item outlining the proposal, date and venue of meeting etc., have been submitted. Moreover, the Letter of Authority does not contain the name the person who has signed it and her/his position in the operational creditor company. This document is also not apostilled.

26. Appellant Rishima has raised the issue of collusion between corporate debtor and SIDCL in filing of the IBC application to stall the execution of the arbitral award. The dispute between Rishima and SIDCL on one hand, and Rishima and corporate debtor on the other, do not concern us insofar as these appeals regarding admission of application under section 9 is concerned. The cited disputes can only lend credence to the allegation of the Appellant

Rishima that the operational creditor and the corporate debtor (who are related as both are connected with the Kanoria Group) colluded to stall the execution of the arbitral award by bringing the Section 9 application and the enforcement of moratorium after its admission.

27. An argument placed before us by the Appellant is the way the application for urgent mentioning by the operational creditor vide email dated 10.8.2020 sent to the Registry of the NCLT was dealt. The NCLT Registry immediately replied to the operational creditor asking for a Defence Note in 15-20 lines within 24 hours, for consideration. It is quite surprising that even when the mentioning had not been made before the NCLT, the NCLT Registry presumed that the mentioning would be about final hearing of the case and asked for a Defence Note. Furthermore, after the Defence Note was sent by the Corporate Debtor vide email dated 11.8.2020 (attached at page 27, Reply of Respondent No.2 UICL in CA No. 892/2020, diary number 23638/21.11.2020), the corporate debtor proceeds to admit the operational debt of UICL without so much as a weak defence, nor did it seek the right and time to file a complete reply, as would be normally expected. Thus, without a full and proper hearing, as was desirable from the point of view of natural justice, the impugned order is passed by the Adjudicating Authority (NCLT) on 12.8. 2020. If anything, the events as they unfolded show the haste and alacrity with which the matter as serious as initiating CIRP against a 'going concern' was dealt with, without any regard to natural justice.

28. It would, therefore, not be far-fetched to infer that the corporate debtor appeared to be itself keen and waiting for

admission of Section 9 application and initiation of CIRP against itself.

29. The Adjudicating Authority, without obtaining a full and proper reply from the corporate debtor, proceeded to admit the application due to admission of Corporate Debtor, under section 9 and declare moratorium under section 14 of the IBC on the assets of the corporate debtor without weighing credibility of Authority of person filing application and without examining documents to consider if claim was in limitation. . Holding the debt to be within limitation on the basis of an unreliable and unverified ledger record (attached at pg. 118, Reply of Respondent No. 3 operational Creditor UICL in CA (AT) No. 800 of 2020) is erroneous finding in the Impugned Order.

30. The Ld. Counsel of Appellant Rishima has submitted the judgments of Hon'ble Supreme Court in the following cases: **(i) BK Education Services Pvt. Ltd. v. Parag Gupta & Associates [2019 11 SCC 633]**, and **(ii) Babulal Vardharji Gurjar v. Veer Gurjar Aluminium Industries Pvt. Ltd. & Anr. [Civil Appeal No. 6347 of 2019]** to lend strength to its argument that the period of limitation is to be counted from the date of default, which in the present appeal is in the year 2016, and hence the application U/S 9 which was filed on 21.7.2020 was barred by limitation.

31. A matter raised by the Appellant Rishima is for initiation of Section 65 proceedings against the corporate debtor and SIDCL. Insofar as proceedings under this provision is concerned, Hon'ble Supreme Court has held in the case of **Swiss Ribbons (P) Ltd. v. Union of India [(2019) 4 SCC 17: 2019 SCC Online SC 73]**:

CA (AT) (Ins.) No.800 of 2020 & I.A. NO. 289 of 2021 and CA (AT)(Ins.) No. 892 of 2020

“59. What is also of relevance is that in order to protect the corporate debtor from being dragged into the corporate insolvency resolution process mala fide, the Code prescribes penalties. Section 65 of the Code reads as follows:

65. Fraudulent or malicious initiation of proceedings - (1) *If, any person initiates the insolvency resolution process or liquidation proceedings fraudulently or with malicious intent for any purpose other than for the resolution of Insolvency, or liquidation, as the case may be, the Adjudicating Authority may impose upon such person a penalty which shall not be less than one lakh rupees, but may extend to one crore rupees.*

(2) *If, any person initiates voluntary liquidation proceedings with the intent to defraud any person, the Adjudicating Authority may impose upon such person a penalty which shall not be less than one lakh rupees but may extend to one crore rupees.”*

32. The IBC provides for action u/s 65 of IBC against the person who initiates proceeding under the IBC fraudulently or with malicious intent, for the purpose other than the resolution of Insolvency or liquidation under the Code. To levy a penalty under Section 65 of the Code, the decision is required to be arrived at by the Adjudicating Authority. In view of the provision in Section 65 (1), we feel that Adjudicating Authority is the correct forum to agitate this issue and we desist from commenting any further on this matter.

33. In view of the submissions and arguments made by the Appellant and Respondents and a close perusal of documents submitted by the operational creditor and other parties lead us to the conclusion that the application u/s 9 was not submitted within limitation and it contained documents of doubtful origin which do not inspire confidence, and which formed the basis of admission order. The allegations of collusion between the Operational Creditor and the corporate debtor raise reasonable doubt. Documents filed to hold debt was due, or payable do not raise confidence. Initiation of CIRP of a company which is a going concern, on the basis of a short defence note without a proper reply/defence called from the corporate debtor, and based on such documents attached with the admission application is certainly not proper and defeats the purpose and intent of the IBC in letter and spirit.

34. In the light of the discussion cited above, the Impugned Order dated 12.8.2020 is set aside. All steps taken pursuance of Impugned Order are quashed and set aside. The Interim Resolution Professional/Resolution Professional shall hand back charge of Corporate Debtor. Adjudicating Authority will pass orders regarding fees to be paid to Interim Resolution Professional/Resolution Professional. The Corporate Debtor is released from the rigours of 'moratorium' and CIRP.

There is no order as to costs.

(Justice A I S Cheema)
The Officiating Chairperson

(Dr. Alok Srivastava)
Member(Technical)

New Delhi

27th August, 2021

/aks/