

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL PRINCIPAL BENCH,
NEW DELHI**

Company Appeal (AT) (Insolvency) No. 557 of 2021

IN THE MATTER OF:

Ashmeet Singh Bhatia

...Appellant

Versus

Sundrm Consultants Pvt. Ltd. & Anr.

...Respondents

Present:

For Appellant : Mr. Krishnendu Datta, Sr. Advocate along with Mr. Sonam Sharma, Ms. Ridhima Verma, Mr. Shashwat Tripathi & Ms. Varsha Himatsingha, Advocates.

For Respondents : Mr. Karan Bharioke, for R-1.

Mr. Raj Kamal & Mr. Aseem Atwal, for R-2.

ORDER

Per: Justice Rakesh Kumar Jain: (Oral)

13.03.2023 This appeal is directed against the order dated 31.05.2021, passed by the National Company Law Tribunal, New Delhi, (in short 'Learned Tribunal') by which an application bearing I.A. No. 4971 of 2020 filed in C.P. (IB) No. 849 (PB)/2020 by the Appellant, under Section 65 of the Insolvency & Bankruptcy Code, 2016 (in short '**Code**'), has been dismissed on the ground that such an application would be maintainable only after the main petition is admitted and CIRP is initiated.

2. The brief facts of the case are that M/s. Sundrm Consultants Pvt. Ltd. filed an application under Section 7 of the Code against M/s Three C Properties Pvt. Ltd. (Corporate Debtor) for the resolution of an amount of

Rs. 5 Crore. The said application was assigned Petition No. (IB)-849 (PB)/2020.

3. During the pendency of this application, the present Appellant (Ashmeet Singh Bhatia) a Homebuyer in one of the companies of the Corporate Debtor, namely, M/s. Granite Gate Properties Pvt. Ltd. undergoing Corporate Insolvency Resolution Process (CIRP) before the Tribunal in C.P. (IB)-1248(PB) of 2018, under Section 60(1) read with Rule 11 of the NCLT Rules, 2016 sought issuance of the directions, namely,

“a. Allow the impleadment of the Applicant in the present Company Petition.

b. Dismiss the present Company Petition, under Section 65 of the I & B Code, 2016 as it has been filed with malicious intent to defraud this Hon’ble Tribunal and the thousands of innocent flat buyers, including the Applicant;

c. Impose a very heavy penalty on the Financial Creditor for intentionally and mischievously filing this malicious and fraudulent collusive Company Petition, in criminal conspiracy with the Corporate Debtor, and

d. Pass any other/ further orders, in favour of the Applicant, which this Hon’ble Tribunal may deem fit and proper in the fact and circumstances of the matter.”

4. The application filed by the Appellant has been dismissed by the Tribunal in the following manner:-

“It is to be noted that a bare reading of Section 65(1), states that “If, any person initiates the insolvency resolution process... “. However, in the present case the

Company Appeal (AT) (Insolvency) No. 557 of 2021

CIRP has not yet been initiated. C.P. (IB)-1248(PB) of 2018 is currently being heard by this bench, CIRP has not yet been initiated. The Applicant can approach this tribunal under Section 65 of I & B Code, only once the Petition is admitted and CIRP has been initiated.”

5. Aggrieved against the aforesaid decision, the present appeal has been preferred.

6. Senior Counsel appearing on behalf of the Appellant has argued that the Learned Tribunal has committed a patent error of law in misinterpreting the word “initiation” of the Insolvency Resolution Process with admission of the application and initiation of the CIRP proceedings. In this regard, he has referred to Section 65 of the Code under which the application has been filed which read as under :-

“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.

1 [(3) If any person initiates the pre-packaged insolvency resolution process—

(a) fraudulently or with malicious intent for any purpose other than for the resolution of insolvency; or

(b) 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.]”

7. He further referred to Section 5 (11) and Section 5(12) which read as under :-

“5. Definitions. –

(11) *“initiation date” means the date on which a financial creditor, corporate applicant or operational creditor, as the case may be, makes an application to the Adjudicating Authority for initiating corporate insolvency resolution process 1 [or pre-packaged insolvency resolution process, as the case may be];*

(12) *“insolvency commencement date” means the date of admission of an application for initiating corporate insolvency resolution process by the Adjudicating Authority under sections 7, 9 or section 10, as the case may be.”*

8. Counsel for the Appellant has submitted that the word “initiates” mentioned in the beginning of Section 65 has been wrongly interpreted by the Learned Tribunal because the word “initiate” would fall under Section 5(11) which means the day on which the application for initiation of the corporate insolvency resolution process is filed whereas the insolvency

commencement date is the date on which such an application filed for the initiation of the insolvency process is admitted.

9. In support of his submission, he has relied upon a decision of the Hon'ble Supreme Court in the case of **Ramesh Kymal vs. Siemens Gamesa Renewable Power Private Limited [(2021) 3 SCC 224]**, in which it has been held that :-

“33. The date of the initiation of the CIRP is the date on which a financial creditor, operational creditor or corporate applicant makes an application to the adjudicating authority for initiating the process. On the other hand, the insolvency commencement date is the date of the admission of the application. This distinction is also evident from the provisions of sub-section (6) of Section 7, sub-section (6) of Section 9 and sub-section (5) of Section 10, Section 7 deals with the initiation of the CIRP by a financial creditor; Section 8 provides for the insolvency resolution by an operational creditor; Section 9 provides for the application for initiation of the CIRP by an operational creditor; and Section 10 provides for the initiation of the CIRP by a corporate applicant.

34. NCLAT has explained the difference between the initiation of the CIRP and its commencement succinctly, when it observed : (Ramesh Kymal case SCC OnLine NCLAT para 13)

“13. ...Reading the two definition clauses in juxtaposition, it emerges that while the first viz. “initiation date” is referable to filing of application by the eligible applicant, the later viz. “commencement date” refers to passing of order of admission of application by the

Company Appeal (AT) (Insolvency) No. 557 of 2021

adjudicating authority. The “initiation date” ascribes a role to the eligible applicant whereas the “commencement date” rests upon exercise of power vested in the adjudicating authority. Adopting this interpretation would leave no scope for initiation of CIRP of a corporate debtor at the instance of eligible applicant in respect of default arising on or after 25-3-2020 as the provision engrafted in Section 10-A clearly bars filing of such application by the eligible applicant for initiation of CIRP of corporate debtor in respect of such default. The bar created in retrospective as the cut-off date has been fixed as 25-3-2020 while the newly inserted Section 10-A introduced through the Ordinance has come into effect on 5-6-2020. The object of the legislation has been suspend operation of Sections 7, 9 & 10 in respect of defaults arising on or after 25-3-2020 i.e. the date on which Nationwide lockdown was enforced disrupting normal business operations and impacting the economy globally. Indeed, the explanation removes the doubt by clarifying that such bar shall not operate in respect of any default committed prior to 25-3-2020.

35. *We are in agreement with the view which has been taken by NCLAT for the reasons which have been set out earlier in the course of this judgment. We affirm the conclusion of NCLAT. The appeal is accordingly dismissed. There shall be no order as to costs. Pending application(s), if any, stand disposed of.”*

10. On the other hand, Counsel appearing on behalf of the Respondents have vehemently opposed the present appeal, inter-alia, on the ground that the Appellant does not have the locus standi to file the application under Section 65 of the Code and that there is no error in the ‘impugned order’.

11. We have heard Counsel for the parties and perused the record with their able assistance.

12. The issue involved in this case is as to whether an application filed under Section 65 of the Code is maintainable after the filing of the application under Section 7, 9 or 10 of the Code or could be maintainable only after the admission of such an application?

13. As a matter of fact, the Learned Tribunal has taken a decision, while interpreting Section 65 of the Code, that the application under Section 65 of the Code would be maintainable only once the application under Section 7, 9 or 10 is admitted and the CIRP is initiated. However, in our considered opinion the view taken by the Learned Tribunal is totally erroneous as it has not looked into the basic provisions much less the definitions provided under Section 5(11) and 5(12) of the Code and has been unnecessarily influenced with the word “initiates” used under Section 65 to observe that it would mean that when the CIRP is initiated i.e. after the admission.

14. In this respect, regard may be had to the decision of the Hon’ble Supreme Court in the case of **Ramesh Kymal** (*Supra*) in which the Hon’ble Supreme Court has held that the date of initiation of CIRP is the date on which the Financial Creditor, Operational Creditor or Corporate Applicant makes an application with the Adjudicating Authority for the initiation of the process and the insolvency commencement date is the date of the admission of the application.

15. The application under Section 65 has been filed at the stage of initiation of the proceedings for the purpose of CIRP and is not maintainable after the admission of the application as has been held by the Learned Tribunal.

16. Thus, in view of the aforesaid discussion, the question posed herein before, is answered in favour of the Appellant and against the Respondents. It is hereby held that in case where application is filed under Section 65 of the Code, it would be maintainable after the application is filed either under Section 7, 9 or 10 of the Code.

17. The view taken by the Learned Tribunal that the said application would be maintainable only after admission and initiation of the CIRP proceedings is totally fallacious and is hereby overruled.

18. As far as, the objection of the Respondents in regard to the locus-standi of the Appellant for filing such an application under Section 65 of the Code is concerned, the said issue shall be decided by the Tribunal after taking into consideration the objection raised or to be raised by the Respondent and after giving due opportunity to the Appellant/Applicant.

19. It is needless to mention that the Tribunal shall decide the said objection in accordance with law.

20. No other point has been raised. In view of the aforesaid facts and circumstances, the present appeal is hereby allowed, 'impugned order' is hereby set aside and the matter is remanded back to the Learned Tribunal

to proceed further after taking into consideration the fact that the application of the Appellant is maintainable.

21. The parties are directed to appear before the concerned Tribunal on **10th April, 2023.**

22. The registry is directed to send the copy of this order to the concerned Tribunal for compliance.

**[Justice Rakesh Kumar Jain]
Member (Judicial)**

**[Mr. Naresh Salecha]
Member (Technical)**

Sim/RR