

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH: NEW DELHI

Company Appeal (AT)(Insolvency) No. 572 of 2021

[Arising out of Order dated 16th April, 2021 passed by the Adjudicating Authority (National Company Law Tribunal, Mumbai Bench-I, Mumbai) in Company Petition (IB) No. 3448/MB/2018]

IN THE MATTER OF:

**BKFC & Co.
A proprietorship Firm
Through its Proprietor
Mr. JVS Rathi
Having its office at:
House No. 10, Block H-1
Street No.5, New Palam Vihar
Gurgaon, Haryana**

...Appellant

Versus

**1. M/s Transparent Energy System Pvt. Ltd.
Through its Authorised Representative
Having its office at:
Plot No. T-145/146/147, M.I.D.C.
Bohosari, Pune – 411026**

...Respondent No.1

**2. Mr. Vijendra Kumar Jain
Resolution Professional
Having its office at:
1507, B Wing, One BKC,
G-Block, BKC, Bandra East
Mumbai – 400051**

...Respondent No.2

Present:

For Appellant : Mr. L.B. Rai and Mr. Kartik Rai, Advocates

**For Respondents : Mr. Aatreya Singh, Advocate for R-1
Ms. Udit Singh, Advocate for R-2**

J U D G M E N T

KANTHI NARAHARI, MEMBER (TECHNICAL)

Preamble:

The Present Appeal is filed against the Order dated 16th April, 2021 passed by the Adjudicating Authority (National Company Law Tribunal,

Mumbai Bench-I, Mumbai) in I.A. No. 07/MB/2021 in Company Petition (IB) No.3448/MB/2018, whereby the Adjudicating Authority approved the Resolution Plan submitted by the Successful Resolution Applicant (in short 'SRA').

Brief Facts:

Appellant's Submissions:

2. The Learned Counsel for the Appellant submitted that the impugned order dated 16.04.2021 was passed by the Adjudicating Authority in an application filed by the Resolution Professional under Section 30(6) of the I&B Code, 2016 seeking approval of Resolution Plan. The Adjudicating Authority after considering the application allowed by approving the resolution plan submitted by Mr. Ashok Atre, the SRA.

3. The Learned Counsel for the Appellant submitted that the Appellant is aggrieved by the impugned order on the ground that the claim of the Appellant has not been considered by the RP and the RP included the Appellant in Category 'L' and has agreed to pay only 2% i.e. Rs.46,595/- of the admitted claim of Rs.23,29,773/-.

4. It is submitted that the Appellant has initiated arbitration proceeding against the Corporate Debtor for recovery of Rs. 1,33,62,369/- and the said arbitration proceeding is at the stage of cross examination of Respondent's witnesses.

5. While so, the Corporate Debtor was admitted and CIRP Proceedings was initiated and IRP was appointed on 08.03.2019. The IRP issued a public

announcement in Form 'A' and invited all the creditors to submit their claims. The Appellant submitted its claim along with its documents to the IRP vide e-mail dated 21.04.2019 as per the information provided in the public announcement. The Appellant did not receive any response from the IRP, therefore, the Appellant has addressed a letter dated 29.08.2019 to the IRP about the status of its claim. The IRP vide his mail dated 10.09.2019 stated that he is no more continuing as IRP and one Mr. Nimit Kalsi has been appointed as the RP.

6. The Appellant again addressed a letter to the RP regarding its claim. The RP sent a mail dated 22.05.2020 to the Appellant stating that the claim has been duly received and still pending for admission. The Appellant also sent a mail dated 11.02.2021 to the RP for inclusion the name of the Appellant in the list of Operational Creditors. The RP vide his letter dated 30.04.2021 informed the Appellant that the Resolution Plan has been approved by the Adjudicating Authority vide impugned order dated 16.04.2021. Further, the RP informed that the Appellant has not filed any claim, however, the Resolution Applicant in good faith dealt with the dues of the Appellant on the basis of books of accounts and observed that a credit balance of Rs.23.29 lacs is reflected and an amount of Rs.46,595/- was provided towards settlement of dues.

7. It is submitted that the RP failed to appreciate to examine the books of accounts and other documents of the Corporate Debtor for the purpose of determining the liability, however, included the Appellant in Category 'L' and has agreed to pay only 2% of the admitted claim of Rs.23,29,773/- which

comes to Rs. 46,595/- whereas the other creditors included in Category 'K' are being fully paid. Sub-para XV of para 7 at page 16 of the Appeal paper book, it is stated that *"it is pertinent to mention that both the creditors mentioned in Category 'K' and 'L' have not filed their claim before the IRP or RP.*

8. Further, the Learned Counsel submitted that Learned Adjudicating Authority has not considered that the books of accounts and other documents of the Corporate Debtor have not properly examined, to say that the architect of the Corporate Debtor had approved the bills of the Appellants for Rs.85 lacs and the claim of the Appellant is for Rs.1.72 crores.

9. In view of the reasons as stated above the Learned Counsel prayed this Bench to allow the Appeal.

1st Respondent's Submissions:

10. The Learned Counsel appearing for the 1st Respondent in rebuttal submitted that the Appellant had filed an application being M.A. No. 3228/2019 before the Adjudicating Authority seeking its impleadment as an Operational Creditor in the Insolvency proceedings. The Adjudicating Authority vide its order dated 25.11.2019 dismissed the said application and directed the Appellant to approach the RP. However, the Appellant did not comply the said directions. The RP i.e. 2nd Respondent herein, while finalizing the Information Memorandum for the Corporate Debtor observed that the claim of the Appellant was not on the record and therefore, he sent an e-mail to the Appellant on 22.05.2020 to file its claim and also sent a reminder to the Appellant vide an e-mail dated 25.05.2020. However, the Appellant did

not file any claim with the 2nd Respondent in accordance with the procedure laid down in the Code. Therefore, the name of the Appellant included in the list of creditors who did not file their claims and the said list was part of the Information Memorandum. It is also mentioned regarding the pending arbitration proceedings between the Appellant and the Corporate Debtor.

11. Despite, the pending claims and counter claims between the parties, the claim of the Appellant was dealt with in the Resolution Plan on the basis of books of accounts of the Corporate Debtor in a good faith to put a quietus to the disputes between the parties and proposed to pay an amount of Rs.46,596/-.

12. In view of the reasons as stated above, it is submitted that the Appellant has not made out any case, either on facts or on law, accordingly, requested the Bench to dismiss the Appeal being devoid of any merits.

2nd Respondent's Submissions

13. The Learned Counsel appearing for the 2nd Respondent submitted that the RP filed an application being I.A. No. 7/2021 in CP (IB) No. 3448/2018 before the Adjudicating Authority, NCLT, Mumbai Bench seeking approval of Resolution Plan and the Adjudicating Authority allowed the application by approving the Resolution Plan vide order dated 16.04.2021.

14. It is submitted that the CIRP commenced against the Corporate Debtor by an order dated 08.03.2019 by the Adjudicating Authority, NCLT, Mumbai Bench. Thereafter, the IRP received the claims from the Financial Creditors, Operational Creditors and claims from employees and workmen of the

Corporate Debtor. The IRP conducted the meetings of Committee of Creditors from time to time. It is not in dispute that the Appellant initiated the arbitration proceedings against the Corporate Debtor for recovery of claim of Rs.1,33,62,369/- and the Corporate Debtor contested the said arbitration proceedings. In view of moratorium imposed by order dated 08.03.2019 by the Adjudicating Authority, a bar was imposed on the arbitration proceedings and the Appellant was asked to file its claim before the IRP. The IRP vide its e-mail dated 10.09.2019 addressed to the Appellant suggested to get in touch with the IRP to enquire about the status of its claim with new IRP, since the earlier IRP set to replace the new IRP as per the decision of CoC.

15. The Appellant did not follow the suggestions made by the IRP, however, filed MA. No. 3228/2019 seeking impleadment as an Operational Creditor. However, the said MA was dismissed on 25.11.2019. The IRP vide e-mail dated 22.05.2020 informed the Appellant that as per the list of claims submitted to him by the previous RP, the claim of the Appellant was not shown in the list of admitted claims and its claim was still pending consideration. In the same e-mail the IRP specifically, asked the Appellant to re-submit its claim in Form 'B' along with their relevant documents and requested to do so urgently. However, the Appellant failed to provide requisite claim form along with documents, the IRP could not process and include the claim of the appellant in the Information Memorandum.

16. Further, the IRP again sent an e-mail dated 25.05.2020 stating that he had not received the claim form from the Appellant and requested to submit

again. In spite of reminders the Appellants failed to submit its claim form with the IRP.

17. It is submitted that it is the duty of the IRP to check and ensure that the Resolution Plan falls within the ambit of and satisfies the provisions of Section 30(2) of the Code, 2016. Once, the said criteria is satisfied, it is for the CoC to take a decision and the IRP does not have any role. While so, in the present case, the CoC passed the Resolution Plan with 100% voting share.

18. In view of the reasons as stated above the Learned Counsel prayed this Bench to dismiss the Appeal.

Analysis / Appraisal:

19. Heard the Learned Counsel appeared for the respective parties, perused the pleadings and documents filed in their support. After hearing the parties, this Tribunal intend to examine, whether the Appellant has made out any prima-facie case to grant/allow the Appeal as prayed for.

20. The grievance of the Appellant is that its claim has not been considered and only a sum of Rs.46,595/- has been provided in the plan. The Appellant though aggrieved by the order dated 16.04.2021 whereby the Adjudicating Authority approved the Resolution Plan of the Successful Resolution Applicant upon an application filed by the IRP under Section 30(6) of the I&B Code, 2016. However, the Appellant sought an order / direction in this Appeal to consider its claim.

21. The Corporate Debtor admitted in to CIRP by order dated 08.03.2019 and the IRP made a public announcement on 09.03.2019 inviting claims from

the creditors of the Corporate Debtor. After receipt of claims the IRP constituted Committee of Creditors on 01.04.2019 and conducted its first meeting of the CoC on 08.04.2019. The Appellant contended that it has submitted its claim on 16.04.2019 to the then IRP claiming an amount of Rs.1,81,72,824/-. Further, it is contended that the Appellant addressed a letter dated 29.08.2019 to the then IRP viz. Mr. Ashish Vyas regarding the status of the claim filed by it. On the other hand, the IRP vis. Mr. Ashish Vyas vide its e-mail dated 11.09.2019 addressed to the Appellant stating that the details of claims were uploaded at the website of the Corporate Debtor, <http://www.tespl.com/creditors-List.pdf>. Further, it is stated that the NCLT has appointed Mr. Nimit Kalsi as Resolution Professional and he had handed over entire record to Mr. Nimit Kalsi and advised the Appellant to get in touch with him directly about its claim. Further, it appears that the Adjudicating Authority replaced the IRP and appointed Mr. Vijendra Kumar Jain as Resolution Professional replacing Mr. Nimit Kalsi by order dated 21.02.2020 in respect of Corporate Debtor. The Appellant vide its letter dated 11.02.2021 addressed a letter to the newly appointed IRP i.e. Mr. Vijendra Kumar Jain requesting the IRP to include the claim of the Appellant in list of Operational Creditors its claim of Rs.1,50,00,000/-. In reply the newly appointed IRP i.e. Mr. Vijendra Kumar Jain vide its e-mail dated 12.02.2021 addressed to the Appellant stating that on verification from the records of the Corporate Debtor, the claim of the Appellant is pending for consideration and requested the Appellant to submit the claim in Form-B along with relevant documents for the purpose of acceptance of the claim of the Appellant and requested the Appellant to submit the claim immediately.

22. From the records it appears that the Appellant has not submitted its claim as requested by the IRP vide its e-mail dated 12.02.2021. However, the IRP vide its letter dated 30.04.2021 addressed to the Appellant stated that the Hon'ble Adjudicating Authority has approved the Resolution Plan in respect of the Corporate Debtor by an order dated 16.04.2021 and stated that the claim of the Appellant has been settled by providing a sum of Rs.46,595/- in the plan at column-6 of the plan. The copy of the approved Resolution Plan dated 14.08.2020 has been filed along with the appeal paper book. At page 90, the claim of the Appellant has been discussed whereas it is stated that the Appellant is the civil contractor for construction of the Corporate Debtor factory, and has invoked arbitration proceedings for recovery of Rs.172.59 lakhs and the dispute is non payment of dues for the execution of work. Further, it is stated that the corporate Debtor filed counter claims of Rs.30 lakhs on account of incomplete work by the Appellant. It is also stated that the books of account of the Corporate Debtor have a credit balance of Rs.23.29 lakhs against the Appellant.

23. It is an admitted fact that the Appellant filed an application bearing No. 3228 of 2019 seeking inclusion its claim as an Operational Creditor, before the Adjudicating Authority in September, 2019. However, the Adjudicating Authority dismissed the said application on 25.11.2019 with a direction to approach the RP. While so, despite the request by the IRP for submission of claim in Form-B with proof, the Appellant has not submitted its claim as evident from the documents. Thus, in the Resolution Plan the Operational Creditor who have not filed their claims categorised as 'L' i.e. other creditors.

Under the said category total admitted claims are Rs. 172.68 and the proposed amount to be paid is Rs.3.45 lakhs.

Finding:

24. Admittedly, the application filed by the Resolution Professional under Section 30(6) of the I&B Code, 2016 seeking approval of the Adjudicating Authority. The Adjudicating Authority after satisfying that the plan is in compliance of sub-section (2) of Section 30 and meets the requirement and as approved by the Committee of Creditors under sub-section (4) of Section 30. If the above, compliance is met, the Adjudicating Authority shall by order approve the Resolution Plan which shall be binding on the Corporate Debtor and its employees, members, creditors, (including the Central Government, any State Government or any local authority to whom a debt in respect of the payment of dues arising under any law for the time being in force, such as authorities to whom statutory dues are owed,) guarantors and other stakeholders involved in the Resolution Plan.

25. The Adjudicating Authority in the impugned order has specifically stated that the plan is in compliance of Regulation 38 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 and in terms of Section 30(2)(f) of the Code. It is also specifically stated that the Resolution Plan has been approved by 100% voting share of the CoC and the same is in compliance of Regulation 38(1)(b) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

26. Once the plan has been approved by the CoC and by the Adjudicating Authority it binds upon the creditors and other stakeholders as per Section 30(1) of the Code.

27. From the documents, it is evident that the RP vide its letter dated 22.05.2020 requested the Appellant to submit the claim in Form-B and also sent a reminder dated 25.05.2020 to the Appellant whereby it is stated that the RP has not received the claim with documents for verification and acceptance of claim. Despite the above request the Appellant has not filed its claim in Form-B with proof as required under Regulation 12(1) & (2) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, which read as under:

“12. Submission of proof of claims. –

(1) Subject to sub-regulation (2), a creditor shall submit [claim with proof] on or before the last date mentioned in the public announcement.

[(2) A creditor, who fails to submit claim with proof within the time stipulated in the public announcement, may submit the claim with proof to the interim resolution professional or the resolution professional, as the case may be, on or before the ninetieth day of the insolvency commencement date.]”

28. The said amendment has substituted by notification dated 03.07.2018 and as per the above rules the creditor shall submit its claim with proof. The claim of the Appellant has been settled in the plan under the category ‘L’ and the plan has been approved with 100% voting share of the CoC members and also approved by the Adjudicating Authority in compliance of Section 31 of

the I&B Code. Once the plan is approved it shall bind on the creditors and other stakeholders.

Conclusion:

29. In view of the forgoing reasons, this Tribunal comes to an irresistible and inescapable conclusion that the order passed by the Adjudicating Authority in approving the Resolution Plan vide order dated 16.04.2021 is in accordance with law and no interference is called for.

30. In fine, the Company Appeal sans merit, and the same is liable to be dismissed. Accordingly, Company Appeal (AT) (Insolvency) No. 572 of 2021 is dismissed. No order as to costs. Applications, if any, pending stand closed.

[Justice Anant Bijay Singh]
Member (Judicial)

[Kanthi Narahari]
Member (Technical)

20th October, 2022

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