2023INSC816

**REPORTABLE**

**IN THE SUPREME COURT OF INDIA**

**CIVIL APPELLATE JURISDICTION**

**CIVIL APPEAL NO. 5590 OF 2021**

**M/s. RPS INFRASTRUCTURE LTD. …Appellant**

***Versus***

**MUKUL KUMAR & ANR. …Respondents**

**J U D G M E N T**

**SANJAY KISHAN KAUL, J.**

***Factual Background***

1. An agreement was entered into on 02.08.2006 between the appellant and M/s KST Infrastructure Private Limited (hereinafter referred to as 'the Corporate Debtor'), for development of land licensed with the appellant admeasuring 8 acres into a residential group housing complex at Faridabad, Haryana. However, the appellant, being aggrieved by the Corporate Debtor's alleged misconduct in advertising the project under its own name and without mentioning the name of the appellant, sought reference to arbitration on 02.05.2011.

2. The arbitral proceedings culminated in an award dated 01.08.2016 in favour of the appellant. In addition to awarding a

monetary claim, the award *inter alia* directed the Corporate Debtor to apply to the authorities for transfer of the requisite licenses to the appellant. Aggrieved by the award, the Corporate Debtor filed a petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Arbitration Act') on 26.09.2016. It appears that on the same date, the appellant filed execution proceedings in respect of the said award. Those execution proceedings were ultimately adjourned *sine die* on 22.12.2017 on account of the pendency of the proceedings under Section 34 of the Arbitration Act. These proceedings under Section 34 of the Arbitration Act culminated in the award being upheld by the A.D.J. (Special Commercial Court, Gurugram), albeit with some modifications, on 25.04.2019. An appeal filed against the same under Section 37 of the Arbitration Act is stated to be pending.

3. Meanwhile, the Corporate Insolvency Resolution Process ('CIRP') was initiated against the Corporate Debtor in respect of three real estate projects viz. (i) Sector 114, Gurugram, (ii) Sector 89, Faridabad, and (iii) KST Whispering Heights in Sector 88, Faridabad by certain homebuyers who had invested in these projects. This application under Section 7 of the Insolvency and Bankruptcy Code (hereinafter referred to as 'the IBC') was admitted on 27.03.2019 by the Adjudicating Authority. On the same date, an Interim Resolution Professional

('IRP') was appointed. The IRP issued a public announcement inviting claims from creditors, in accordance with Section 15 of the IBC read with Regulation 6 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (hereinafter referred to as the 'IBBI Regulations') on 30.03.2019. After receipt of the claims, the IRP constituted the Committee of Creditors ('COC') on 06.11.2019 and circulated the draft information memorandum and invited expressions of interest from prospective resolution applicants. Five such applications were received.

4. Thereafter, the IRP was replaced and respondent no. 1 was appointed as Resolution Professional (RP) of the Corporate Debtor by the COC on 18.06.2020. The resolution plan submitted by KST Whispering Heights Residential Welfare Association was approved by the COC by a majority vote of 80.74% on 11.07.2020. This plan was then submitted by respondent no. 1 to the Adjudicating Authority for approval under Section 31 of the IBC on 08.09.2020. We may note that the Corporate Debtor is not a party before us. However, the Resolution Professional has been arrayed as respondent no.1, while respondent no.2 is the successful resolution applicant. Respondent no.2 was impleaded in the present civil appeal by this Court's order dated 29.10.2021.

5. The appellant sent an email on 19.08.2020 to respondent no.1 highlighting their pending claim of Rs.35,67,05,337 against the Corporate Debtor arising from the arbitral award dated 01.08.2016, confirmed with certain modifications in the proceedings under Section 34 of the said Act. However, respondent no.1 rejected this claim on 25.08.2020 on the ground that the time period for submitting the claim was within 90 days of initiation of CIRP and the applicant was 287 days late. A Resolution plan had already been passed by the COC.

6. The appellant filed an application under Section 60(5) of the IBC. During the pendency of respondent's no. 1 application for approval of the plan before the Adjudicating Authority, seeking directions to respondent no.1 that the appellant's claim may be considered on merits. This relief was granted to the appellant by the Adjudicating Authority vide an order dated 03.11.2020 predicated on the following grounds: (a) respondent no.1 could not have summarily rejected appellant's claim, as this claim would have appeared in the Corporate Debtor's books of accounts; (b) in case such books of accounts were not available, respondent No. 1 had a duty to obtain them and verify the financial position; and (c) as such announcement was made through public newspapers, it was likely that the appellant missed out on the same.

7. Respondent No. 1 thereafter preferred an appeal under Section 61 of the IBC before the National Company Law Appellate Tribunal, New Delhi ('NCLAT') against the Adjudicating Authority's order.

8. The challenge by the respondent no.1 before the NCLAT was primarily based on the potential consequences of allowing such a belated claim when the COC had already approved the Resolution Plan. The appellant having made the claim more than a year after the invitation of claims by the public notice dated 30.03.2019; it was urged that allowing such claims would set the clock back on the CIRP and set a precedent, thereby making CIRP prolonged and inefficacious. In support of this plea, reliance was placed on the judgment in ***Committee of Creditors of Essar Steel India Limited through Authorised Signatory v. Satish Kumar Gupta and Ors.***[1], where this Court opined that a successful resolution applicant cannot be faced with undecided claims after the resolution plan has been accepted. This Court observed:

> "*...A successful resolution applicant cannot suddenly be faced with "undecided" claims after the resolution plan submitted by him has been accepted as this would amount to a hydra head popping up which would throw into uncertainty amounts payable by a prospective resolution applicant who would successfully take over the business of the corporate debtor. All claims must be submitted to and*

[1] (2020) 8 SCC 534 (hereinafter referred to as 'Essar Steel').

*decided by the resolution professional so that a prospective resolution applicant knows exactly what has to be paid in order that it may then take over and run the business of the corporate debtor. This the successful resolution applicant does on a fresh slate, as has been pointed out by us hereinabove. For these reasons, NCLAT judgment must also be set aside on this count*."

On the other hand, the appellant explained that it could not file the claim in time as it was unaware of the public announcement. A belated claim should not be shut out as the time-periods in the IBC are merely directory and not mandatory as per ***Brilliant Alloys Private Limited v. Mr. S. Rajagopal & Ors.***,[2] and in any case the resolution plan was yet to be approved by the Adjudicating Authority. The appellant contended that respondent no.1 had failed to discharge his duty to include the appellant's claim in the information memorandum as a contingent liability.

9. The NCLAT, *vide* the impugned order dated 30.07.2021, did not favour the view adopted by the Adjudicating Authority. Their reasoning was as follows:

(i) Respondent no.1 had effectuated proper service for inviting claims in accordance with Regulation 6 of the IBBI Regulations which only mandates a pronouncement

[2] (2022) 2 SCC 544 (hereinafter referred to as 'Brilliant Alloys').

through newspapers and not through personal service - an aspect that was not disputed by the appellant;

(ii) the appellant failed to show that it filed its claim as soon as it came to know of the initiation of the CIRP. The appellant even issued a Special Power of Attorney on 26.07.2019 in favour of the Corporate Debtor after confirmation of the arbitral award on 25.04.2019;

(iii) respondent no.1 even filed an application under Section 19 of the IBC before the Adjudicating Authority seeking that a direction be issued to the ex-management to provide all records. Although nothing came of this attempt, it reflected his sincere efforts;

(iv) Regulations 12 and 13 of the IBBI Regulations obliged the RP to accept claims filed within the extended period of 90 days of the commencement of CIRP. ***Brilliant Alloys***[3] dealt with the timelines under Section 12A of the IBC and Regulation 30A of the IBBI Regulations. These provisions pertained to the withdrawal of an application. In this context it was held that that IBBI Regulations can be directory depending on the facts of each case; and

[3] (supra).

(v) the resolution plan, as approved by the COC, would be jeopardised if new claims were entertained.

10. The aforesaid view of the NCLAT resulted in the appellant approaching this Court.

***Appellant's pleas before the Supreme Court***:

11. The appellant contended that the claim in terms of the award was a contingent claim as proceedings under Section 37 of the Arbitration Act remain pending before the High Court of Punjab and Haryana against the dismissal of the Corporate Debtor's challenge. There ought to be a provision for contingent claims in the resolution plan, as provided in ***State Tax Officer v. Rainbow Papers Limited***[4]. Thus, if the appeal is dismissed and the award becomes crystallized, the appellant's claim, if not provided for in the contingent claim, will be rendered nugatory. It was further submitted that the timeline provided under Section 12 of the IBC for completion of CIRP was only directory as per the judgment in ***Essar Steel***[5]. Since the Adjudicating Authority was yet to approve the resolution plan, respondent No.1 should have included the same as a contingent liability. This was also the view taken by the adjudicating agency. It was thus submitted that there was no cause for NCLAT to interfere with the same. The appellant also sought to contend their lack of awareness about the CIRP. It was urged

[4] 2022 SCCOnline SC 1162 (hereinafter referred to as 'Rainbow Papers').
[5] (supra).

that the Corporate Debtor did not disclose that the CIRP had been initiated, either during the pendency of the proceedings under Section 34 of the Arbitration Act or in appeal under Section 37 of the Arbitration Act. Had the appellant known of the CIRP, it may not have filed an application for restoration of the execution petition on 16.11.2019.

12. It was urged that the appellant urged that respondent No.1 could have easily found this information from the Corporate Debtor's books of accounts.

***Respondent No.1's pleas before the Supreme Court***:

13. Respondent no.1, on the other hand, contended that the appellant had deemed knowledge of the CIRP as the applicable procedure for inviting claims under the IBC and the IBBI Regulations was followed. Respondent No.1 made sincere efforts to collate all claims, including filing an application under Section 19 of the IBC for procuring the Corporate Debtor's records, although the same were not made available. The appellant's belated claim had the potential to open floodgates of litigation if the same was allowed.

14. It was urged that there was no need to create an arrangement for contingent claims as the resolution plan had been prepared on the basis of the information memorandum. The plan was comprehensive and took care of the claims of the homebuyers.

15. Finally, it was contended that a recent judgment of this Court in ***Paschimanchal Vidyut Vitran Nigam Ltd. v. Raman Ispat Pvt. Ltd. & Ors.***[6] had confined the dicta in ***Rainbow Papers***[7] to the facts of that case alone. At this stage, we may notice that the question of law in the two judgments was different.

***Our view***:

16. We have examined the aforesaid submissions. The only issue before us is whether the appellant's claim pertaining to an arbitral award, which is in appeal under Section 37 of the said Act, is liable to be included at a belated stage – i.e. after the resolution plan has been approved by the COC.

17. It is undisputed that the process followed by respondent no. 1 was not flawed in any manner, except to the extent of whether an endeavour should have been made by respondent no. 1 to locate the liabilities pertaining to the said award from the records of the Corporate Debtor.

18. If we analyse the aforesaid plea, it is quite obvious that respondent no. 1 did what could be done to procure the Corporate Debtor's records by even moving an application under Section 19 of the IBC. That it was not fruitful is a

[6] 2023 SCC OnLine SC 842 (hereinafter referred to as 'Paschimanchal').
[7] (supra).

consequence of the Corporate Debtor not making available the material. It is thus not even known whether there was a reflection in the records on this aspect or not.

19. The second question is whether the delay in the filing of claim by the appellant ought to have been condoned by respondent no. 1. The IBC is a time bound process. There are, of course, certain circumstances in which the time can be increased. The question is whether the present case would fall within those parameters. The delay on the part of the appellant is of 287 days. The appellant is a commercial entity. That they were litigating against the Corporate Debtor is an undoubted fact. We believe that the appellant ought to have been vigilant enough in the aforesaid circumstances to find out whether the Corporate Debtor was undergoing CIRP. The appellant has been deficient on this aspect. The result, of course, is that the appellant to an extent has been left high and dry.

20. Section 15 of the IBC and Regulation 6 of the IBBI Regulations mandate a public announcement of the CIRP through newspapers. This would constitute deemed knowledge on the appellant. In any case, their plea of not being aware of newspaper pronouncements is not one which should be available to a commercial party.

21. The mere fact that the Adjudicating Authority has yet not approved the plan does not imply that the plan can go back and forth, thereby making the CIRP an endless process. This would result in the reopening of the whole issue, particularly as there may be other similar persons who may jump onto the bandwagon. As described above, in *Essar Steel*,[8] the Court cautioned against allowing claims after the resolution plan has been accepted by the COC.

22. We have thus come to the conclusion that the NCLAT's impugned judgment cannot be faulted to reopen the chapter at the behest of the appellant. We find it difficult to unleash the hydra-headed monster of undecided claims on the resolution applicant.

23. The result of the aforesaid is that the appeal is dismissed leaving the parties to bear their own costs.

**.....J.**
**[Sanjay Kishan Kaul]**

**.....J.**
**[Sudhanshu Dhulia]**

**New Delhi.**
**September 11, 2023.**

[8] (supra)