

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

WRIT PETITION (L.) NO.21271 OF 2021

Surendra B. Jiwrajka ... Petitioner
V/s.
Omkaara Assets Reconstruction Private Limited ... Respondent

AND

WRIT PETITION (L.) NO.21272 OF 2021

Surendra B. Jiwrajka and anr. ... Petitioners
V/s.
Omkaara Assets Reconstruction Private Limited ... Respondent

Mr.Janak Dwarkadas alongwith Mr.Nirman Sharma, Ms.Nasrin Shaikh, Ms.Vatsala Pant and Mr.Jash Dalia i/by Mr.Jash Dalia, Advocates for the Petitioner in WPL No.21271 of 2021.

Mr.Adarsh Ramanujan i/by Mr.Aakshay Chheda, Advocates for the Respondent in WPL No.21271 of 2021.

Mr.Nirman Sharma, Ms.Nasrin Shaikh and Mr.Jash Dalia i/by Mr.Jash Dalia, Advocates for the Petitioners in WPL No.21272 of 2021.

Dr.Birendra Saraf, Senior Advocate alongwith Mr.Adarsh Ramanujan i/by Mr.Aakshay Chheda, Advocates for the Respondent in WPL No.21272 of 2021.

**CORAM : UJJAL BHUYAN &
MADHAV J. JAMDAR, JJ.
DATE : SEPTEMBER 30, 2021.**

Oral Order (Per Ujjal Bhuyan, J.) :-

This order will dispose of both Writ Petition (L) Nos.21271 and 21272 of 2021.

2. We have heard Mr.Dwarkadas, learned senior counsel for the petitioner; and Dr.Birendra Saraf, learned senior counsel for the respondent.

2. Challenge made in both the writ petitions are to identical orders. In Writ Petition (L) No.21271 of 2021, the impugned order dated 6th September, 2021 was passed by the Debts Recovery Tribunal-1, Mumbai (Tribunal) in Application IBC No.2 of 2021 whereas in Writ Petition (L) No.21272 of 2021 identical impugned order dated 6th September, 2021 was passed by the Tribunal in Application IBC No.3 of 2021. Both the applications before the Tribunal were moved by Omkara Assets Reconstruction Private Limited which is the respondent in the present writ proceedings with petitioner as the respondent therein.

3. Since both the impugned orders are identical, the one in Writ Petition (L) No.21271 of 2021 is extracted hereunder:-

“1. Ld. Counsel for the applicant presses this petition and submits that the respondent herein are the personal guarantors. Therefore, a Resolution Professional may be appointed and contends that the applicant has already proposed Snehal A. Kamdar to be appointed as a Resolution Professional.

2. Ld. Counsel for the respondent objected to the appointment of the RP in the present Insolvency Application and contends that the applicant herein has already been assigned the entire loan to J.M.Finance vide assignment agreement therefore present application under IBC is not maintainable. He also contends that Resolution professional has no power to decide the said issue, thus he submits that before proceeding further in the present matter, the Tribunal adjudicate the issue of maintainability of the present Insolvency application.

3. Ld. Counsel for the applicant objected to the said contentions of the Ld. Counsel for the respondent and submits that respondent has no right to object at this stage and he submits that he serve notices to the respondent only for the purpose of informing regarding the interim moratorium. He also drawn my

attention to provision of Section 95 to 100 of IBC and submits that the resolution professional is required to be appointed before entering any objection.

4. Further he shown the assignment agreement and submits that it is specifically agreed between the parties at the time of assignment that the applicant is having right to pursue their right of damages against the personal guarantor and the said right is not assigned to the assignor. In support of this contentions Ld. Counsel for the application also referred the judgment of Hon'ble NCLAT in Company Appeal (AT) (Insolvency) No.316/2021 between Mr. Ravi Ajit Kulkarni Vs. State Bank of India, dated 12/08/2021 and submits that the Hon'ble NCLAT has already passed the detailed order regarding the claim of the creditors qua the personal guarantor. Therefore, he submits that objection raised by the respondent may be declined.

5. Considering the rival contentions of the parties and gone through the record.

6. As per the provision of IBC more particularly from Section 95 to 100, any objection of the parties shall not be entrained till the stage of the report of the resolution professional, thus the objection raised by the respondent is not maintainable at this stage hence, declined.

7. Since the applicant themselves has provided the name of the resolution professional and also consent of the resolution professional has already been obtained. It is also clarified that the name of the resolution professional has already been available in the list of IBBI, therefore, I hereby appoint Mr.Snehal A. Kamdar IBBI/IPA-001/IP-P00415/2017-18/10738 a resolution professional in the present matter and he is directed to submit report in terms of IBC."

4. From a perusal of the aforesaid order we find that the impugned order was passed under section 97 of the Insolvency and Bankruptcy Code, 2016 (IBC). Application was filed by the respondent before the Tribunal to initiate insolvency resolution process against the petitioner and for appointment of resolution

professional. The application was opposed by the petitioner on the ground that petitioner had already assigned the entire loan to J.M.Finance. Therefore, the application under section 95 of IBC was not maintainable. Petitioner contended that resolution professional has no power to decide the issue and therefore, before proceeding further Tribunal should decide on maintainability of the application to initiate insolvency resolution process. Notwithstanding such objection raised by the petitioner, Tribunal took the view that provisions of the IBC, more particularly from sections 95 to 100, do not contemplate entertaining any objection at that stage till the receipt of report from the resolution professional. Therefore, objection raised by the petitioner was rejected whereafter resolution professional was appointed and he was directed to submit report in terms of IBC.

5. Mr.Dwarkadas, learned senior counsel for the petitioner submits that the principal borrower was under corporate insolvency resolution process. The New India Co-operative Bank Limited which had sanctioned the term loan to the borrower had assigned all its rights, title and interest in the term loan to the respondent. In terms of the implemented resolution plan outstanding dues has been assigned to the JM Financial Asset Reconstruction Company, JM Finance ARC- March, 2018 Trust (ARC Trust). Therefore, respondent can no longer seek to enforce the loan which is already sold for consideration to the ARC Trust. This is a jurisdictional fact the existence of which is essential for the Tribunal to assume jurisdiction. In the absence of such jurisdictional fact Tribunal could not have exercised jurisdiction and proceed with the application filed by the respondent. Referring to section 96 of IBC he submits that the moment such application is filed under section 95, interim moratorium commences thereby causing serious prejudice to the petitioner. That apart, subjecting the

petitioner to such proceeding without affording him a hearing would impact his standing in the market. There is serious invasion of petitioner's privacy, that too without the Tribunal first determining as to whether it has jurisdiction to proceed with the matter. Impugned decision of the Tribunal is clearly in violation of the principles of natural justice rendering the same a nullity. Therefore, interference by the High Court under Article 226 is called for.

6. To support his submissions, learned senior counsel has placed reliance on the following decisions:-

1. Arun Kumar Vs. Union of India, (2007)1 SCC 732.
2. State Bank of India Vs. M/s Veekay Polycoats Ltd., (IB)-1291(PB)/2018.
3. Lalit Kumar vs. Union of India, Civil No.245/2020.

7. The writ petition is vehemently resisted by Dr.Saraf, learned senior counsel for the respondent who submits that having regard to the scheme of the IBC, more particularly sections 95 to 100, no interference by the writ court at this stage is called for. He submits that the stage from sections 95 to 99 is only for the purpose of collecting evidence. Question of hearing the petitioner or for that matter the respondent will arise only after submission of report by the resolution professional under section 100 of IBC. Therefore, there is no error or infirmity in the impugned order. To support his submission Dr.Saraf has relied on a recent decision of the National Company Law Appellate Tribunal, Principal Bench, New Delhi in **Ravi Ajit Kulkarni Vs. State Bank of India**, decided on 12th August, 2021.

8. Submissions made by learned counsel for the parties have received the due consideration of the court.

9. We have already extracted the impugned order whereby objection raised by the petitioner to decide the jurisdictional issue at the threshold was declined by the Tribunal holding that at the present stage the same is unwarranted.

10. Section 95 of IBC deals with application by creditor to initiate insolvency resolution process. As per sub-section (1), a creditor may apply either by himself or jointly with other creditors or through a resolution professional to the adjudicating authority for initiating an insolvency resolution process under section 95 by submitting an application. As per sub-section (4) the application under sub-section (1) should be accompanied by the details and documents mentioned therein. Sub-section (5) mandates that the creditor should provide a copy of the application made under sub-section (1) to the debtor.

11. In terms of section 96(1) when an application is filed under section 94 (section 94 deals with application by debtor to initiate insolvency resolution process) or under section 95, an interim moratorium shall commence on the date of the application in relation to all the debts and shall cease to have effect on the date of admission of such application. During the interim moratorium period, all legal actions or proceedings pending in respect of such debt shall remain stayed and creditors shall not initiate any legal action or proceeding in respect of such debt.

12. Section 97 deals with appointment of resolution professional. Under sub-section (3) where an application under sections 94 or 95

is filed by the debtor or by the creditor himself, as the case may be, the adjudicating authority shall direct the Insolvency and Bankruptcy Board of India (briefly “the board” hereinafter) to nominate a resolution professional for the insolvency resolution process within 7 days of the filing of such application. Under sub-section (4) the board shall nominate a resolution professional within 10 days of receiving the direction issued by the adjudicating authority under sub-section (3), whereafter the adjudicating authority shall appoint the resolution professional under sub-section (5). Sub-section (6) provides that the resolution professional appointed by the adjudicating authority shall be provided a copy of the application for insolvency resolution process.

13. Section 98 deals with replacement of resolution professional which may not have much relevance *vis-a-vis* the subject matter of the present writ petitions.

14. Under sub-section (1) of section 99 the resolution professional shall examine the application referred to in section 94 or section 95, as the case may be, within 10 days of his appointment, and submit a report to the adjudicating authority recommending for approval or rejection of the application. As per sub-section (2) where the application has been filed under section 95, the resolution professional may require the debtor to prove repayment of the debt claimed as unpaid by the creditor by furnishing evidence etc. In terms of sub-section (4), the resolution professional may seek such further information or explanation for the purpose of examining the application from the debtor or the creditor or any other person. Sub-section (5) says that the person from whom information or explanation is sought under sub-section (4) shall furnish such information or explanation within 7 days of the receipt of the request. A conjoint reading of sub-

sections (6) and (7) of section 99 would indicate that the resolution professional shall examine the application and ascertain whether the application satisfies the requirement set out in sections 94 and 95 and whether the applicant has provided information and given explanation sought for by the resolution professional under sub-section (4). After examination of the application resolution professional may recommend acceptance or rejection of the application in his report. As per sub-section (9) the resolution professional is required to record reasons in both eventualities either recommending acceptance or rejection of the application. In terms of sub-section (10) the resolution professional shall give a copy of the report so prepared to the debtor or to the creditor, as the case may be.

15. That brings us to section 100 of IBC which deals with admission or rejection of the application. As per sub-section (1), the adjudicating authority shall within 14 days from the date of submission of the report under section 99 pass an order either admitting or rejecting the application referred to in sections 94 or 95, as the case may be. Sub-section (2) deals with the situation where the adjudicating authority admits an application under sub-section (1) and sub-section (4) deals with the situation where the application under sub-section (1) is rejected by the adjudicating authority. In either case under sub-section (3) a copy of such order is required to be provided to the creditor alongwith the report of the resolution professional within 7 days from the date of the order.

16. Thus from an analysis of the provisions contained in sections 95 to 100 of IBC, we find that a definite time-line has been provided at each stage of the proceeding. That apart, the interim moratorium in terms of section 96 which commences from the

date of the application remains in force till the date of admission of such application under section 100. Though time-lines have been prescribed at each stage of the proceeding leading to acceptance or rejection of the application under section 100, we find that no such time-line has been prescribed for submission of report by the resolution professional though section 100 provides that the adjudicating authority shall take a decision either admitting or rejecting the application within 14 days from the date of submission of the report. That apart on a careful examination of section 100, we are of the view that before the adjudicating authority takes a decision to either admit or reject the application upon receipt of report from the resolution professional, the parties to the insolvency resolution process are required to be heard. Though the legislature itself has provided in section 99(10) that a copy of the report of the resolution professional be furnished to the debtor or to the creditor thus complying with the requirement of the principles of natural justice, it would be in the fitness of things and in furtherance of the principles of natural justice that the parties are also heard before the decision is taken by the adjudicating authority one way or the other under section (1) of section 100.

17. In such circumstances, we do not find any good ground to interfere with the impugned orders save and except that the resolution professional should submit the report within a definite time period. This is because under sub-section (1) of section 96 the interim moratorium automatically commences from the date of the application and continues till the date of admission of such application (or rejection as the case may be). The legislative intent which is discernible is that such interim moratorium should be for a limited duration. Therefore, the resolution professional should expedite preparation and submission of report but at the

same time complying with the requirements of section 99 of IBC. We may note that in this case the resolution professional has already been appointed.

18. Accordingly, we direct that the resolution professional shall submit his report within a period of six weeks from the date of receipt of a copy of this order, whereafter the Tribunal shall decide the application within 14 days thereafter in terms of section 100 of IBC after giving due opportunity of hearing to the parties. All contentions are kept open.

19. Both the writ petitions are accordingly disposed of.

(MADHAV J. JAMDAR, J.)

(UJJAL BHUYAN, J.)

....