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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 8th November, 2019

+ **W.P.(C) 11706/2019 & CM APPLs. 48124/2019, 48125/2019, 48126/2019**

SUNIL KUMAR DAHIYA

..... Petitioner

Through: Mr. Manik Dogra, Mr. Dushyant Manocha, Mr. Dhruv & Mr. Brian Moses, Advocates (M-9999714826)

versus

UNION OF INDIA AND ORS.

..... Respondents

Through: Mr. Akshay Makhija, CGSC with Mr. Himanshu Pathak & Mr. Mrankit Tyagi, Advocates for R-1 (M-9810079901)

Mr. V. Shridhar Reddy & Mr. Sunder Khatri, Advocates for IRP (M-9810187449)

Mr. Abhinav Mishra, Mr. Siddhant Tripathi & Ms. Nivedita Chauhan, Advocates for Vigneshwara Barter Investment Association (M-9650110548)

Mr. Bharat Gupta & Mr. Vishesh Chauhan, Advocates for Investors Sangharsh Samiti (M-9810444651)

Mr. Shailendra Singh & Mr. Bhuvanesh Partap Singh, Advocates for Vigneshwara Victims Welfare Association (M-9717575151)

Mr. Ritesh Agrawal, AOR, Mr. Aishwarya Adlakha & Mr. Tejas Bhatia, Advocates for Mr. Lavkash Verma (M-9999972564)

CORAM:

JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. The present writ petition has been filed challenging the impugned

order of the NCLT dated 10th October, 2019 by which the NCLT has proceeded under Section 7 of the Insolvency and Bankruptcy Code, 2016 (*hereinafter*, “IBC”), appointed an Interim Resolution Professional (*hereinafter*, “IRP”) and declared a moratorium in terms of Section 14 of the IBC.

2. The Petitioner is the ex-Director/Promoter of the company – M/s Vigneshwara Developers Private Ltd. (*hereinafter*, “VDPL”), in respect of which the IRP has been appointed. The grievance of the Petitioner is that there were a number of investors in VDPL, who had preferred petitions under Sections 529 (A) and 530 of the Companies Act, 1956 before this Court.

3. The aforesaid petitions were admitted by the Company Court on 22nd July, 2016 and the Official Liquidator of the Court was appointed as the Provisional Liquidator. During the pendency of these proceedings, the ex-directors of VDPL and Vigneshwara Developwell Pvt. Ltd. engaged in mediation proceedings with their creditors, with the express permission of the Company Court, to explore amicable resolution. The Company Court had referred a large number of investors to mediation. A settlement was arrived at under the aegis of the Delhi High Court Mediation Centre on 4th December 2017.

4. Vide order dated 12th October, 2018, the Company Court admitted the first motion. In the said order, it is recorded that a settlement has been arrived at in the Delhi High Court Mediation and Conciliation Centre, with investors who represent more than 80% of VDPL’s creditors. Accordingly, the settlement was taken on record and the Court proceeded to the second stage. Subsequently, further submissions have been heard in the matter.

Arguments were thereafter heard and judgment was reserved on 13th May, 2019.

5. Parallely, one Mr. Lavkash Verma, claiming to be a Financial Creditor of VDPL, approached the NCLT under Section 7 of the IBC with a prayer for appointment of an IRP and for commencing the insolvency process against VDPL. By the impugned order, the said petition has been admitted by the NCLT, an IRP has been appointed and a moratorium has been declared.

6. The grievance of the Petitioner, who is the ex-Director/Promoter of VDPL was that the Company Court was fully seized of the matter and had, in fact, taken on record the scheme for revival of VDPL. It is submitted that the entire purpose behind the IBC being revival, the matter being fully seized before the Company Court and judgment having been reserved, the NCLT ought not to have brought the revival to a complete standstill by appointing an IRP and declaring a moratorium. It is further submitted that as a consequence, the entire effort of entering into a settlement with the various investors has been stalled. If the IRP takes over the company, the settlement which has already been recognized by the Company Court would come to a standstill. Thus, according to the Id. counsel for the Petitioner, there has been a clear conflict of jurisdiction.

7. Id. counsel relies upon the judgment in ***Jotun India Pvt. Ltd. v. PSL Ltd., (2019) 150 CLA 117*** and ***Action Ispat v. Shyam Metallics and Energy Ltd. [Co. App 11/2019, decided on 10th October, 2019]*** to argue that conflicts of jurisdiction ought to be avoided in order to ensure that confusion and chaos is not created in the running of a company.

8. On the other hand, Id. counsel appearing for the Union of India

submits that the present petition is not maintainable as there is an alternative remedy of approaching the NCLAT under Section 61 of the IBC.

9. Mr. Shailendra Singh, ld. counsel appearing for the Vigneshwara Victims Welfare Association (*hereinafter*, “VVWA”), submits that the present petition ought not to be entertained, as, if the Corporate Insolvency Resolution Process (*hereinafter*, “CIRP”) is not permitted to go on, VDPL would continue to remain in the control of the management. The revival scheme is not acceptable to VVWA, which has also been recorded by the Company Court in its order dated 12th October, 2018.

10. Ld. counsel appearing for Mr. Lovkesh Verma i.e., the Financial Creditor who had approached the NCLT, reiterates the submission that the present petition is not maintainable in view of the express bar under Section 63 of the IBC. He further submits that his client had been called during mediation proceedings in the Delhi High Court, however, no settlement was arrived at between his client and VDPL.

11. Ld. counsel appearing for the IRP also reiterates that the present petition is not maintainable in view of the provisions of the IBC.

12. Mr. Abhinav Mishra, ld. counsel appearing for M/s Vigneshwara Barter Investment Association (*hereinafter*, “VBIA”), which was also represented before the Company Court, submits that the Company Court has spent enormous amount of time and effort in formulating the revival scheme. The entire scheme would be set at naught if the order passed by the NCLT is allowed to continue. It is submitted by the ld. counsel that the entire purpose of the IBC is to revive the company, which is actually what the High Court is considering and supervising at this point, and the intervention by the NCLT would lead to absolute chaos.

13. Mr. Bharat Gupta, Id. counsel appearing for Investors Sangharsh Samiti supports the case of the company that there is a revival scheme which is currently underway before the Delhi High Court and pending for orders.

14. The Court has considered the various submissions of the parties and has perused the orders of the NCLT and of the Company Court. A perusal of the order dated 12th October, 2018 shows that the Company Court had heard all the relevant associations who are represented before the Court even today. After hearing all the parties and considering the mediation report and the settlement scheme which was agreed to by more than 80% of the creditors, the Court had accepted the first motion and had directed that publication etc. would be made in accordance with the scheme of the IBC. The order dated 12th October, 2018 is set out below:

“ ...

CA No.509/2018 in CP No.885/2015

1. This application has been filed by the Ex-Directors of the respondent company to record the scheme of compromise and arrangement among Vigneshwara Developwell Private Limited, Vigneshwara Developers Private Limited, their respective Members and the Creditors.

2. It has been pointed out in the application that this Court was pleased to admit the petition on 22.07.2016 and appointed the Official Liquidator attached to this Court as Provisional Liquidator. During the pendency of the aforesaid proceedings with the express permission of this Court, the ex-directors of the companies, who are still in judicial custody engaged in mediation proceedings with their creditors and arrived at a settlement. It is stated that pursuant to the settlement the permission of this Court is sought to approve the revival scheme. It has also been pleaded that the share holders of the company are supporting

the revival scheme and have filed the affidavits in support thereof. It has also been stated that both the companies namely Vigneshwara Developwell Private Limited and Vigneshwara Developers Private Limited have no secured creditors and certificates of the Chartered Accountant to the effect have been attached. The audited balance sheets as on 31.03.2013 have also been placed on record.

3. Learned counsel appearing for the applicant has pointed out that there are two projects of the respondent company i.e. Darson & Kisson I Valley Business Park at Plot No.CP02, Sector-8, Manesar, Gurugram which was to be allotted for development of a technology park. Similarly another project by the name of Aquarious Business Park has also been developed at Village Begumpur Khatola, Sector-74, Gurugram.

4. It has also been pleaded by the learned counsel for the applicant that that the applicant has entered into a settlement before the Delhi High Court Mediation and Conciliation Centre with the Investors Sangharsh Samiti (Regd.) who has 523 members on 4th December, 2017. They have also entered into a settlement with the Vigneshwara Barter Investors Association (VBIA) which has 250 members and Vigneshwara Victims Welfare Association who had 300 members. In addition there are certain individual agreements that have also been entered into. It is pleaded that out of about 1437 unit buyers, 1180 have agreed to the settlement, i.e. 1180 unit buyers have signed the settlement agreements before the Delhi High Court Mediation and Conciliation Centre.

5. Learned counsel appearing for the Vigneshwara Victims Welfare Association has further pleaded that the as per the terms of the settlement agreement, the ex-Directors are to bring in funds for the purposes of payment to the farmers from whom the land has been purchased and payment of other necessary and

statutory dues. He submits that in the absence of the funds being available, the future of the proposed scheme is itself in jeopardy.

6. Learned counsel for the applicant in CA No.739/2017 has also stated that he is an un-secured creditor of the respondent company and does not find a place in the scheme at all.

7. Keeping in view the above position, in my opinion as 1180 unit buyers have supported the scheme, out of 1437, the requisite majority as provided under Section 391 of the Companies Act would be available. Under the Section 391 of the Companies Act, if a majority in number representing 3/4th in value of the creditors, or class of creditors, or class of members as the case may be present and voting have to agree any compromise or arrangement for the court to sanction the scheme.

*8. In this context, reference may be had to the judgment of the Supreme Court in **Miheer H.Mafatlal vs. Mafatlal Industries Ltd., (1997) 1 SCC 579** wherein the Supreme Court held as follows:-*

"In view of the aforesaid settled legal position, therefore, the scope and ambit of the jurisdiction of the Company Court has clearly got earmarked. The following broad contours of such jurisdiction have emerged:

1. The sanctioning court has to see to it that all the requisite statutory procedure for supporting such a scheme has been complied with and that the requisite meetings as contemplated by Section 391(1)(a) have been held.

2. That the scheme put up for sanction of the Court is backed up by the requisite majority vote as required by Section 391 sub-section (2).

3. That the meetings concerned of the creditors or members or any class of them had the relevant material to enable the

voters to arrive at an informed decision for approving the scheme in question. That the majority decision of the concerned class of voters is just and fair to the class as a whole so as to legitimately bind even the dissenting members of that class.

4. That all necessary material indicated by Section 393(1)(a) is placed before the voters at the meetings concerned as contemplated by Section 391 sub-section (1).

5. That all the requisite material contemplated by the proviso of sub-section (2) of Section 391 of the Act is placed before the Court by the applicant concerned seeking sanction for such a scheme and the Court gets satisfied about the same.

6. That the proposed scheme of compromise and arrangement is not found to be violative of any provision of law and is not contrary to public policy. For ascertaining the real purpose underlying the scheme with a view to be satisfied on this aspect, the Court, if necessary, can pierce the veil of apparent corporate purpose underlying the scheme and can judiciously X-ray the same.

7. That the Company Court has also to satisfy itself that members or class of members or creditors or class of creditors, as the case may be, were acting bona fide and in good faith and were not coercing the minority in order to promote any interest adverse to that of the latter comprising the same class whom they purported to represent.

8. That the scheme as a whole is also found to be just, fair and reasonable from the point of view of prudent men of business taking a commercial decision beneficial to the class

represented by them for whom the scheme is meant.

9. Once the aforesaid broad parameters about the requirements of a scheme for getting sanction of the Court are found to have been met, the Court will have no further jurisdiction to sit in appeal over the commercial wisdom of the majority of the class of persons who with their open eyes have given their approval to the scheme even if in the view of the Court there would be a better scheme for the company and its members or creditors for whom the scheme is framed. The Court cannot refuse to sanction such a scheme on that ground as it would otherwise amount to the Court exercising appellate jurisdiction over the scheme rather than its supervisory jurisdiction.

The aforesaid parameters of the scope and ambit of the jurisdiction of the Company Court which is called upon to sanction a scheme of compromise and arrangement are not exhaustive but only broadly illustrative of the contours of the Court's jurisdiction."

9. It is manifest from the pleadings placed on record that more than 80% of the unit buyers have agreed to the scheme. Learned counsel appearing for the OL and the applicant submit that this would roughly be about 80% of the value of the creditors.

10. Learned counsel appearing for the OL filed a report No.278/2018 wherein it has been pointed out that 41 claims were received pursuant to the advertisement published in the newspaper for total value of Rs.21.47 crores for Vigneshwara Developwell Pvt. Ltd. Regarding Vigneshwara Developers Pvt. Ltd., 25 claims were received with a total value of Rs.7.93 crores. All the claims were received from the home

buyers/unit buyers.

11. Keeping in view the above facts and in the interest of the creditors and the home buyers/unit buyers calling of the above meeting under Section 391 of the Companies Act is dispensed with.

12. Notice will be issued under Rule 80 of the Companies Court Rules in the newspapers 'Statesman' (English) and 'Veer Arjun' (Hindi) inviting any objections from any effected party to the scheme. An advance copy of the objections may be given to the applicants.

13. The applicant will put the scheme on the net. This information will be carried on in the advertisement.

14. Copy of this application be also served on the Regional Director, Ministry of Corporate Affairs, CGO Complex.

15. Learned counsel appearing for some of the unit holders submits that any order passed by this court would be misused by the applicant for seeking bait.

16. Learned counsel appearing for the applicant has strongly rebutted this statement stating that majority of the unit buyers have voluntarily entered into an agreement before the Delhi High Court Mediation and Conciliation Centre and hence to claim that this application is motivated is entirely erroneous.

17. Learned counsel appearing for Manasvi Security Services has pointed out that on instructions of OL security has been deployed on the site and an outstanding bill amounts of Rs.2.16 crores is pending. It is agreed that the representative of the management will meet the OL on 15.10.2018 at 3:00 PM. The OL will sort out the issue regarding claim of Manasvi Security Services.

18. List in the Court on 16.01.2019."

15. After the scheme was advertised extensively, both in newspapers and on the internet, further hearing was conducted by the Company Court on 13th May, 2019, and judgment has been reserved.

16. The question as to whether the scheme would be finally accepted by the Court and if so, what steps are to be taken, is yet to be pronounced by the Company Court. However, the order of the NCLT, at this stage, has become an interdiction into the proceedings which were pending before the Company Court. The NCLT has considered the judgment of the Supreme Court in ***Forech India Ltd. v. Edelweiss Assets Reconstruction Co. Ltd*** [Civil Appeal No. 818/2018, decided on 22nd January, 2019] and has held that the pendency of the winding up petition does not take away the jurisdiction of the NCLT and, in fact, the NCLT would have the exclusive jurisdiction to adjudicate upon such disputes.

17. What the NCLT has failed to appreciate is that even the judgment in ***Forech (supra)*** clearly observes that the objective would be to ensure that there are no parallel proceedings before the High Court and before the NCLT. The relevant paragraph of ***Forech (supra)*** reads as under:

“17. The resultant position in law is that, as a first step, when the Code was enacted, only winding up petitions, where no notice under Rule 26 of the Companies (Court) Rules was served, were to be transferred to the NCLT and treated as petitions under the Code. However, on a working of the Code, the Government realized that parallel proceedings in the High Courts as well as before the adjudicating authority in the Code would stultify the objective sought to be achieved by the Code, which is to resuscitate the corporate debtors who are in the red. In accordance with this objective, the Rules kept being amended, until finally Section 434 was itself substituted in 2018, in which a proviso was added by which even in winding up petitions where notice has been served and which are pending in the High Courts, any person could apply for transfer of such petitions to

the NCLT under the Code, which would then have to be transferred by the High Court to the adjudicating authority and treated as an insolvency petition under the Code. This statutory scheme has been referred to, albeit in the context of Section 20 of the SICA, in our judgment which is contained in Jaipur Metals & Electricals Employees Organization Through General Secretary Mr. Tej Ram Meena v. Jaipur Metals & Electricals Ltd. Through its Managing Director, being a judgment by a Division Bench of this Court dated 12.12.2018.”

18. The Company Court in the Delhi High Court is completely seized of the revival of the company. The company, as also the various stake holders, have been duly represented before the Company Court. The Company Court being seized of the matter and judgment having been reserved by the Court, the same is awaited. The revival scheme has been formulated after deliberations for more than five years before the High Court. The entire effort and labour put into the revival of the company would be completely defeated if at this stage, an IRP is appointed and moratorium is declared.

19. Though, there is no doubt that the jurisdiction of this Court is not to be exercised under Article 227 if there is an alternate remedy available, in order to avoid conflicting orders from operating in respect of the company, to the detriment of the creditors and other stakeholders, this Court is of the opinion that, while relegating the Petitioner to the NCLAT, the impugned order of the NCLT deserves to be kept in abeyance. In view of the remedy of appeal being available to the Petitioner, to approach the NCLAT, the Petitioner is permitted to approach the NCLAT within four weeks. In view of the peculiar facts and circumstances of the present case, it is directed that the order dated 10th October, 2019, passed by the NCLT, shall remain stayed

until the pronouncement of the judgment by the Delhi High Court in Company Petition No. 885/2015 and connected petitions, or until the matter is finally decided by the NCLAT, whichever is earlier. The NCLAT shall consider the entire matter including the orders passed by the Company Court. All parties who are intervening before the Court today and any other affected parties are permitted to appear before the NCLAT. The NCLAT shall consider the Petitioner's plea in accordance with law. This Court has not given any opinion on the merits of the revival scheme pending before the Company Court or the order of the NCLT which is under challenge in the present case.

20. Ld. counsel for the Petitioner assures the Court that the Petitioner would approach the NCLAT on or before 30th November, 2019. Parties may place the present order before the Company Court where judgment is reserved.

21. With these observations, the petition and all pending applications are disposed of.

**PRATHIBA M. SINGH
JUDGE**

NOVEMBER 08, 2019

Rahul

Corrected and released on 18th November, 2019