23.02.2024
Court No.19

CO 543 of 2024

EDCL Infrastructure Limited
vs.
Urban Infra Projects Pvt. Ltd.

Mr. Bikash Ranjan Bhattacharya, Sr. Adv.
Mr. Swatarup Banerjee
Mr. Nirmalya Dasgupta
Mr. Avishek Guha
Sk. Sariful Haque
Ms. Sonal Agarwal

... for the petitioner

1. This revisional application arises out of an order dated February 08, 2024 passed by the learned National Company Law Tribunal, Kolkata.

2. By the order impugned, the application filed by the petitioner under Section 60 (5) read with Section 65 of the Insolvency and Bankruptcy Code, 2016 (in short IBC) was rejected.

3. Mr. Bikash Ranjan Bhattacharya, learned Senior Advocate appearing on behalf of the petitioner submits that the order of learned Tribunal suffers from jurisdictional error. The Tribunal proceeded with material irregularity by not considering the objections with regard to the maintainability of the application under Section 7 of the IBC, in its true legal perspective.

4. According to Mr. Bhattacharya, the application under Section 7 of the IBC should have been dismissed on the following grounds:-

(i) The company petition was defective. It was addressed to the Registrar, NCLT, Cheenai

Bench, whereas, the application was filed before the Bench at Kolkata.

(ii) The company petition was filed without proper authorization.

(iii) The existence of an Arbitration clause in the purported loan agreement barred the proceedings under Section 7 of IBC. An application under Section 8 of the Arbitration and Conciliation Act was pending before the learned Tribunal, which the Tribunal failed to take note of.

(iv) The order suffers from total non-application of mind.

5. Mr. Bhattacharya contends that the learned Tribunal ought to have returned the application with further direction upon the financial creditor to file a proper application in the proper form with proper authorization and within the parameters of the IBC. Time barred claims, claims which were covered by an arbitration clause, claims arising out of actions taken in violation of law etc. could not form the sum and substances of the application under Section 7. Part of the amount claimed, was not only time barred, but also beyond the scope of the purported agreement. The agreement was non-est in the eyes of law as the financial creditor acted beyond the scope of such agreement.

6. Mr. Bhattacharya further submits that some judgments were cited by the learned Tribunal while dealing with the issues although, the said judgments were not cited by the parties. The learned Tribunal had itself referred to those judgments without allowing the petitioner any opportunity to deal with the same.

7. Having heard Mr. Bhattacharya, learned Advocate for the petitioner, this Court is of the view that the only question which is to be decided in this application is whether the order either suffers from perversity or wrongful exercise of jurisdiction.

8. Normally, a party aggrieved by an order of the Tribunal must exhaust the statutory remedy of an appeal before the appellate forum. The IBC is a complete code, which provides the manner in which the person aggrieved by an order of the learned Tribunal, can assail the same before the National Company Law Appellate Tribunal (in short NCLAT). Therefore, the High Court should be extremely, careful and circumspect in exercising its jurisdiction while interfering with orders passed by the learned Tribunal. It must be remembered that interference with an action taken by the financial creditor for recovery of money due, will have a serious impact on the financial health of the financial creditor. The High Court ordinarily should not entertain a petition

under Article 227 of the Constitution of India, if an effective remedy is available to the aggrieved person. IBC is a Code unto itself and it contains a comprehensive procedure to be followed. The only exception that has been carved out by judicial decisions, permitting interference of the High Court under Article 227 of the Constitution of India, are instances when the order is either without jurisdiction or passed in erroneous exercise of jurisdiction or based on extraneous considerations and materials not available with the records.

9. Undoubtedly, the jurisdiction of the High Court under Article 227 of the Constitution of India is microscopic.

10. Coming back to the facts of this case, on April 18, 2023, the opposite party instituted an application under Section 7 of the IBC (hereinafter referred to as the company petition), inter alia, seeking initiation of Corporate Insolvency Resolution Process (in short CIRP). The total claim against the petitioner was Rs.35,18,55,646/- in aggregate, including interests for a principal sum of Rs.27,64,00,000/-.

11. The claim was based on an agreement dated April 12, 2019. The opposite party prayed for the following reliefs, which are quoted below:-

i. To allow and admit the present petition in order to enable the Petitioner to initiate

> Corporate Insolvency Resolution process against the Corporate Debtor;
>
> ii. To appoint Interim Resolution Professional as the Hon'ble Bench may deem fit and proper;
>
> iii. Such other orders as the Hon'ble Bench may deem fit in the instant case."

12. The petitioner filed an application which was registered as I.A. (IB) No.2105/KB/2023, for the following reliefs, which are quoted below:-

> "C.P. No.106 of 2003 (Urban Infraprojects Private Limited vs. EDCL Infra) be dismissed.
>
> Cost be imposed upon Urban Infraprojects Private Limited for fraudulently filing C.P. No.106 of 2003.
> Stay of C.P. No.106 of 2003 till disposal of the instant application.
>
> Ad-interim orders in terms of prayers above;
> Such further or other order or orders be passed and/or direction or directions be given as this Hon'ble Tribunal may deem fit and proper."

13. The grounds for seeking dismissal of the company petition were elaborated in paragraph 4 of the IA. They were as follows:-

(a) The agreement dated April 12, 2019, on the basis of which the application under Section 7 had been filed, was a disputed agreement. The said application was filed fraudulently and with malicious intent;

(b) The bank's statement showing disbursal of the funds to the corporate debtor did not reflect that the same was transferred under the agreement dated April 12, 2019;

(c) The purported agreement provided that the maximum principal amount that could be disbursed would not exceed Rs.25 crores, whereas, the claim of the financial creditor was Rs.27,64,00,000/- as the principal amount which was contrary to the agreement. The transactions were made prior to the execution of the agreement and could not have been included in the proceedings;

(d) The financial creditor did not issue any demand notice. There were no documents to show that the purported agreement had been acted upon by the parties. The financial creditor had violated the terms and conditions of the purported agreement;

14. It was argued before the learned Tribunal that the company petition was defective as it was addressed to the Registrar, NCLT, Chennai Bench. The company petition was filed without proper authorization. Section 186 of the Companies Act, 2013 was violated by the financial creditor as an amount in excess of 60% of the paid-up capital of the company had been paid to the debtor. Part of the claim was time-barred.

15. In the order impugned, the objections raised by the petitioner in the IA, have been recorded in paragraphs 4(1) to 4 (7). The submissions on behalf

of the petitioner were recorded in paragraphs 5 to 12 thereof. The submissions of the opposite party have been recorded in paragraphs 13 to 20. The analysis and findings are at paragraphs 21 to 44.

16. The first ground of the corporate debtor with regard to the covering letter being addressed to the Registrar, NCLT, Chennai, was discussed and it was held that the same was a clerical error which would not make the company petition defective. The second ground that the corporate debtor filed the application without proper authorization was next dealt with. In paragraph 23, the matter has been answered as follows:-

> "We see that the minutes of the board resolution contains in the last para as under
>
> > 'Mr. Tannamy Agarwal, Director of the Company, be and is hereby authorised to propose and engage insolvency professionals, advisors, consultants, lawyers, advocates and solicitors etc. on such terms as may be deemed fit from time to time in connection with the proposed CIRP and obtain any advisory/consultation in regard to the above for Urban Infraprojects Private limited.'
>
> Therefore, we are of the view that the application has been filed with proper authorization and consequently, we reject this ground placed by the Corporate Debtor."

17. Next, the ground that the financial creditor had not acted as per the agreement dated April 12, 2019 and as such the loan agreement was a disputed document, was considered.

18. The other contentions of the corporate debtor that by non-compliance of the clauses of the

agreement, i.e., granting loan in excess of Rs.25 crore and claiming simple interest at a lower rate than what was agreed upon, was also decided. The learned Tribunal found that there was scope for altering or modifying the terms and conditions as per clause 18 of the agreement. When the agreement was read as a whole, it could be inferred that loans were advanced against payment of interest and the transactions fell within the definition of "financial debt".

19. It was further held that changes in the amount of loan and the amount of interest would not itself make the agreement invalid. With regard to the violation of Section 186 of the Companies Act, 2013, the learned Tribunal was of the opinion that the said contention was neither a part of the pleadings nor a part of the reply to the company petition.

20. It was further held that the corporate debtor benefited from the alleged violation and could not use the said section as a sword, only to render the proceedings to be invalid. With regard to the pendency of an application under Section 8 of the Arbitration and Conciliation Act, 1996, and the existence of an arbitration clause, the learned Tribunal referred to a judgment of the Hon'ble Apex Court and arrived at the finding as follows:-

> "41. Further, the Learned Counsel for the Applicant has asserted that there exists

arbitration clause in the agreement and therefore any such disputes should be referred to arbitration and it is not open for the Financial Creditor to file an application under Section 7 of the IBC. In this context, we would rely upon the judgment passed by the Hon'ble Apex Court in Indus Biotech Private Limited vs. Kotak India Venture (Offshore) Fund and Ors. reported in (2021) 6 SCC 436 at para 27 that:

'As noted, the issue which is posed for our consideration is arising in a petition filed Under Section 7 of IB Code, before it is admitted and therefore not yet an action in rem. In such application, the course to be adopted by the Adjudicating Authority if an application Under Section 8 of the Act, 1996 is filed seeking reference to arbitration is what requires consideration. The position of law that the IB Code shall override all other laws as provided Under Section 238 of the IB Code needs no elaboration. In that view, notwithstanding the fact that the alleged corporate debtor filed an application Under Section 8 of the Act, 1996, the independent consideration of the same dehors the application filed Under Section 7 of IB Code and materials produced therewith will not arise. The Adjudicating Authority is duty bound to advert to the material available before him as made available along with the application Under Section 7 of IB Code by the financial creditor to indicate default along with the version of the corporate debtor. This is for the reason that, keeping in perspective the scope of the proceedings under the IB Code and there being a timeline for the consideration to be made by the Adjudicating Authority, the process cannot be defeated by a corporate debtor by raising moonshine defence only to delay the process. In that view, even if an application Under Section 8 of the Act, 1996 is filed, the Adjudicating Authority has a duty to advert to contentions put forth on the application filed Under Section 7 of IB Code, examine the material placed before it by the financial creditor and record a satisfaction as to whether there is default or not. While doing so the contention put forth by the corporate debtor shall also be noted to determine as to whether there is substance in the defence and to arrive at the conclusion whether there is default. If the irresistible conclusion by the Adjudicating Authority is that there is default and the debt is payable, the bogey of arbitration to delay the process would not arise despite the position

> that the agreement between the parties indisputably contains an arbitration clause.
>
> (Emphasis Added)
>
> 42. Thus, we are of the view that the Learned Counsel Dr. Binani appearing on behalf of the Respondent is right in her submissions that apropos to the arbitration clause in the Loan Agreement, even if any proceedings of arbitration is invoked, the Adjudicating Authority is to consider the application under Section 7 of the IBC independently and pass necessary order pertaining to admission or rejection of the application, consequence of which will befall on the proceedings under the Arbitration and Conciliation Act, 1996. It is further submitted that in the instant case, the proceedings under Section 7 of the IBC have been initiated by the Financial Creditor and no proceedings has been initiated by the Respondent herein in terms of the Arbitration and Conciliation Act, 1996. We are of the considered opinion that even if any proceedings initiated by the Respondent or any other party under the Arbitration and Conciliation Act, 1996, that would be treated as a separate and independent proceeding and no proceedings will vitiate or influence each other."

21. Upon analysis of the order impugned, this Court finds that each and every point raised by the petitioner was considered and answered. The case laws relied upon by the petitioner were dealt with. The submissions of the petitioner and the grounds of challenge with regard to the maintainability of the proceeding were examined, scrutinized and rejected with reasons. The order does not suffer from violation of the principles of nature justice.

22. Each and every issue was scrutinized in detail with special reference to the facts involved. Thus, this Court cannot hold that the order suffers from perversity.

23. Mention of NCLT, Chennai Bench in the covering letter is curable, which the learned Tribunal can always direct to be corrected. Secondly, with regard to the authorization and Form No.NCLT-12, the learned Tribunal found that Mr. Rohit Sharma, had stated that he was authorized by the director, Mr. Tanmay Agarwal, to file the petition.

24. The board resolution was looked into and the last paragraph therein, stated that Mr. Tanmay Agarwal, director of the company was authorized to propose and engage insolvency professional/advisor/ consultant/solicitor/ advocate on such terms as may be deemed fit and proper. Therefore, the competence of Mr. Rohit Sharma to sign the form on being authorized by Mr. Tanmay Agarwal, was found to be proper.

25. The merits of the said order and the findings of fact are not decided in this proceeding. The order is not patently without jurisdiction. The merits of the issues decided, have to be tested in the alternative remedy of a statutory appeal. The petitioner ought to have preferred an appeal in accordance with law.

26. There is a hierarchy of appeal under the Code and this Court refrains from interfering with the order impugned under Article 227 of the Constitution of India.

27. The findings of the learned Tribunal cannot be disturbed under the supervisory jurisdiction. All the points raised before this Court can be raised in an appeal before the appropriate forum under the statute.

28. The power of superintendence is to be used most sparingly and only in appropriate cases in order to keep the subordinate courts and tribunals within the bounds of their authority and not for correcting mere errors.

29. Thus, the revisional application is disposed of without any interference.

30. The observations in this order shall not prejudice any proceeding either before the NCLT or NCLAT as the case may be.

31. There shall be order as to costs.

32. Parties are to act on the basis of the sever copy of this order.

(Shampa Sarkar, J.)