

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
KOLKATA BENCH (Court-II)  
KOLKATA**

IA No. 2035/(KB)/2023  
in  
C.P. No. 2074/KB/2019

*An application under Sections 60(5) of the Insolvency & Bankruptcy Code,  
2016 read with Rule 11 of the NCLT Rules, 2016;*

In the matter of:

Sanjeev Kumar Mishra

...OPERATIONAL CREDITOR

Versus

Abhijeet Hazaribagh Toll Road Ltd.

...RESPONDENTS

And

Abhijeet Infrastructure Limited

...APPLICANT

Versus

1. Abhijeet Hazaribagh Toll Road Ltd.
2. National Highways Authority of India.
3. State Bank of India.

...RESPONDENTS

**Date of pronouncement of order: 17.05.2024**

**CORAM:**

**SMT. BIDISHA BANERJEE, HON'BLE MEMBER (JUDICIAL)**

**SHRI D. ARVIND, HON'BLE MEMBER (TECHNICAL)**

**Appearances (via Video Conferencing/Physical):**

Mr. Sauritro Ganguly, Adv. ] For the Applicant

Mr. M.S. Tiwari, Adv. ]

Mr. Anirudh Singh, Adv. ]

Mr. Abhrajit Mitra, Sr. Adv. ] For the Liquidator

Mr. D. N.Sharma, Adv. ]

Mr. Debartha Chakraborty, Adv. ]

Mr. K. Saraf, Adv. ]

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**O R D E R**

**Per: Bidisha Banerjee, Member (Judicial)**

1. The Court congregated through a hybrid mode.
2. Ld. Counsels were heard and records were perused.
3. This application has been preferred by a promoter and shareholder of the Corporate Debtor (under liquidation), on being aggrieved with a settlement arrived by the Liquidator under Vivad se Vishwas II Scheme pursuant to a recommendation by liquidator and decision by the Stakeholders Consultation Committee on 10<sup>th</sup> July, 2023.

**4. Facts alluded to the petition:**

- 4.1. The Corporate Debtor had entered into a Concession Agreement dated 31<sup>st</sup> August, 2010 with NHAI.
- 4.2. The Article 44 of the Concession Agreement inter alia provided a dispute Resolution Clause. In terms of Article 44.3 therein a reference was made before an Arbitral Tribunal, which on contest, by an award dated 2<sup>nd</sup> October, 2017, inter alia awarded a claim of Rs.182,35,26,479/-.
- 4.3. On being aggrieved and dissatisfied with the said award the interest calculation error NHAI, the respondent took a recourse under Section 34 of the Arbitration and Conciliation Act, 1996.
- 4.4. Meanwhile, the liquidation of the Corporate Debtor was ordered on 7<sup>th</sup> November, 2022 pursuant to which the liquidator was appointed.
- 4.5. The Liquidator opted and availed the scheme Vivad se Vishwas II Scheme on 10<sup>th</sup> July, 2023 for settlement of the actionable claim/the awarded sum under the Vivad se Vishwas II Scheme. Pursuant to a

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recommendation of the SCC. Accordingly, the liquidator agreed for a haircut of approximately 35% thereby drastically reducing the awarded sum of Rs.182 odd crores to Rs.118.5 crores.

4.6. It is the contention of the Applicant that had the Corporate Debtor continued and succeeded with the recourse preferred under Section 34 the Corporate Debtor would ought to have secured more than Rs.1000 crores which would in turn could have satisfied the claim of the “SCC and the Applicant herein”.

4.7. It is alleged that the Liquidator on settlement of the said award under the Vivad se Vishwas II Scheme has been benefited with the sum of Rs.1.53 crores.

5. The Applicant alleges that the Liquidator is not entitled to settle a claim. Reference is made to the following statutory provisions:

5.1. Under the said Code, 2016 and the Insolvency & Bankruptcy Board of India (Regulation Process) Regulation, 2016 as amended upto 16.09.2022 there is no provision in the said Code and the Regulation which permits the liquidator to settle a claim.

5.2. Under Chapter VI (Realization of Assets) of Regulation 32 (Sale of Assets) the liquidator in course of the liquidation process is required to sell the assets in terms of the said Regulation.

5.3. Under Regulation 32A (Sale as a Going Concern) where the liquidator is of the opinion that sale of the liquidation estate assets shall maximize the value of the Corporate Debtor he shall proceed to sell under the said clause.

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- 5.4. In terms of Regulation 37A a liquidator is permitted to assign or transfer not readily realizable asset through a transparent process.
- 5.5. Under Regulation 43, a Stakeholder shall forthwith return any money received by him in distribution which he is not entitled to. Under such circumstances, a judicial scrutiny has been sought for whether a liquidator is at all permitted to enter into any form of settlement.
6. The Applicant would further refer to the order dated 10<sup>th</sup> October, 2023 passed this Tribunal to disabuse our mind that the Order operates as res judicata for the purpose of adjudication of this instant application and to contend that this Tribunal proceeded to hold that under Regulation 31A the advice of the Consultation Committee is not binding on the liquidation however, the proposal of the liquidator since was acted upon by the Consultation Committee there was no occasion on part of the liquidator to deviate therefrom. Further that, based on a consideration that the claim of the Operational Creditor is worth Rs.4,00,000/- the Operational Creditor should not be allowed to oppose the move or question the wisdom of the stakeholder Consultation Committee members.
7. By way of this application the Applicant further seeks to question the propriety of the order dated 10.10.2023 on the ground that there is no finding whatsoever in regard to whether the liquidator is at all permitted to settle an actionable claim in Regulation 32, 32A and 37A.
- 8. Submissions of the Respondent Liquidator:**
- 8.1. Per Contra Learned Senior Counsel Mr. Joy Saha, appearing for the respondents would vehemently oppose the move as it seeks a review of the order dated 10.10.2023.

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- 8.2. Further Contention is that, the Applicant has no locus to file the said application as it is not a stakeholder of the Corporate Debtor and was only a shareholder of the Corporate Debtor to the extent of 26.50% equivalent to 1,99,92,137 shares in the Corporate Debtor.
- 8.3. Further that, this Application is barred by the principles of res judicata, issue estoppel, estoppel and thus no order can be passed in the said application for this Adjudicating Authority has already decided and adjudicated upon in IA 1317/KB/2023 in the issues which have been sought to be re-agitated by the Applicant now.
- 8.4. That the Applicant in I.A(IB) No.1317/KB/2023 had challenged the decision to settle the contractual dispute with National Highway Authority of India (Respondent No.2) under the “Vivad se Vishwas II- (Contractual Disputes)” scheme which was introduced by the Ministry of Finance, Government of India, Department of Expenditure, Procurement Policy Division dated May 29, 2023.
- 8.5. This Tribunal has already considered the alleged ground that it will cause loss to the Corporate Debtor to the tune approximately Rs.500 crores and has rejected the contention as such the issue now sought to be agitated by the Applicant is barred by res-judicata and principles of estoppel and issue estoppel, even otherwise the purported case sought to be made out by the Applicant of the Corporate Debtor suffering alleged loss of Rs.500 crores is also incorrect, false, fictitious and a fanciful imagination of the Applicant.
- 8.6. It is contended that the Scheme is beneficial for the interest of the Corporate Debtor as on date the books of the Corporate Debtor show only one asset which is an immovable property of 230 sq mt Land with a Liquidation Value of approx. 9.80 lacs situated at Mauza Zaap,

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Taluka Singhagad, Raigad, Maharashtra. The Liquidator has already taken steps twice for inviting bids under the e-auction for the said immovable property and insofar as the arbitral award dated October 2, 2017 was concerned, the said award was a contingent asset which may or may not be finally sustain after the legal challenge is over to be construed as an asset in the books of the Corporate Debtor.

**8.7. The summary of the award dated October 2, 2017 is the following:**

- i. Principal sum awarded under the awarded to the Corporate Debtor Rs.182,35,26,479/-
- ii. Principal sum awarded to NHAI under the said award is Rs.5,84,67,397/-as counter claim;
- iii. Therefore, after giving consideration/adjustment for the counter claim which has been awarded in favour of NHAI, the net principal amount which the Corporate Debtor was entitled to under the arbitral award would be Rs.176,50,59,082/-;
- iv. The arbitral award provides for interest to be paid to the Corporate Debtor at the rate of 8% per annum from January 1, 2015 till realisation. A chart has been prepared to show the summary of the award upon considering the claim and the counter claim which has been awarded by the Learned Arbitrator, copy thereof is annexed hereto and marked with the **“letter R-3”**.

8.8. That all the four lenders of the Corporate Debtor had participated in the said Stakeholders Consultation Committee meeting on July 10, 2023 and had requested the liquidator to proceeded to take steps under the said scheme as the same will ultimately be beneficial to the interest of the Corporate Debtor and 100%

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members of the SCC had agreed and decided that the Corporate Debtor should opt under the “Vivad se Vishwas II-(Contractual Disputes)” scheme for settlement of the arbitral award. On July 25, 2023 the liquidator had submitted its claim under the said scheme which was accepted by NHAI/respondent No.2 on September 20, 2023 and NHAI had submitted an offer of Rs.200.25 crores.

8.9. Further that, the application is not maintainable either in law or in facts and is now infructuous because of the subsequent developments which had taken place after the order dated October 10, 2023 was passed by this Adjudicating Authority.

- i. The liquidator had accepted the offer of NHAI dated September 20, 2023.
- ii. On November 6, 2023 the liquidator had filed an application before the Hon'ble High Court of Delhi at New Delhi under Section 151 of the Code of Civil Procedure to withdraw the pending petition under Section 34 of the Arbitration and Conciliation Act, 1996 in terms of the scheme.
- iii. On November 17, 2023 the settlement agreement was signed between the respondent no.2 and the Corporate Debtor represented by the Liquidator.
- iv. NHAI had also filed an application for withdrawal of the Section 34 petition which was filed by the NHAI Authorities before the Hon'ble High Court of Delhi at New Delhi. Finally, by the two separate orders both dated December 4, 2023 passed by the Hon'ble High Court allowed the withdrawal

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applications making it clear that the parties will be bound by the terms of settlement dated November 17, 2023.

- v. On December 21, 2023 and March 19, 2024 the NHAI Authority has credited to the account of the Corporate Debtor a total sum of Rs.196,24,68,761/- after deducting TDS of Rs.4.01 crores.
- vi. The security which was furnished by the NHAI Authority of a sum of Rs.187.5 crores was allowed to be withdrawn together with interest accrued in favour of the NHAI Authority and the execution proceedings were disposed of in view of the settlement.
- vii. At the sixth meeting of the SCC, held on December 26, 2023 it was resolved that the amount which was received from the NHAI Authorities under the scheme during the liquidation process would be distributed in accordance with Section 53 of the IBC Code between all the stakeholders after deducting the insolvency resolution process costs, estimated liquidation costs and liquidator fees.
- viii. In terms of the decision taken in the 6<sup>th</sup> SCC meeting disbursement had taken place to all the stakeholders on or about December 27, 2023, December 28, 2023, March 30, 2024 and April 4, 2024 will appears from documents annexed as "R-16".

9. The rival contentions are noted.



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10. It is trite, axiomatic and settled law that this Tribunal lacks power of review of its own order.
11. The order was rendered as the Stakeholders Consultation Committee had agreed to settle the claim under the Scheme.
12. The Order dated 10.10.2023 has not been challenged with the higher form, and has thus attained a finality and has been acted upon.
13. As such, the present application **IA No. 2035/(KB)/2023** is not maintainable and it is thus **dismissed**.
14. Further, being frivolous and speculative in nature a cost of Rs.5,00,000/- is imposed upon the Applicant to be paid to the Defence Fund of India. This cost imposed in terms of Rule 149 read with Rule 11 of NCLT Rules, 2010.
15. **C.P. No. 2074/KB/2019** for further consideration on **27.06.2024**.
16. The Registry is directed to send e-mail copies of the order forthwith to all the parties and their Ld. Counsel for information and for taking necessary steps.
17. Certified Copy of this order may be issued, if applied for, upon compliance of all requisite formalities.

**D. Arvind  
Member (Technical)**

**Bidisha Banerjee  
Member (Judicial)**

**Signed on this, the 17<sup>th</sup> May, 2024**

SG, Steno