

IN THE NATIONAL COMPANY LAW TRIBUNAL: NEW DELHI
PRINCIPAL BENCH

ITEM No. 3
(IB)-25(PB)/2018

IN THE MATTER OF:

ICICI Bank Limited Petitioner/Applicant

v.

ESSAR Power Jharkhand Ltd Respondent

Order U/s. 7 of Insolvency & Bankruptcy Code (IBC), 2016 (Liq.)

Order delivered on 16.10.2023

CORAM:

SH. ASHOK KUMAR BHARDWAJ
HON'BLE MEMBER (JUDICIAL)

SH. AVINASH K. SRIVASTAVA
HON'BLE MEMBER (TECHNICAL)

(HEARING THROUGH PHYSICAL MODE & VC)

PRESENT:

For the Applicant : Sr. Adv. Sanjiv Sen, Adv. Samrat Sengupta,
Adv. Siddhant Jayswal, Adv. Anjali Singh, Adv.
Radha Gupta

For the Respondent : Samrat Chowdhury Advocate, Adv. Sumesh
Dhawan, Adv. Vatsala Kak, Adv. Ankita
Bajpai, Adv. Rajeev Kumar

For the Liquidator : Adv. Abhishek Anand, Adv. Sanampreet
Singh, Adv. Dhiraj Mhetre, Adv. Smiti Tiwari,
Adv. Manpreet Lamba, Adv. Shivani Sharma

ORDER

IA-2343/2021 & IA-3107/2020

Apparently, the ex. Board of Director(s)/Promoter(s) have not been impleaded as respondents in the present application. As can be seen from Section 66 of IBC, 2016, the proceedings in terms of the provision need to be instituted against the ex. Board of Director(s)/Promoter(s). Confronted with the situation, Mr. Abhishek Anand, Ld. Counsel appearing for the Applicant seeks an opportunity to amend the Memo of Parties and implead the ex. Board of Director(s)/Promoter(s) as respondent qua the petition. As prayed by him, one week's time is granted for doing the impleadment of ex. Board of Director(s)/Promoter(s) as Respondents qua the petition.

Ld. Counsel for the Applicant would serve notice upon the newly impleaded Respondents by all modes returnable by 22.11.2023.

Affidavit of service be filed within one week. Newly impleaded Respondents are directed to file their reply, if any, within two weeks.

Rejoinder, if any, be filed within one week thereafter. List the matter on 22.11.2023.

IA-1536/2022,

There is no appearance on behalf of the Respondent i.e. Central Warehousing Corporation. The brief issue espoused in the captioned petition is that certain assets viz machines and equipment of the Corporate Debtor were lying in the premises of CWC which could not be removed by the RP, thus the same could be sold by the Respondent and the proceed thereof has been retained by them. The further plea espoused is that certain more assets are also lying in the CWC and the Applicant herein needs to be allowed to remove the same. The issue is brief and need to be adjudicated at the earliest.

Issue fresh notice to the CWC by all modes, returnable by 22.11.2023.

Affidavit of service be filed within one week. CWC is directed to file its reply, if any, within two weeks. It is made clear that in the event of non-appearance of Respondent i.e. CWC, application would be decided on the basis of the pleadings and the material available on record.

Rejoinder, if any, be filed within one week thereafter. List the matter on 22.11.2023.

Appeal (IBC)- 40/2023

The Applicant in this **Appeal (IBC)- 40/2023** has filed an application for condonation of delay in preferring the Appeal bearing no. 40/2023 (**@ page 191-195 of Appeal (IBC)- 40/2023**) and contended that it could be prevented from approaching this Adjudicating Authority within prescribed period of limitation as the appellant being situated at Calcutta, the procurement of the documents and handing over the same to the Ld. Counsel for preparing the appeal could take some time. It is also the plea espoused on behalf of the appellant that the Registry of this Tribunal was closed from 17.06.2023 to 02.07.2023.

Mr. Abhishek Anand, Ld. Counsel appearing for the Liquidator opposed the plea and submitted that the stand taken in para 4 of the application is not correct as during the aforementioned period, though the NCLT was observing vacations but

the Registry was functioning and all sorts of filing whether urgent or ordinary were accepted.

Though the submission raised on behalf of the Liquidator are correct and the ground raised on behalf of the Applicant for condonation of delay with reference to the functioning of the Registry during the aforementioned period cannot be accepted, but, we cannot be oblivious to the fact that the Applicant is an instrumentality of the State and when any legal proceedings are instituted on behalf of the State, the decision does not vest with a single individual, but a well knitted mechanism is involved to take such a decision. The movement of the file from one authority to other unavoidably consume some time. In the wake, we need to apply a criteria different from the one applicable to individual, while examining an application for condonation of delay preferred on behalf of the State/instrumentality of the State. Such is the view taken by the Hon'ble Supreme Court in **State Of Bihar & Ors vs Kameshwar Prasad Singh & Anr (Special Leave Petition (civil) 10653 of 1998)** relevant portion of which reads thus:

"It is notorious and common knowledge that delay in more than 60 per cent of the cases filed in this Court - be it by private party or the State - are barred by limitation and this Court generally adopts liberal approach in condonation of delay finding somewhat sufficient cause to decide the appeal on merits. It is equally common knowledge that litigants including the State are accorded the same treatment and the law is administered in an even-handed manner. When the State is an applicant, praying for condonation of delay, it is common knowledge that on account of impersonal machinery and the inherited bureaucratic methodology imbued with the note-making, file pushing, and passing-on-the buck ethos, delay on the part of the State is less difficult to understand though more difficult to approve, but the State represents collective cause of the community. It is axiomatic that decisions are taken by officers/agencies proverbially at slow pace and encumbered process of pushing the files from table to table and keeping it on table for considerable time causing delay - intentional or otherwise - is a routine. Considerable delay of procedural red-tape in the process of their making decision is a common feature. Therefore, certain amount of latitude is not impermissible. If the appeals brought by the State are lost for such default no person is individually affected but what in the ultimate analysis suffers, is public interest. The expression 'sufficient cause' should, therefore, be considered with pragmatism in

justice-oriented process approach rather than the technical detention of sufficient cause for explaining every day's delay. The factors which are peculiar to and characteristic of the functioning of pragmatic approach in justice oriented process. The court should decide the matters on merits unless the case is hopelessly without merit. No separate standards to determine the cause laid by the State vis-à-vis private litigant could be laid to prove strict standards of sufficient cause. The Government at appropriate level should constitute legal cells to examine the cases whether any legal principles are involved for decision by the courts or whether cases require adjustment and should authorise the officers to take a decision to give appropriate permission for settlement. In the event of decision to file the appeal needed prompt action should be pursued by the officer responsible to file the appeal and he should be made personally responsible for lapses, if any. Equally, the State cannot be put on the same footing as an individual. The individual would always be quick in taking the decision whether he would pursue the remedy by way of an appeal or application since he is a person legally injured while State is an impersonal machinery working through its officers or servants." "It is notorious and common knowledge that delay in more than 60 per cent of the cases filed in this Court - be it by private party or the State - are barred by limitation and this Court generally adopts liberal approach in condonation of delay finding somewhat sufficient cause to decide the appeal on merits. It is equally common knowledge that litigants including the State are accorded the same treatment and the law is administered in an even-handed manner. When the State is an applicant, praying for condonation of delay, it is common knowledge that on account of impersonal machinery and the inherited bureaucratic methodology imbued with the note-making, file pushing, and passing-on-the buck ethos, delay on the part of the State is less difficult to understand though more difficult to approve, but the State represents collective cause of the community. It is axiomatic that decisions are taken by officers/agencies proverbially at slow pace and encumbered process of pushing the files from table to table and keeping it on table for considerable time causing delay - intentional or otherwise - is a routine. Considerable delay of procedural red-tape in the process of their making decision is a common feature. Therefore, certain amount of altitude is not impermissible. If the appeals brought by the State are lost for such default no person is individually affected but what in the ultimate analysis suffers, is public interest. The expression 'sufficient cause' should, therefore, be considered with pragmatism in

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Also, in **State Tax Officer (1) Vs. Rainbow Papers Limited (Civil Appeal No. 1661/2020)**, Hon'ble Supreme Court viewed that the timeline stipulated in Code is directory and not mandatory. Although, the view taken in the Rainbow could be watereddown by Hon'ble Supreme Court in **Paschimachal Vidyut Vitran Nigam Limited v. Raman Ispat Private Limited (Civil Appeal No. 7976 of 2019)** but that is on the proposition as to whether the State can be treated as a secured creditor or not. The view taken by the Hon'ble Supreme Court in Rainbow Vs. State Tax Officer regarding examination of the claim of the State on merit could not be reversed in the subsequent judgment by Hon'ble Supreme Court in Pashimanchal Vidyut Vitran Nigam Limited. The relevant excerpt of judgment (Rainbow) dealing with issue of delay (ibid) regarding the proceeding instituted on behalf of the State reads thus:-

" We are constrained to hold that the Appellate Authority (NCLAT) and the Adjudicating Authority erred in law in rejecting the application/appeal of the appellant. As observed above, delay in filing a claim cannot be the sole ground for rejecting the claim."

Only on the ground that Appeal-40/2023 is preferred by an instrumentality of State, the delay in preferring the same is condoned subject to payment of cost of Rs. 25,000/- to be deposited in Prime Minister's National Relief Fund. IA for condonation of delay stands allowed accordingly.

As can be seen from the order dated 10.05.2023 passed in IA-5281/2020, the liquidator was directed to verify the claim of the appellant in terms of the provisions of IBC, 2016, The operative portion of the order reads thus:-

Heard Mr. Abhishek Anand, Ld. Counsel for the Liquidator and Mr. Sanjiv Sen Ld. Sr. Counsel for the Board of Trustees for the Port of Kolkata. Though the matter was argued at length, Mr. Sanjiv Sen pointed out that Form-C, Column-8 does not disclose whether security interest is relinquished or he is enforcing security interest. Ld. Counsel for Liquidator argued that from the letter of the liquidator dated 11.03.2020 and the subsequent request letter dated 13.06.2020 by the Applicant i.e. Board of Trustees for the Port of Kolkata to which a response has been given by the Liquidator on 25.06.2020, it is clear that the liquidator has taken a decision based on the Form-C.

Be that as it may, Mr. Sanjiv Sen now states that such decision is not clear and precise as to whether the status of the Port of Kolkata is a secured or unsecured creditor and therefore, an opportunity should be given to the Port of Kolkata to go before the liquidator and make a claim in the light of what they have already expressed.

The provision of Code more particularly sections 38, 39, 40, 41 & 42 provide for certain manner of admission or rejection of the claim based on verification of such claims.

In this case there is a plea of ambiguity raised by the applicant which is denied by the Counsel for the liquidator.

In order to put this issue at rest, we remand the matter to the liquidator to verify the claim in terms of the provisions of Code and communicate that decision to the Applicant who is at liberty to pursue the matter thereafter in accordance with law. IA-5281/2020 stands disposed of.

In the wake, the Liquidator communicated its decision regarding the claim of the Appellant in terms of the Email dated 21.06.2023. Though the liquidator admitted the claim of the appellant for an amount of Rs. 2,49,90,23,647/- as operational creditor but regarding its claim to be treated as secured operational creditor, the liquidator viewed that the security interest was not verifiable under

the means and mechanism in the relevant provision of the IBC, 2016 read with the relevant provisions of IBBI (Liquidation Process) Regulations, 2016, thus the claim of the appellant to be treated as secured operational creditor as also its claim over certain security interest was mixed. The relevant portion of the Email dated 21.06.2023 reads thus:-

“

In view thereof and basis the information, documents and clarifications received from you and further to verification of the same, the undersigned would again like to update you that your claim of Rs.249,90,23,647/-, has been admitted in full based on the books of accounts of the Corporate Debtor and the supporting documents provided along with your claim.

Further, with respect to the KoPT's purported security interest over the assets of the Corporate Debtor, kindly note that the said security interest is not verifiable under the means and mechanism mentioned in the relevant provisions of the Insolvency and Bankruptcy Code, 2016 ("Code") read with the relevant provisions of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 ("Liquidation Regulations") and thus, KoPT's claim of purported security interest over the assets of the Corporate Debtor is rejected. Accordingly, the claim of KoPT is admitted under the category of "Unsecured Operational Creditor".

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The understanding of the Email by Mr. Sen, Ld. Sr. Counsel appearing for the Appellant is that the Liquidator tried to convey that there was no provision in IBC, 2016 as also in IBBI (Liquidation Process) Regulations, 2016, in terms of which the Liquidator could verify the claim espoused by the appellant as secured operational creditor, on the other hand, the understanding of Mr. Abhishek Anand, Ld. Counsel for the Liquidator of the same paragraph is that the Liquidator did the exercise to do the verification but with reference to the provision of the Code (ibid) and the extant regulations, there was no material on record to arrive at a conclusion that the Appellant could have security charge over any of

the property of the Corporate Debtor. The entire dispute in the appeal is regarding understanding and interpretation of aforementioned paragraph of the Email dated 22.06.2023 sent by the Liquidator to the Appellant, conveying its decision regarding the claim of the appellant.

As far as the issue of concluding/ascertaining the claim of the claimant either in CIRP or in liquidation process, indubitably, the same needs to be verified with reference to the books of accounts of the Corporate Debtor and with due deference to the provision of Section 39 and 52(2) of IBC, 2016 read with Regulation 21, 22 & 23 of IBBI (Liquidation Process) Regulations, 2016. If after verification of the claim with reference to the documents/records referred to in Sections 39 and 52 (2) of the Code as also in Regulation 21 of IBBI (Liquidation Process) Regulations, 2016, the Liquidator arrived at a conclusion that the claim of the claimant is not established, there would not be any scope for the Adjudicating Authority to interfere with such decision. Nevertheless, in the present case the understanding of Mr. Sen, Ld. Sr. Counsel appearing for the Appellant is that the liquidator refused to verify the claim. As has been noted hereinabove, the entire controversy is with reference to understanding an interpretation of the word, “verifiable’ used in 9th line of Email dated 21.06.2023.

Mr. Abhishek Anand, Ld. Counsel appearing for the Liquidator could not point out any analysis or discussion by Liquidator regarding the decision arrived at by it. Had the liquidator indicated that it had referred to the books of accounts/records of the Corporate Debtor and after verification of the same, he could not be satisfied that the Appellant herein has any security interest, there could be no scope for us to interfere with his decision. Nevertheless, the language of the expression used in the Email is quite vague and nebulous. In the wake we are left with no option but to dispose of the appeal with the direction to the Liquidator/Respondent to verify the claim of the Applicant with reference to the books of accounts/records of the Corporate Debtor and with due deference to the provision of Section 39 & 52 (2) of IBC, 2016 read with Regulation 21, 22 & 23 of IBBI (Liquidation Process) Regulations, 2016. The appeal stands disposed of accordingly.

The status quo regarding the property over which the appellant has claimed security charge would remain in the operation for a period of one week after the decision of the Liquidator is received by the Applicant.

New IA-5427/2023

This is the 12th monthly status report and the same is taken on record subject to just exceptions. Registry is hereby directed to put this report before the Bench at the time of final disposal.

IA-5427/2023 stands disposed of.

-Sd/-
(AVINASH K. SRIVASTAVA)
MEMBER (TECHNICAL)

-Sd/-
(ASHOK KUMAR BHARDWAJ)
MEMBER (JUDICIAL)

16.10.2023
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