

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) Insolvency No. 749 of 2020

IN THE MATTER OF:

**Phoenix ARC Private Limited
Trustee of Phoenix Trust FY 16-18**

Appellant

Versus

Kotak Mahindra Prime Limited & Anr

Respondents

Present:

**For Appellant : Mr Vikram Wadehra, Ms Vidushi Chokan and Ms
Smriti Churiwal, Advocates.**

For Respondent : None

ORDER
(Through Virtual Mode)

03.09.2020 The Appellant has filed this Appeal against the order passed by the Adjudicating Authority/National Company Law Tribunal, Kolkata Bench, Kolkata in C.P.(I.B.) No.1503/KB/2018, dated 06th July 2020, whereby the Adjudicating Authority has issued direction to the Resolution Professional to reconsider the claim submitted by the Applicant /Financial Creditor under the provisions of Code & Regulations and also against the direction to the R.P. to treat the payment of EMIs received by the Applicant/ Financial Creditor, as adjusted against the claim of the Applicant, with a further direction that the remaining amount of loan will be considered and admitted by the R.P., after verification of the claim submitted by the Applicant.

Appellant contends that impugned order was passed on 06th July 2020. A free copy was not received by the Appellant. However, the Appellant was informed of the said Impugned Order by the Respondent No.2/Resolution

Professional vide an e-mail dated 11th August 2020, and this Petition is filed on 21st August 2020.

The Applicant has filed IA No.2011 of 2020 for Condonation of delay, due to unprecedented situation, arising out of the spread of Covid-19 pandemic and the prevailing circumstances and on account of lockdown/restrictions, which affected the functioning of the Courts/Tribunals. The Appellant thus could not apply for a certified copy of the Impugned Order, and therefore, the Appeal could be not filed within 30 days of the order.

It is essential to mention that the Appellant has preferred this Appeal against the order dated 06th July 2020 on 21st August 2020. Appellant contends that due to Covid-19 situation and lockdown restrictions by the Government, he could only get a certified copy of the order on 11th August 2020. After that, the Appeal is filed on 21st August 2020. Thus it appears that there is no delay in filing the Appeal.

Appellant has challenged the impugned order whereby the Adjudicating Authority has issued the following directions:

“i) The R.P. is directed to reconsider the claim submitted by the Applicant in accordance with the provisions of the Code and Regulations and result of verification is to be intimated to the Applicant.

ii) The Applicant and the R.P. are directed to treat the payments of EMIs received by the Applicant as ADJUSTED against the claim of the Applicant, and the remaining amount of

loan will be considered and admitted by the R.P, after verification of the claim submitted by the Applicant.”

(verbatim copy)

As far as the first direction is concerned, it is only a direction to the R.P., to reconsider the claim submitted by the Applicant in accordance with the provisions of the Code and Regulations. The said directions cannot be treated as an order passed by the Adjudicating Authority. This is a general direction whereby the Adjudicating Authority has directed the Resolution Professional to reconsider the claim of the financial creditor, as per Rules and Regulation. Thus, no Appeal lies against the said direction.

As far as the second direction is concerned, it is about treating payments of EMIs received by the Financial Creditor during the moratorium, as adjusted against the claim. It is also clarified that the remaining amount of the loan will be considered and admitted by R.P. after verification of claim submitted by the Applicant. It is essential to mention that on 06th November 2019 the Applicant/Financial Creditor filed the Petition filed under Section 7 of the Insolvency & Bankruptcy Code, 2016, for the initiation of Corporate Insolvency Resolution Process. The public announcement was made on 13th November 2019. After that on 04th December 2019, the Resolution Professional intimated the Bank of the Corporate Debtor to close all active ECS Accounts of the Corporate Debtor and further directed that no further ECS should be debited from the accounts of the Corporate Debtor.

Appellant further contends that from 05th December 2019 to 05th March 2020 total ECS amounting to Rs.2,24,792/- (Rupees Two Lakhs Twenty Four

Thousand Seven Hundred Ninety-Two only) was deducted from the Corporate Debtor. Despite, instructions from the Resolution Professional in violation of the moratorium order passed under Section 14 of the I&B Code.

The Adjudicating Authority vide impugned order allowed the submissions of the claim by Respondent No.1 after due adjustment of the sums received by them during the moratorium period.

It is pertinent to mention that CIRP is going against the Corporate Debtor. During CIRP if the Resolution Professional finds that any preferential transaction is made, then he is at liberty to file an Application under Section 43 of the Code. At this stage, no adverse interference can be drawn, based on deduction of EMI by the bank, for which loan was sanctioned, and an agreement was signed before initiation of CIRP, and EMI was deducted by the bank as per the loan agreement. Thus, we are of the considered opinion that the Appeal is premature and liable to be rejected.

There is no reason for interference in the impugned order by this Appellate Tribunal. Thus the Appeal is dismissed at the threshold.

[Justice Bansi Lal Bhat]
Acting Chairperson

[V.P. Singh]
Member (Technical)

[Dr. Alok Srivastava]
Member (Technical)

pks/gc

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT)(Insolvency) No. 749 of 2020

(Arising out of Impugned Order dated 06.07.2020 passed by the Adjudicating Authority/National Company Law Tribunal, Kolkata Bench, Kolkata in IA (I.B.) No. Nil of 2020 in Company Petition No. 1503/KB/2018)

IN THE MATTER OF:

An application under Section 61 of the Insolvency and Bankruptcy Code, 2016

IN THE MATTER OF:

PHOENIX ARC PRIVATE LIMITED
(TRUSTEE OF PHOENIX TRUST FY 16-18)

...APPELLANT

VERSUS

KOTAK MAHINDRA PRIME LIMITED

...RESPONDENT NO. 1

MR. JITENDRA LOHIA
RESOLUTION PROFESSIONAL
FOR SUNITTI PAPERS PRIVATE LIMITED

...RESPONDENT No. 2

Present:

For Appellant: Mr. Jaivir K Sidhant

For Respondents:

ORDER

(3rd September, 2020)

{Per: Alok Srivastava, Member (Technical)}

1. The instant Comp App (AT)(INS) no. 749/2020 has been filed by the appellant who is aggrieved by order dated 6/07/2020 (hereinafter called the Impugned Order) passed by Hon'ble National Company Law Tribunal, Kolkata Bench (hereinafter called the Adjudicating Authority) in un-numbered IA (IB) No. Nil/KB/2020 in CP (IB) No. 1503/KB/2019. The appeal has been filed by the authorised representative of the Appellant Mr. Harsh Magia.

2. Though the Impugned Order was passed and pronounced on 06/07/2020, the appellant has contended that the copy of Impugned Order was first available to the Appellant on 11/8/2020 through an email from Respondent no. 2. Accepting the contention of the Appellant, the appeal is found to be within limitation.

3. The main ground of the appeal as stated in the appeal memo is that the application under section 7 filed vide C.P. (I.B.) No. 1503/KB/2018 was admitted by the AA on 06.11.2019, and order imposing moratorium was a part of the same order of admission of application under section 7 of IBC, 2016. Shri Jitendra Lohia was appointed as Interim Resolution Professional (hereinafter referred as IRP) in the Impugned Order. He communicated the order regarding moratorium to all concerned including to the Branch Manager, ICICI Bank, RN Mukherjee Branch, Kolkata through letter dated 4/12/2019 to close all the active ECS against the A/C No. 00060022288 of Sunitti Papers Private Limited and to not make any payment from the said account unless the same is approved or directed by the IRP. The IRP also wrote another email to Respondent no. 1 on 31.03.2020 and further emails to Respondent No. 1 and ICICI Bank on 1.04.2020, 15.04.2020 and 01.05.2020 reminding them of the currency of the moratorium and to refund the amount of Rs. 2,24,792 received by ICICI Bank through four ECSs during the currency of the moratorium. One of these emails asked Kotak Mahindra Prime Limited to file their claim as Financial Creditor in the CIRP of Sunitti Papers Private Limited. Another reminder through email was sent on 01.05.2020 by the RP to the Respondent No. 1. These emails continuously asked Kotak Mahindra Prime Limited and ICICI Bank to refund the amount realised during the moratorium period to the account of Corporate Debtor.

4. In response to the email received from RP and suggestion made therein, Kotak Mahindra Prime Limited filed its claim vide email dated 01.05.2020. This request was not accepted by the RP since it was beyond the 90 days' time limit specified in the procedure for submission of claims. It is seen from documents filed with appeal paperbook that neither Respondent No. 1 nor ICICI Bank refunded the amount to the CD's account that was realised through ECS during the moratorium period in the account of the corporate. Aggrieved by decision of RP rejecting its claim Kotak Mahindra Prime Limited filed an application dated 15.05.2020 before the AA (NCLT, Kolkata Bench) for acceptance and admission of their claim as secured financial creditor.

5. Aggrieved by this action of the RP the Respondent no 1 filed an application before the AA for accepting and admitting his claim as financial creditor. The RP also filed

an application before the AA for seeking orders for direction to Respondent No. 2 (Kotak Mahindra Prime Limited) to refund the amount of Rs. 2,24,792 that he had been continuously asking for. The AA vide order dated 06.07.2020 accepted the prayer of Kotak Mahindra Prime Limited for considering its claim as Financial Creditor and also ordered that the amount realised by Kotak Mahindra Prime Limited through ECS during the moratorium period be adjusted against its claim.

6. In compliance of this order the RP accepted the claim of Kotak Mahindra Prime Ltd. Phoenix Arc Private Ltd. (which is a Financial Creditor which had submitted its claim in time to the Committee of Creditors) has preferred this appeal before the NCLAT on the ground that preferential treatment has been given to the Respondent No. 1. The Impugned Order is, therefore challenged 'inasmuch as it permits the amount received by the Respondent No. 1 after the imposition of the moratorium' and the Respondent No. 1 may be directed to refund the amount of Rs. 2,81,750 (Rupees Two Lakhs Eighty One Thousand Seven Hundred and Fifty only) as received by the Respondent No. 1 and the same shall for part of CIRP.

7. The Ld. Counsel of Appellant was heard on the appeal and grounds mentioned therein on the first date. The appellant's counsel has put forth the argument that Impugned order insofar as it relates to adjustment of the amount paid to the ICICI bank is in contravention of the conditions imposed after the moratorium has come in force and, therefore, his case has merit and should be heard by the Hon'ble NCLAT. He has put forth the argument that the order the AA amounts to giving preferential treatment to the Respondent No. 1 in that it allows the amount collected by him to be kept by him and to be adjusted against his claim whereas the claim of other creditors have yet to be considered.

8. The main issue in this appeal is whether, during the currency of the moratorium which has been imposed through Section 14 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as IBC, 2016), can any amount be released or realised from the total assets of the Corporate Debtor and whether the AA was justified in allowing the amount debited from the Corporate Debtor's account in ICICI Bank. To decide whether prima facie case exists in favour of the appellant the issues that are relevant at this stage appear to be:

(1) Can preferential treatment be given to any creditor (financial or operations) once order under Section 14 regarding moratorium has been imposed? and

(2) Does the Adjudicating Authority or Resolution Professional enjoy any latitude in according preferential treatment to any creditor while the CIRP is going on and the liabilities of various stakeholders are being considered?

9. After hearing the arguments of the Ld. Counsel for Appellant it would be useful to look at the statutory provisions and any judgment or observation on these issues by the Hon'ble Supreme Court or NCLAT.

10. The Insolvency and Bankruptcy Code, 2016 contains the following provisions regarding the declaration of moratorium and public announcement after the admission of an application under any of the sections 7, 8, 9 or 10.

“13. (1) The Adjudicating Authority, after admission of the application under section 7

or section 9 or section 10, shall, by an order—

(a) declare a moratorium for the purposes referred to in section 14;

(b) cause a public announcement of the initiation of corporate insolvency

resolution process and call for the submission of claims under section 15; and

(c) appoint an interim resolution professional in the manner as laid down in section 16.

(2) The public announcement referred to in clause (b) of sub-section (1) shall be made immediately after the appointment of the interim resolution professional.

14. (1) Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely:—

(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

(b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;

(c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;

(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

(2) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.

(3) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

(4) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process:

Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.

11. A reading of the Sections 14 and 15 of the IBC, 2016 makes it clear that during the currency of moratorium the sanctity of maintaining the integrity of the assets of the Corporate Debtor is a sine qua non for the CIRP. Section 14(1)(b) prohibits 'transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein.' In view of the blanket prohibition mandated by Section 14 after the initiation of CIRP it stands to reason that any change in the conditions of assets from what existed on the date of initiation of CIRP is not permitted in the normal course. The section 14 also does not give any authority to the RP or AA to accord any preferential treatment to any creditor.

12. The legal position regarding the sanctity and integrity of the moratorium in the CIRP which, inter alia, requires maintaining of the assets of the corporate debtor in the same form as on the date of declaration of moratorium has been considered by Hon'ble Supreme Court, which had held as follows in Rajendra k. Bhutta vs.

Maharashtra Housing and Area Development Authority and Ors. (Civil Appeal No. 12248 of 2018):

“16. This is for the very good reason that when a moratorium is spoken of by Section 14 of the Code, the idea is that, to alleviate corporate sickness, a statutory status quo is pronounced Under Section 14 the moment a petition is admitted Under Section 7 of the Code, so that the insolvency resolution process may proceed unhindered by any of the obstacles that would otherwise be caused and that are dealt with by Section 14. The statutory freeze that has thus been made is, unlike its predecessor in the SICA, 1985 only a limited one, which is expressly limited by Section 31(3) of the Code, to the date of admission of an insolvency petition up to the date that the Adjudicating Authority either allows a resolution plan to come into effect or states that the corporate debtor must go into the liquidation. For this temporary period, at least, all the things referred to Under Section 14 must be strictly observed so that the corporate debtor may finally be put back on its feet albeit with a new management.” (emphasis supplied).

13. The statute and the judicial pronouncement (supra) do not allow any preferential treatment to be given to any particular creditor. If one creditor is given preferential treatment then others should also get it to provide them a level playing field and same treatment in the eyes of law. This would not only cause confusion in the eyes of possible Resolution Applicants thereby putting a spanner in the resolution of the company which is the ultimate objective under the IBC, 2016. It would also lead to the collapse of ‘waterfall mechanism’ regarding payment of liabilities to various stakeholders as is mandated and required under the IBC, 2016.

14. The discussion in above paragraphs make it clear that the statute does not offer any in-built scope for preferential treatment to be accorded to any creditor. In addition, the provision in Section 14 do not allow any latitude to either the RP or the AA to give preferential treatment to any creditor.

15. After a perusal of the appeal memo and prayer contained therein, the Impugned order, statutory position regarding moratorium and the pronouncement of Hon’ble Supreme Court in RajendraBhutta case (supra) it is clear that grounds exist for a full hearing to be accorded to the appellant after giving notice to the respondents and hearing both sides for a well-thought out and judicious decision. Hence, notices be issued to the respondents to be present in the tribunal and present their cases. The

appellant shall provide fees etc. for service alongwith full contact details including postal and email address of the respondents.

16. Through this order I most humbly beg to differ from the view held by my Hon'ble Colleagues in the Bench who have found the appeal fit for dismissal at this stage after hearing the appellant only. I feel that prima facie a case exists as put forth by the appellant and hence, in the interest of justice and for upholding the law as enumerated in IBC, 2016 a proper chance of hearing should be accorded to both the appellant and respondents before the case is finally admitted for hearing.

17. Matter be listed for hearing for admission (after notice).

(Dr. Alok Srivastava)
Member (Technical)

Appeals are dismissed in terms of the order rendered by majority of the Members comprising the Bench.

[Justice Bansi Lal Bhat]
Acting Chairperson

[V.P. Singh]
Member (Technical)

NEW DELHI

3rd September, 2020

AM