

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) (Ins) No.891 of 2020

[Arising out of Orders dated 20.07.2020 and 17.09.2020 passed by National Company Law Tribunal, New Delhi in I.A. No.3491(ND)/2020 in/and C.P. IB-2721/ND/2019]

IN THE MATTER OF:

Before NCLT

Before NCLAT

Greenopolis Welfare
Association
E-302,
Anupam Apartments,
East Arjun Nagar,
Delhi - 110032

Applicant
(in I.A.)

Appellant

Vs.

1. Three C Shelters
Private Limited
C-23 Greater Kailash
Enclave, Part – 1,
New Delhi 110048

Respondent
(Corporate Debtor)

Respondent No.1

2. Straight Edge
Contracts Pvt. Ltd.
Through the
Interim Resolution
Professional - (in CP/IB/1071/ND/2019)
Sh. Ranjit Kumar Verma
Ground Floor, 4,
Dayanand Vihar,
Main Vikas Marg,
Delhi - 110092

Applicant/
Operational Creditor
(in C.P. IB-2721/ND/2019)

Respondent No.2

For Appellant:

Mr. Piyush Singh, Mr. Aditya Parolia, Mr. Prateek Vats and Ms. Aditi Sinha, Advocates.

For Respondent:

Mr. Jayant K. Mehta, Mr. Pankaj Agarwal, Ms. Sonal Alagh, Ms. Shreya Kohli and Mr. Nikhil Jain, Advocates for R-1.
Mr. Amarpal, IRP
Mr. GP Madaan, Ranjeet Kumar Verma and Mr. Pranay Chitale (RP), R-2.

**Mr. Deepak Garg, Advocate for R-2.
Ms. Asmita Chaudhary, for Impleadment.
Mr. Sumedha Dang and Mr. Viabhav Gaggar,
for Interveners.**

J U D G E M E N T
(06th January, 2021)

A.I.S. Cheema, J. :

1. Appellant claims to be association representing 350 home buyers in the project Greenopolis of the Respondent No.1 - Three C Shelters Pvt. Ltd. (Corporate Debtor). The Appeal has been filed against the admission of Application under Section 9 of Insolvency and Bankruptcy Code, 2016 (IBC – in short) in C.P. IB-2721/ND/2019 dated 20th July, 2020 (Impugned Order No.1) (Annexure A-1 – Page 34) and against Order dated 17th September, 2020 (Page 34A – Impugned Order No.2) by which Order I.A. No.3491 of 2020 filed by the Appellant in the Petition was dismissed.

2. **Impugned Order No.1** is short Order which reads as under:-

“Heard the submissions made by the Operational Creditor as well as Corporate Debtor. Annexure A-10 which is affidavit of admission shows that on January 27, 2020, the Director of Three C Shelters Private limited. Mr. Girish Chander Joshi has confirmed that the Corporate Debtor has to pay to the Operational Creditor as per his claim. Therefore, the petition is allowed.”

Impugned Order No.2 is also short Order which reads as under:-

“I.A. No. 3491/2020: Application is without any merit. Hence dismissed.”

The above Orders have been challenged in this Appeal which was filed on 22nd September, 2020. Due to pandemic, objection regarding limitation of Impugned Order No.1 is ignored.

3. The Appellant claims that it is the largest Financial Creditor of Corporate Debtor and is aggrieved by the admission Order whereby Company Petition IB 2721(ND)/2019 was allowed “though to the relief of the Appellant, the Petition was not admitted”. It is claimed that the admission Order is perverse and devoid of merit. Appellant claims that Respondent No.1 – Three C Shelters Pvt. Ltd. – Corporate Debtor lured Appellant to book units in the project which was being developed by the Corporate Debtor and made false representations with regard to timely possession. The Order of CP (IB) No.2721/2019 which has been admitted by the admission Order is challenged on the ground that the Respondent No.2 – Straight Edge Contracts Pvt. Ltd., who filed the Application under Section 9 of IBC as Operational Creditor was itself a Corporate Debtor in another Petition **“Gupta Ji Electric Company vs. Straight Edge Contracts Pvt. Ltd.”** in IB No.1071/ND/2019 (other Petition – in short). That other Petition was admitted on 26th February, 2020. Appellant claims that in that Petition, the Respondent No.2 who was Corporate Debtor took contrary stand against Respondent No.1. The admission Order of that matter dated 26th February, 2020 (Annexure A-2 – Page 35) recorded that the present Respondent No.2 had assigned the debt which was owed to Gupta Ji to principal employer of present Respondent No.2.

The Appellant thus wants to claim that Respondent No.2 was not an Operational Creditor. It is also claimed that Respondent No.1 – Corporate Debtor launched the Greenopolis Projects in 2011 in collaboration with “Orris Infrastructure Pvt. Ltd.” and the project was of 38 towers and thousands of flats were to be developed by the Corporate Debtor in conjunction with Orris Infrastructure Pvt. Ltd. It is claimed that for fruitful CIRP (Corporate Insolvency Resolution Process), the Corporate Debtor cannot be subjected to the CIRP process alone since the project was being developed jointly with Orris Infrastructure. It is claimed that it is not feasible to only subject one participant into one CIRP. According to Appellant, there should be group insolvency of Respondent No.1 with Oriss Infrastructure.

4. The Appellant claims that Respondent No.2 – Operational Creditor could not have initiated insolvency proceedings against the Corporate Debtor as there was bar under Section 11(b) of IBC. Appellant stated that in the matter of M/s. Gupta Ji when the Appeal was filed, matter between the Respondent No.2 and Gupta Ji was settled in Company Appeal (AT) (Ins) No.388 of 2020. Respondent No.2 exited rigours of CIRP only on 13th March, 2020 and thus 12 months were not over as required by Section 11(b) of IBC.

5. The Appellant further claims and it is argued that the Impugned Order of admission is perverse as no reasons have been recorded and it is mechanical admission Order. The Appeal points out (para – 8(ii)) that

Respondent No.1 – Corporate Debtor who was under obligation to deliver the units to the Appellant in timely manner completely failed to do so. According to the Appellant, the Appellant had filed I.A.No.3491 of 2020 to bring the facts to the notice of Adjudicating Authority. The Adjudicating Authority failed to appreciate that there was collusion between the Respondents which was highlighted in the I.A. No.3491 of 2020. The Adjudicating Authority should have invoked Rule 11 of National Company Law Tribunal Rules, 2016 and invoked inherent powers to investigate the case which was made out by the Appellant. The prayer in Appeal is to set aside both the Impugned Orders and to take action against the Respondents. Prayer (d) states that this Tribunal should direct initiation of CIRP on a project-wise basis as per decision of this Tribunal in **“Flat Buyers Association Winter Hills Vs. Umang Realtech Pvt. Ltd.”** in Company Appeal (AT) (Ins) No.926 of 2019.

6. In the present matter, the Respondents 1 and 2 are now both under CIRPs, both represented through different Insolvency Resolution Professionals. There are also I.A.s 2742 and 2743 filed by Company named “Orissa Infrastructure Pvt. Ltd.” under Rule 11 of National Company Law Appellate Tribunal Rules, 2016 seeking intervention. There is I.A. 2605 of 2020 by one Dhruv Ranjan Verma claiming to be representing 120 home buyers seeking intervention and claiming that the CIRP should be continued.

7. Before proceeding further, it would be appropriate to make brief reference to the developments before the present Impugned Orders and also developments which have taken place after the Impugned Orders as well as during pendency of this Appeal. We are making short reference chronologically for appreciation.

Developments in short

8. The developments are as under:-

8.1 On 26th February, 2020, Application under Section 9 of IBC filed by M/s. Gupta Ji Electric Company (Operational Creditor) was admitted against M/s. Straight Edge Contract Pvt. Ltd. (Annexure A-2 – Page 35). Present Respondent No.2 was Corporate Debtor in that matter which we are referring as “earlier matter”.

8.2 On 13th March, 2020, the Appeal - Company Appeal (AT) (Ins) No.388 of 2020 filed in the earlier matter came up before this Tribunal and the same was disposed by the Order dated 13th March, 2020 (Annexure A-3 – Page 46) and MOU between present Respondent No.2 who was Corporate Debtor in that matter with M/s. Guptaji, the Operational Creditor in the earlier matter was recorded and the admission Order dated 26th February, 2020 was set aside and Gupta Ji withdrew that Application. Liberty was given to Gupta Ji and IRP (Insolvency Resolution Professional) in that matter to approach this Appellate Tribunal in case the Corporate Debtor in that matter (present

Respondent No.2) commits default in honouring the MOU. Thus at that point of time, the CIRP had ceased to exist, in CP IB No.1071/2019.

8.3 On 20.07.2020, the present Impugned Order No.1 came to be passed in IB 2721/ND/2019 in Application filed by M/s. Straight Edge Contracts Pvt. Ltd. as Operational Creditor against M/s. Three C Shelters Pvt. Ltd. which we have reproduced above. In the Cause Title, reference has been made to Section 7 of IBC which was error apparent as the Order refers to submissions made by Operational Creditor. (This and other mistakes in Order Adjudicating Authority corrected later on 14.10.2020 vide Annexure R-5 filed by Respondent No.1 with Reply).

8.4 One Sumita Gogoi Hazarika and another filed I.A. No.2970/2020 in IB No.2721/2019 and there was an Order passed on 27.07.2020 (Annexure 3 colly – Reply of R-1 – Diary No.23486). The said Order shows that, that Application was filed with reference to the present admission Order dated 20th July, 2020 and had come up before another Bench which observed and indicated that clarification and detailed Order was required to be considered as submitted by the Counsel for the Applicant. The Bench directed to place the matter before Bench which had passed Order dated 20th July, 2020.

8.5 On 6th August, 2020, the Appellant filed I.A. 3491/2020 in CP(IB) No.2721/2019. Copy of the Application is at Annexure A-4 – Page 57. It is stated that I.A. filed by Sumita was also similar.

8.6 On 17.09.2020, the I.A. No.3491/2020 filed by the Appellant came to be dismissed as without merits. However, I.A. No.2970/2020 filed by Sumita Gogoi, which is stated to be raising similar grounds was kept pending and came up before Adjudicating Authority on 23.09.2020, 30th September, 2020 and 7th October, 2020 (See Annexure – 3 colly of Reply of R-1).

8.7 On 22nd September, 2020, the Appellant filed present Appeal against both the Impugned Orders mentioned above.

8.8 On 28th September, 2020, the matter of Gupta Ji versus present Respondent No.2 had again come up before this Appellate Tribunal. Copy or the Order is at Annexure A-4 (Diary No.22923) of I.A. No.2547/2020 filed by the Appellant. The Order shows that in view of default and the liberty which had been given, the Operational Creditor in that matter, namely Gupta Ji Electric Company as well as the IRP had filed I.A.s and Contempt Case which came up and as the cheque issued had been dishonoured, the earlier Order of this Tribunal dated 13th March, 2020 (Annexure A-3) were recalled and Appeal was dismissed and Impugned Order dated 26th February, 2020 in that earlier matter was restored and the IRP was directed to proceed with CIRP from the stage it was when Order in Appeal was passed.

8.9 On 7th October, 2020, the I.A. No.2970/2020 filed by Sumita Gogoi (see Annexure – 3 colly of Reply of R-1) came to be dismissed.

8.10 On 14th October, 2020 (see Annexure R-5 in Reply of R-1), the Adjudicating Authority passed Orders in I.A. No.3079/2020 in IB 2721/2019 and corrected errors which had occurred in Impugned Order No.1. The Order passed was as under:-

“IA No.3079 of 2020

IA No.3079 of 2020 is heard and the application is allowed.

By this order the typographical errors of order dated 20.07.2020 are corrected:-

- (i) The word “Section 7” is replaced with “Section 9” in the order dated 20.07.2020.
- (ii) Annexure A10 which is an affidavit of admission is replaced with the words “Annexure A” to the affidavit of admission.
- (iii) the detailed order/final judgement will be uploaded within next three days.”

8.11. On 15th October, 2020, the Impugned Order No.1 and Impugned Order No.2 came up for consideration before this Appellate Tribunal when matter had come up for admission and after hearing Counsel for the Appellant and Respondent No.1, Notice was issued and it was directed “Meanwhile, till next date of hearing, the Impugned Orders are stayed”.

8.12 On 16th October, 2020, the Adjudicating Authority passed detailed Order/Judgement (Annexure R-6 – Reply of R-1) recording that vide Order dated 20th July, 2020, the Petition (2721/2019) was allowed

and the Order which was now being passed (on 16.10.2020) shall be read along with the Order dated 20th July, 2020 and Order dated 14th October, 2020. This Order dated 16th October, 2020 recorded reasons with regard to the operational debt, default and that Rajeev Baisoya duly authorized by the Corporate Debtor had filed Affidavit on 5th March, 2020 with e-mail dated 27th January, 2020 sent by Mr. Girish Joshi, Director of the Corporate Debtor admitting the dues. Further consequential directions were also issued with regard to appointment of IRP.

8.13 On 21st October, 2020, Appellant filed I.A. 2547/2019 claiming that the stay Order dated 15th October, 2020 passed by this Tribunal was conveyed to the staff of the Adjudicating Authority but still the detailed Order dated 16th October, 2020 came to be passed and that the Order dated 16th October, 2020 should be set aside. The I.A. sought action against IRP also.

Alleged Collusion

9. We have heard Counsel for the parties. Counsel for the Appellant has made submissions on the above lines and wants the Impugned Orders to be set aside. The Counsel for Appellant claims that there was collusion between the two Respondents and thus the admission Order was bad. The Counsel claimed that Respondent No.2 is not an Operational Creditor as Respondent No.2 had in the matter of Gupta Ji taken defence which is contradictory to the claim made in the present matter as Operational Creditor. Reference is made to the facts of that

earlier matter and it is argued that the admission Order dated 26th February, 2020 in the earlier matter recorded that the amount which was owed by the Respondent No.2 had been assigned to present Respondent No.1. It is argued that this shows that present Respondent No.2 – Operational Creditor was acting only as an intermediary.

10. We have seen the said Order dated 26th February, 2020 and the defence which was taken by Respondent No.2 in that matter. It has to be remembered that Respondent No.2 was Corporate Debtor in that matter. Para – 14 of earlier Order (Annexure A-2) recorded the defence of Respondent No.2 in earlier matter that it had entered into agreements with “M/s. Three C Shelters Pvt. Ltd. (present Corporate Debtor) and M/s. Three C Projects Pvt. Ltd.” collectively called “principal employer”. The defence recoded in para – 14(d), in the earlier matter was that the Corporate Debtor submitted that the debt of the Corporate Debtor had been assigned to the principal employer of the Corporate Debtor.

The Appellant is banking on such defence recorded in earlier matter. On such basis, collusion and fraud is alleged. We do not find any substance in such averments made by the Appellant. Present Application under Section 9 is undisputedly filed by the Respondent No.2 at a time when CIRP against the Respondent No.2 had been set aside on 13.03.2020, has to be appreciated on its own facts and documents. The definition of Financial Creditor in Section 5(7) and definition of Operational Creditor in Section 5(20) “includes” any person to whom the

debt has been legally assigned or transferred. This, however, does not apply to the definition of Corporate Debtor as found in Section 3(8). Section 3(8) states that “Corporate Debtor” means a corporate person who owes a debt to any person. Thus, when the definitions of Financial Creditor and Operational Creditor are read with the definition of Corporate Debtor, it is clear that while Financial Creditor and Operational Creditor can assign their debt, the same is not applicable to a Corporate Debtor. Thus no such defence can be taken to show existence of dispute. As such, even if Respondent No.2 had taken defence in earlier proceeding IB No.1071/2019 (where the Respondent No.2 was a Corporate Debtor), that it had assigned its debt to principal employer, that defence would have to be ignored. The claim of the Appellant trying to build a case of collusion and fraud is thus not appealing to us. Even if Respondent No.2, a Corporate Debtor had debts to pay of M/s. Guptaji, it can have debt of its own to recover from Respondent No.1 who is another Corporate Debtor.

CIRP against Respondent No. 1 maintainable

11. The other averment of the Appellant is that CIRP against Respondent No.1 alone would not be feasible without joining Orris Infrastructure Pvt. Ltd., now needs to be looked into. Although the Appellant claims (see para – 7.4) that there should be group insolvency of Respondent No.1 along with Orris Infrastructure, when there is no pending CIRP against Orris Infrastructure, such claim has got no substance. Orris Infrastructure has itself filed Application seeking

intervention pointing out proceedings which have taken place before Haryana Real Estate Regulatory Authority and High Court with the prayer that the amounts lying in Escrow Account in view of Orders of the High Court should be used only for the construction of Greenopolis Project. The IRP of the Corporate Debtor who has filed Reply (Diary No.23486) has stated (Reply para – 7.8) that it is denied that the development of the Greenopolis Project was in joint venture. IRP claims that there is no document in support. It is the Reply of IRP that Three C Shelters Pvt. Ltd. is the sole developer of the Greenopolis Project. Thus, we find that the contentions raised by the Appellant are not supported by documentary material and as regards the Intervention, Application filed by Orris Infrastructure, and the prayer made, it would be a matter for the IRP/RP to look into in the course of CIRP proceedings.

The Order Dated 20.07.2020 read with Order dated 16.10.2020

12. The other contention of the Appellant is that the Impugned Order is untenable and perverse as it is without reasons. We have also reproduced Impugned Order No.1 dated 20th July, 2020, which had errors in it which the Adjudicating Authority corrected vide Order dated 14th October 2020 (annexure R-5 of Reply of R-1) and then subsequently, detailed Judgements/Orders were passed on 16th October, 2020. As a matter of fact, the Adjudicating Authority should have avoided passing Impugned Order No.1, in the manner as it did. It would have been appropriate and proper that the Order as passed on 16th October, 2020 should have been passed on 20th July, 2020. The Petition which had

been moved for initiating CIRP under Section 9 of IBC was allowed on 20th July, 2020 and when the Petition was allowed, provisions of the Insolvency and Bankruptcy Code got attracted. Provisions require Adjudicating Authority to pass further consequential Orders like appointing of IRP, declaration of Moratorium, etc. It is inappropriate for Adjudicating Authority to pass Orders as it did on 20th July, 2020 and leave the rest in suspense till further Orders dated 16th October, 2020 were passed. Although the procedures of the Code of Civil Procedure do not strictly apply under Section 424 of the Companies Act, 2013, still the principles of natural justice, and other provisions of IBC required that proper and complete Order (as was done on 16.10.2020) should have been passed in the first instance itself. We are aware NCLT is overburdened. Still such procedure to pass Orders, as in the present matter, should be avoided.

13. The grievance of the Appellant appears to be that it was the biggest Financial Creditor and instead of acting on its Application, the Application of Respondent No.2 was admitted. Prayer – d of the Appeal also indicates that the Appellant also wants CIRP proceedings against the Respondent No.1 – Corporate Debtor. The IRP of Respondent No.1 has with Diary No.24141 filed list of Company Petitions which were moved by stakeholders including home buyers against the present Respondent No.1 – Corporate Debtor. It is a list of 22 petitions in which it appears that the Appellant also had filed CP No.1335 of 2019. Sumita Gogoi who

filed I.A. 2970/2020 in this matter was another Petitioner with CP No.503/2019. Intervener – Dhruv Verma in I.A. 2605/2020 also wants the CIRP to continue. Even if we set aside Impugned Order, there are others waiting against Respondent No.1 Corporate Debtor. When Respondent No.2 as Operational Creditor filed Petition/Application under Section 9 of IBC, the only consideration for Adjudicating Authority was to examine if there is operational debt due and default. It found the debt due of Rs.29,95,91,034/- was not disputed and passed Impugned Order 1 dated 20.07.2020 allowing the Petition. In such matter, after Petition was allowed, the Adjudicating Authority had no power left to review the Order dated 20.07.2020, especially so, on vague surmises of collusion. We do not see any purpose in setting aside on technical grounds the CIRP initiated. The Order dated 16th October, 2020 vide which Order the Adjudicating Authority has recorded reasons thus shows that there was material to show debt due claimed by the Respondent No.2 – Operational Creditor and default to seek CIRP against Respondent No.1. If the Application was complete, the same was required to be admitted.

14. The grievance raised by the Appellant is that the detailed Orders dated 16th October, 2020 were passed in spite of stay dated 15th October, 2020. For this, I.A. 2547/2020 is filed which relies on Annexure A-2 to say that the staff of the Adjudicating Authority was informed. Para – 2 of I.A. 2547/2020, in this regard, does not disclose the name or particulars

of any staff member. There is no reason why the said Order was not put on record by a proper application, if the Appellant was so interested. We would thus not find fault with the passing of detailed Order dated 16th October, 2020 which was indicated by the Adjudicating Authority in its Order dated 14th October, 2020 (Annexure R-5). The Adjudicating Authority cured defect and we do not wish to interfere on technical grounds, as it will serve no purpose. Record shows that both Respondents are now under CIRP and we would trust the IRPs/RPs to follow the law. As such, alleged collusion would be irrelevant, even otherwise.

The alleged Bar under Section 11 of IBC

15. The other grievance of the Appellant is that on 28th September, 2020, this Tribunal set aside the Order dated 13th March, 2020 in the matter of Gupta Ji and thus the CIRP against Respondent No.2 had been restored. The Counsel for Appellant referred to Section 11(a) and (b) to state that the Respondent No.2 who was itself undergoing CIRP could not have filed Application in view of bar under Section 11 of IBC. Section 11 of IBC reads as under:-

“11. Persons not entitled to make application.—The following persons shall not be entitled to make an application to initiate corporate insolvency resolution process under this Chapter, namely:-

(a) a corporate debtor undergoing a corporate insolvency resolution process; or

(b) a corporate debtor having completed corporate insolvency resolution process twelve months preceding the date of making of the application; or

(c) a corporate debtor or a financial creditor who has violated any of the terms of resolution plan which was approved twelve months before the date of making of an application under this Chapter; or

(d) a corporate debtor in respect of whom a liquidation order has been made.

Explanation.—For the purpose of this section, a corporate debtor includes a corporate applicant in respect of such corporate debtor.”

If the Section is perused, the incompetency attached is to initiation. Specified person is not “entitled” to make an application. Thus, the bar under Sub-Section (a) is for making an application when the person who is a Corporate Debtor is undergoing Corporate Insolvency Resolution Process. Under Sub-Clause (b), the bar is to “making an application” by the person – Corporate Debtor having completed CIRP twelve months preceding the date of making of the application. Based on this, the grievance of the Appellant is that when IB 2721/2019 was filed, twelve months had not been completed from the date of 13.03.2020 vide which CIRP in IB 1071/2019 had been set aside. It is argued now when the earlier CIRP has been restored, sub-clause ‘a’ is also attracted.

Date of filing of IB 2721/2019 is not pointed out to us. There is no dispute, however, that it was filed after Orders dated 13.03.2020 in Appeal, in earlier matter. It appears to us that when the IB 2721/2019 was filed, the CIRP against the Respondent No.2 had already been set

aside in view of the Orders of this Tribunal dated 13th March, 2020. Thus the bar “to making the application” was not there. If subsequently on 28.09.2020, the earlier CIRP has been restored against Respondent No.2, that would not hit the making of the application which was already complete and even the Petition was allowed on 20.07.2020. Once the Application in IB 2721/2019 was allowed on 20th July, 2020, (read with continuation Order dated 16th October, 2020), management vests with the IRP/RP and subsequent developments in another matter will not make difference.

16. Apart from the above, it would be appropriate to refer to the Insolvency and Bankruptcy Code (Amendment) Act of 2020 (No.1 of 2020 – Published on 13.03.2020) by which Explanation – II has been added in Section 11 w.e.f. 28.12.2019. The same reads as under:-

“Explanation II.—For the purpose of this section, it is hereby clarified that nothing in this section shall prevent a corporate debtor referred to in clauses (a) to (d) from initiating corporate insolvency resolution process against another corporate debtor.”

Even without relying on this clarificatory Explanation – II, in the facts of the present matter, we do not find that the Appellant can rely on Section 11(a) or (b) to find fault with the CIRP which has already been initiated.

17. The Appeal para – 7.10 refers to Judgement in the matter of “Flat Buyers Association” (referred supra) of this Tribunal where it was

observed that CIRP should be project based as per approved plan by the competent authority and that if the same real estate company has any other project, that cannot be clubbed together. We do not think that this Judgement is helpful to the Appellant in the facts of the present matter.

Order

18. There is no substance in the Appeal. The Appeal is dismissed. Pending I.A.s and Intervention Applications are disposed.

No orders as to costs.

[Justice A.I.S. Cheema]
Member (Judicial)

[V.P. Singh]
Member (Technical)

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