

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) (Insolvency) No. 1347 of 2019

(Arising out of order dated 16th October, 2019 passed by the National Company Law Tribunal, Kolkata Bench, Kolkata in CP (IB)03/KB/2017 & CA (IB) No. 1335/KB/2019)

IN THE MATTER OF:

**D & I Taxcon Services Private Limited,
Nicco House, 2, Hare Street,
2nd Floor,
Kolkata – 700 001.**

...Appellant

Versus

**Mr. Vinod Kumar Kothari,
Liquidator of
Nicco Corporation Limited,**

...Respondents

Present:

For Appellant : Mr. Tapas Dutta, PCS

**For Respondent : Mr. Anirudh Wadhwa, Advocate with
Mr. Bunny Sehgal, PCS**

J U D G M E N T

BANSI LAL BHAT, J.

The Appellant – ‘D & I Taxcon Services Pvt. Ltd.’, claiming to be an ‘Operational Creditor’ for an amount of Rs. 3.20 crores is aggrieved of dismissal of its application challenging the actions of liquidator – ‘Mr. Vinod Kumar Kothari’ (Respondent) appointed in C.P. (IB) No. 3/KB/ 2017 of ‘Nicco Corporation Limited’ whereby and whereunder the Adjudicating Authority (National Company Law Tribunal), Kolkata Bench, Kolkata (**‘Tribunal’**, for short) passed impugned order dated 16th October, 2019 while holding that all

the actions of the 'Liquidator' strictly confirmed to Regulations under the 'Insolvency and Bankruptcy Code' and the Appellant had no *locus standi* under Section 47(1) of the 'Insolvency and Bankruptcy Code, 2016' (**'I&B Code'**, for short) to seek any direction against the 'Liquidator' further holding that the Appellant is guilty of levelling vague and baseless allegations against the 'Liquidator' and slapped costs of Rupees One Lakh on the Appellant which was directed to form part of the 'Liquidation' estate. Aggrieved thereof the Appellant has filed the instant Appeal assailing the impugned order on the ground that the Tribunal failed to appreciate the statutory provision as also the fact that the 'Liquidator' had reduced the price below 75% of the reserved price bypassing the provisions of Regulation 33 (2) and without obtaining permission from the Tribunal.

2. For better understanding of the controversy involved at the bottom of this matter, it would be appropriate to make a brief reference to the factual matrix of the case. The 'Corporate Applicant' – 'Nicco Corporation Limited' was directed to undergo liquidation proceedings in terms of the order dated 17th October, 2017 passed by the Tribunal. Respondent – 'Mr. Vinod Kumar Kothari' was appointed as 'Liquidator' to prepare the list of assets of the 'Corporate Debtor' and for liquidating its assets for discharging the liabilities of the 'Corporate Debtor' in terms of 'The Insolvency and Bankruptcy Board of India (Liquidation Process), Regulations, 2016. The 'Liquidator' made paper publication for selling the 'Nicco House'. The Appellant appears to have resisted such move on the part of the 'Liquidator' (in proceeding with the sale) on the plea that the building in question had been constructed without

obtaining a building plan as regards 4th, 5th, 6th and top floor. As the Appellant's objections did not find favour with the 'Liquidator', he appears to have approached the Hon'ble High Court of Calcutta with the Writ Petition. The Appellant alleged that the 'Liquidator' had made an unholy nexus with the third party for disposing of the said building as the intending purchasers would not participate in the bidding process on account of building being partially constructed without any approved building plan. It further emerges from the record that 'M/s. Narnolia Financial Advisors Pvt. Ltd.' emerged as the 'successful bidder'. However, it was appointed as the sole selling agent which participated in the next e-auction becoming the successful bidder for an amount of Rs.28.25 crores against the reserved price of Rs.27.50 crores. The Appellant contended before the Tribunal that the appointment of 'M/s. Narnolia Financial Advisors Pvt. Ltd.' as 'sole selling agent', barred it from participating in the bidding process. It was contended that the building value at Rs. 55 crores was reduced to a value of Rs. 27.45 crores. The Tribunal, in terms of its order dated 25th June, 2019, relied upon the 'successive value reports' holding that the value of the property is reduced according to the valuation reports. The Appellant challenged the order dated 25th June, 2019 passed by the Tribunal in this regard before the Hon'ble High Court of Calcutta which came to be dismissed, however, liberty being granted to the Appellant to assail the order in appeal before this Appellate Tribunal. The appeal preferred before this Appellate Tribunal came to be dismissed as being barred by limitation vide order dated 29th September, 2019. The 'Liquidator' is alleged to have executed 'Deed of Conveyance' in respect of second floor of the said building far below the 'Fair Market Value'. The Appellant objected

to such 'Deed of Conveyance' being executed by the 'Liquidator' as SLP was pending before the Hon'ble Apex Court. Admittedly, the 'Liquidator's action was not stayed in any judicial proceedings.

3. The Tribunal, while dismissing the plea of the Appellant, observed that all stakeholders including the Appellant, who admittedly was a tenant occupying the tenanted portion, had been addressed while passing order dated 25th June, 2019. It declined to address the issue raised which had already been adjudicated upon further observing that the Appellant had no *locus standi*, to seek any direction against the 'Liquidator' who had been performing his duties strictly as per Regulations under the 'I&B Code'. Being convinced that the allegations were baseless, it slapped costs upon the Appellant as noticed hereinabove.

4. Heard the learned counsel for the parties.

5. Learned counsel for the Appellant submitted that the Appellant suffered massive loss when his office situated in 2nd Floor of Nicco House was engulfed in flames as fire broke out in the building. It is contended that initially the Appellant had lodged the claim with 5th Metropolitan Magistrate, Calcutta for compensation amount of Rs. 3.20 Crores against the 'Corporate Debtor'. However, after appointment of 'Liquidator', the Appellant lodged claim before the 'Liquidator' who did not settle its claim till date. It is further contended that the Appellant had approached the Tribunal for seeking remedy as the 'Liquidator' did not settle its claim and the same was pending for consideration before the Tribunal. Meanwhile, the 'Liquidator' initiated steps to effect sale of the entire building. It is contended that the 'Liquidator' could

not have proceeded to sell 4th, 5th, 6th and roof top floors of the said building as those were unauthorised construction and the 'Corporate Debtor' did not possess any right, title or interest therein. The Appellant did not participate in the said *e-auction* and the 'Liquidator' executed an agreement of sale on 15th March, 2019 in regard to the said premises. It is contended that the 'Liquidator' has been conducting the sale of the premises without following fair practice and transparency and at a reduced price from Rs. 50 Crores to 27.25 crores within a span of five months in utter disregard to the Regulations.

6. Per contra, it is submitted on behalf of the Respondent that the Appellant is barred by the principle of *res judicata* from raising the issue when its earlier application being C.A. 604/KB/2019 has been rejected by the Tribunal with observations that the same appears to have been filed out of ill will and the appeal carried from such order to this Appellate Tribunal was also dismissed. It is thereafter that the instant application was filed resulting in passage of impugned order. It is further submitted that the Appellant has agitated the same matter again and again indulging in Forum shopping. That apart, it is submitted that the Appellant being a mere occupier of a portion of the property comprising the liquidation estate has no *locus standi* in the matter. It is pointed out that the Appellant has claimed compensation in the criminal proceedings and in that way of the matter, it cannot claim to be an 'Operational Creditor'.

7. We have given our anxious consideration to the issue raised in this appeal. Admittedly, the Appellant was occupying a portion of the 'Nicco

House' as a tenant and its claim is relatable to the damage suffered by the tenanted premises due to a fire incident. On his own showing, the Appellant initially approached a criminal court for award of compensation and subsequently staked its claim before the 'Liquidator'. The liquidation estate comprising of 'Nicco House' admittedly does not belong to the Appellant and in its capacity as tenant, the Appellant having no right, title or interest in 'Nicco House' other than the right of occupation in accordance with the terms of 'Lease Agreement does not fall within the ambit of 'Operational Creditor' under Section 5(20) of the 'I&B Code'. It is absurd to assert or even to suggest that by using the demised premises as a tenant, the Appellant was rendering any "services" so as to bring its claim within the fold of 'operational debt'. The argument raised on this score being fallacious is rejected.

8. Insofar as the liquidation proceedings are concerned, it is for the 'Liquidator' to form the 'liquidation estate' in relation to the 'Corporate Debtor' as mandated under Section 36 of the 'I&B Code' which include assets over which the 'Corporate Debtor' has the ownership rights. The 'Liquidator' is required to access any information systems for the purpose of admission and proof of claims and identification of the liquidation assets relating to the 'Corporate Debtor', receive and collect the claims of the creditors within 30 days of commencement of the liquidation process, verify such claims and finally either admit or reject the claim either in whole or in part. The determination of valuation of claims, as mandated by Section 41 of the 'I&B Code', falls within the domain of the 'Liquidator' who is supposed to follow the Regulations framed by 'the Insolvency and Bankruptcy Board of India' in this

regard. A plain reading of Section 38 of the 'I&B Code' lays it bare that such claims may be submitted to 'Liquidator' by a 'creditor' who may be a 'financial creditor' or an 'operational creditor' or partly a financial creditor or partly an operational creditor. Thus, for being entitled as beneficiary to the proceeds from sale of liquidation assets, it is essential that such beneficiary is either a creditor or belongs to any of the categories enumerated in Section 53 of the 'I&B Code'. Once it is found that the Appellant is not an 'operational creditor' as claimed by it on the strength of 'Lease-hold Rights' in 'Nicco House', it cannot seek declaration to adjudge a sale transaction affected by the 'Liquidator' in respect of liquidation estate as being void within the ambit of Section 47 of the 'I&B Code'. Admittedly, the Appellant is also not a member or partner of the 'Corporate Debtor'. Therefore, it has rightly been held to have no *locus standi* under Section 47(1) of the 'I&B Code' to seek any direction against the 'Liquidator' as regards alleged undervalued sale transaction. That apart, it appears that the Appellant has taken varying stands mutually exclusive and inconsistent. 'Claim of compensation' in its capacity as tenant is incompatible with its lately projected claim of being an 'operational creditor' qua the 'Corporate Debtor'. Both stands can't co-exist. Without having a locus, the Appellant has been interfering with the process of liquidation and thwarting the liquidation process which ultimately will have deleterious effect on the rights of those who are found entitled to the benefit of the distribution of sale proceeds of liquidation proceedings. The role played by the Appellant, as the chequered history of the case unfurls, is unwarranted. Re-agitating the same matter time and again in different rounds and lately under self-assumed status of being an 'operational creditor'

clearly at variance with the Appellant's admitted status as tenant of 'Nicco House'. We are convinced that the appeal is frivolous and devoid of any merit.

9. For the forgoing reasons, we are of the considered opinion that the view taken by the Tribunal does not suffer from any legal infirmity or factual frailty. We accordingly decline to interfere with the same. However, the costs slapped on the Appellant are dispensed with, regard being had to it being a victim of incident of fire gutting 'Nicco House'.

10. The appeal is dismissed with the aforesaid observations. While we uphold the impugned order passed by the Tribunal on merits of the case, in the circumstance of the case, we set aside the direction in regard to slapping of the cost to the tune of Rupees One Lakh upon the Appellant.

The Appeal is accordingly disposed off. Interim direction, if any, stands vacated.

[Justice Bansi Lal Bhat]
Member (Judicial)

[Justice Venugopal M.]
Member (Judicial)

New Delhi

3rd March, 2020

/ns/