

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL**  
**NEW DELHI**

**Company Appeal (AT) (Insolvency) No. 1122 of 2019**

**IN THE MATTER OF:**

**Sobodh Kumar Agrawal**

**...Appellant**

**Versus**

**EIH Ltd.**

**...Respondent**

**Present:**

**For Appellant :**

**Mr. Sumant Batra, Ms. Kiran Sharma and  
Ms. Priyanka Anand, Advocates**

**For Respondent :**

**Mr. Sudipto Sarkar, Senior Advocate with  
Mr. Abhijeet Sinha, Mr. Arijit Mazumdar, Mr.  
Shambhu Nandi and Mr. Saikat Sarkar, Advocates**

**ORDER**

**24.10.2019** In the ‘Corporate Insolvency Resolution Process’ against ‘Golden Jubilee Hotels Private Limited’ (Corporate Debtor), the Appellant – ‘Subodh Kumar Agrawal’ (Resolution Professional) filed Interlocutory Application seeking the following relief :

*“a. This Adjudicating Authority may pass an order or direction to the Hon’ble Arbitral Tribunal adjudicating the disputes of Corporate Debtor (GJHPL) and its operator (EIH) to pronounce the final award which is pending before them to enable the Resolution Professional to conduct the Corporate Insolvency Process in a smooth and expeditious manner which will enable to maximise the value of the assets of the*

*Corporate Debtor and to protect the interest of all stakeholders connected thereto.*

- b. To pass necessary direction or order to restore confidence in the prospective Resolution Applicants minds to come forward to submit their bids and to facilitate the Applicant a speedy and effective and smooth resolution to the insolvency of the Corporate Debtor.*
- c. To pass any other order as this Adjudicating Authority may deem fit and proper in the interest of justice.”*

2. Learned counsel appearing on behalf of the Appellant referred to a decision of the Division Bench of this Appellate Tribunal in ‘*Company Appeal (AT) (Insolvency) No. 285 of 2018*’ – ‘**Jharkhand Bijli Vitran Nigam Ltd. vs. IVRCL Ltd. (Corporate Debtor) & Anr.**’, wherein by order dated 3<sup>rd</sup> August, 2018, the following order was passed :

*“03.08.2018 : On 11<sup>th</sup> July, 2018, when the matter was taken up, following order was passed:*

*“11.07.2018-- The question arises for consideration in this appeal is whether a counter claim can proceed during the period of ‘Moratorium’ while the Adjudicating Authority (National Company Law Tribunal) allowed the ‘Corporate Debtor’ to pursue the claim before the Arbitral Tribunal.*

2. *According to the Appellant, the question of determination of counter claim during the period of 'Moratorium' should have been decided by the Adjudicating Authority without leaving it open to be decided by the Arbitral Tribunal.*

3. *Let notice be issued on Respondents by speed post. Requisite along with process fee, if not filed, be filed by 13<sup>th</sup> July, 2018. If the Appellant provides the e-mail address of the Respondents, let notice be also issued through e-mail.*

*Post the case 'for admission' on 3<sup>rd</sup> August, 2018.*

4. *During the pendency of this appeal and the proceedings before the Adjudicating Authority, the Arbitral Tribunal will proceed with the claim and counter claim of the parties and may record appropriate order of award, but keep it in a sealed cover till the decision of this Appellate Tribunal."*

2. *Learned counsel appearing on behalf of the Resolution Professional submits that they have no objection if the counter claim decided by the Arbitral Tribunal.*

3. *As the claim of the Corporate Debtor can be determined only after determination of counter claim made by the Appellant in the same very arbitral proceeding and if counter claim or part of it is set off with the claim made by the Corporate Debtor, we are of the view that both the claim and the counter claim of parties should be heard together by the Arbitral Tribunal in absence of any bar under Insolvency and Bankruptcy Code, 2016.*

4. *However, on determination, if it is found that the Corporate Debtor is liable to pay certain amount, in such case, no recovery can be made during the period of moratorium.*

5. *The appeal stands disposed of with aforesaid observation. No cost.”*

3. Learned counsel for the Appellant submits that the ‘Claim’ and the ‘Counter-claim’ stand in the same footings for all purpose. There are different arbitral proceedings - one is by the ‘Claimant’ and the other is by the ‘Respondent’. Therefore, no distinction can be made with regard to the pendency of the arbitral proceedings by the ‘Claimant’ and pendency of the arbitration in the same proceedings by the Respondent (counter-claimant).

4. Mr. Sudipto Sarkar, learned Senior Counsel appears along with Mr. Abhijit Sinha and Mr. Arijit Mazumdar, Advocates on behalf of the Respondent – ‘EIH Limited’ referred to the decision of the Division Bench of this Appellate Tribunal

in ‘*Company Appeal (AT) (Insolvency) No. 284 of 2017*’ – ***K.S. Oils Ltd. vs. The State Trade Corporation of India Ltd. & Anr.***’ whereby in judgment dated 30<sup>th</sup> January, 2018, this Appellate Tribunal held that the Adjudicating Authority has no jurisdiction to set aside the order passed by the Indian Council of Arbitration.

5. In the said case i.e. ‘K.S. Oil Ltd.’ (Supra), this Appellate Tribunal noted the decision of the Hon’ble Supreme Court and other provisions of the ‘Insolvency and Bankruptcy Code’ and observed :

“6. On hearing the parties we are of the view that the Adjudicating Authority rightly held that the Adjudicating Authority has no jurisdiction to set aside the order passed by the Indian Council of Arbitration i.e. order dated 3<sup>rd</sup> August, 2017.

7. So far as the question relating the continuation of arbitral proceeding is concerned, the issue stands decided by the Hon’ble Supreme Court in “*Alchemist Asset Reconstruction Company Ltd. Versus M/s Hotel Gaudavan Pvt. Ltd & Ors. in Civil Appel no. 16929 of 2017*”. In the said case the Hon’ble Supreme Court by judgement dated 23<sup>rd</sup> October, 2017 observed:-

***“5) The mandate of the new Insolvency code is that the moment an insolvency petition is admitted the moratorium that comes into effect under Section 14(1)(a) expressly interdicts institution or continuation of pending suits or proceedings against Corporate Debtors.***

*6) This being the case, we are surprised that an arbitration proceeding has been purported to be started after the imposition of the said moratorium and appeals under Section 37 of the Arbitration Act are being entertained. Therefore, we set aside the order of the District Judge dated 06.07.2017 and further state the effect of Section 14(1)(a) is that the arbitration that has been instituted after the aforesaid moratorium is non est in law.”*

8. The aforesaid principle will also be applicable to the pending arbitral proceeding.
9. The next question will arise as to where the party will move in respect to the claim as has been preferred before the Arbitral Tribunal? In this respect we may observe that after initiation of Corporate Insolvency Resolution Process, all creditors are required to file claim before the Resolution Professional pursuant to declaration of moratorium and public announcement under Section 13. It is the duty of the Interim Resolution Professional to receive and collect all the claims submitted by the creditors pursuant to Section 15. This is apparent from Sub-section (a) of Section 18 of I&B Code. Pursuant to public announcement of initiation of Corporate Insolvency Resolution Process calling for submission of the claim under Section 15, the Adjudicating Authority is required to collect the claims as stipulated under Sub-section 1 (b) of Section 13 and reads as follows:

**“13. Declaration of moratorium and public announcement.** – (1) *The Adjudicating Authority,*

*after admission of the application under section 7 or section 9 or section 10, shall, by 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.”*

10. Section 15 stipulate public announcement in the manner as prescribed giving all the information as required under Sub-Section (1) of Section 15. Thereafter, the Interim Resolution Professional is required to receive and collect all the claims submitted by the creditors to him, pursuant to public announcement made under Section 13 and 15 as evident from Section (1) (b) of Section 18 and quoted below:

**“18. Duties of interim resolution professional.**

– *(1) The interim resolution professional shall perform the following duties, namely:-*

- (a) collect all information relating to the assets, finances and operations of the corporate debtor for determining the financial position of the corporate debtor, including information relating to –*
  - (i) business operations for the previous two years;*
  - (ii) financial and operational payments for the previous two years;*

- (iii) *list of assets and liabilities as on the initiation date; and*
- (iv) *such other matters as may be specified;*
- (b) *receive and collate all the claims submitted by creditors to him, pursuant to the public announcement made under sections 13 and 15; .....*”

11. The Interim Resolution Professional, thereafter on collection of all the claim received against the Corporate Debtor is required to constitute Committee of Creditors under Section 21, which in its term is required to notice the claim for the purpose of preparation of Information Memorandum under Section 29.

12. As per Section 238, the I&B Code override other laws, as quoted below:

**“238. Provisions of this Code to override other laws.** *–The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.*”

Thereby, the I&B Code will prevail over the Arbitration and Conciliation Act, 1996.

13. In view of the provisions as referred to the above and the decision of the Hon’ble Supreme Court in *“Alchemist Asset Reconstruction Company Ltd. Versus M/s Hotel Gaudavan Pvt. Ltd & Ors.”* we hold that the arbitral proceeding pending between ‘M/s K. S. Oil Ltd.’ (Corporate Debtor) and ‘The State Trade Corporation of India Ltd.’ (Financial Creditor) before the Indian Council of Arbitration cannot proceed during the moratorium period.

14. For the reasons recorded above while we are not inclined to interfere with the part of the impugned order



whereby the Adjudicating Authority refused to set aside the order passed by the Indian Council of Arbitration, declare that the Arbitration Tribunal/ Indian council of Arbitration cannot proceed with the arbitral proceeding pending between the parties. Both the parties are directed not to pursue arbitral proceeding before the Arbitration Tribunal/ Indian Council of Arbitration till final order is passed by the Adjudication Authority on the resolution plan and completion of the moratorium period. However, it will open to both of them to file their respective claim and counter claim, if any, before the Resolution Professional. The appeal stands disposed of with the aforesaid observations and directions. No Costs.”

6. It is true that the ‘Counter-claim’ made by the ‘Corporate Debtor’ is a ‘separate proceedings’ than that of the ‘Arbitral proceedings’ filed by the ‘Claimant’. However, they cannot be segregated and can go on simultaneously together. The claim of the Respondent cannot be determined by the ‘Arbitral Tribunal’ during the period of ‘Moratorium’ passed by the Adjudicating Authority. In such situation, as it cannot be decided as to what amount can be taken, we hold that the ‘counter-claim’ filed by the ‘Corporate Debtor’ also cannot proceed.

7. In ‘Jharkhand Bijli Vitran Nigam Ltd.’ ‘claim petition’ was filed by the ‘Corporate Debtor’. The order of Moratorium passed by the Adjudicating Authority was not applicable to such arbitration proceedings. Therefore, this Appellate Tribunal allowed the ‘claim petition’ filed by the ‘Corporate Debtor’ of the said case to proceed with. For determination of the claim, it was also noticed that the ‘counter-claim’ or part of it is set-off with the claim, this Appellate Tribunal observed that the ‘claim’ and ‘counter-claim’ should also be heard

together by the Arbitral Tribunal, however, with a clear understanding on such determination the 'Corporate Debtor' is liable to pay certain amount, in such case, no recovery is made during the period of 'Moratorium'.

8. For the reasons aforesaid, while we are of the view that the Appeal is squarely covered by the decision of this Appellate Tribunal in 'K.S. Oils Ltd.' (Supra), we hold that in the facts and circumstances, the order dated 3<sup>rd</sup> August, 2018 passed in 'Jharkhand Bijli Vitran Nigam Ltd.' is not applicable to a 'Corporate Debtor' not being the claimant and the claim petition of the Respondent cannot proceed during the period of 'Moratorium'.

We find no merit in this appeal and accordingly it is dismissed. No costs.

[Justice S.J. Mukhopadhaya]  
Chairperson

[Justice Venugopal M.]  
Member (Judicial)

[Justice Jarat Kumar Jain]  
Member (Judicial)

/ns/gc