

(2023) 02 NCLT CK 0015

In the National Company Law Tribunal

Case No : CA No. 976/2019 & IA No. 750/2022 In CP (IB) No. 155/Chd/Hry/2018

Excise And Taxation Commissionerm, Haryana Vs Deepak thukral RP ?

Date of Decision : 06-02-2023

Acts Referred:

Insolvency and Bankruptcy Code, 2016 — Section 3(30), 3(31), 14, 15, 30(2), 31, 53, 53(1)(b)(ii) 60(5)(b), 238
Haryana Value Added Tax Act, 2003 — Section 26

Citation : (2023) 02 NCLT CK 0015

Hon'ble Judges : Harnam Singh Thakur, Member (J); Subrata Kumar Dash, Member (T)

Bench : Division Bench

Advocate : Piyush Bansal, Swati Saluja

Final Decision : Disposed Of

Judgement

Subrata Kumar Dash, Member (Technical)

CA No.976/2019

1. The present application has been filed by Excise and Taxation Commissioner, Haryana through Excise and Taxation Officer (ETO), Rohtak under Section 60(5) (b) of the Insolvency and Bankruptcy Code, 2016 with the inter alia, prayer seeking acceptance of claim regarding the assessment of tax for the Financial Year 2016-17 and 2017-18 and modifying/setting aside the Resolution Plan approved by Committee of Creditors (hereinafter referred as CoC).

2. The brief facts of the case are that the Corporate Debtor entered into CIRP vide order dated 18.07.2018 passed by this Adjudicating Authority. The Resolution Professional (hereinafter referred as 'RP') was appointed vide order dated 18.07.2018 of this Adjudicating Authority. The Public Announcement dated 26.07.2018 was made and 06.08.2018 was the last date for submission of the claims. The Applicant Department filed its claim for Unit II regarding the amount of tax due after framing of assessment upto the Financial Year 2014-15 and 'estimated claim' for 2015-16, 2016-17 and 2017-18 as pending assessment amounting to Rs.4,65,61,555/- in Form B. The claim was duly accepted by the

RP. The Applicant filed its revised claim before RP against Corporate Debtor, Unit I in Form B dated 30.04.2019 for the total outstanding amount of Rs.14,56,40,280/- upto Assessment Year 2015-16 and 'estimated claim' for Assessment Year 2016-17 and 2017-18. There was a claim of Rs.5,17,87,616/- for Unit II up to the assessment of Financial Year 2015-16 and an 'estimated claim' for 2016-17 and 2017-18 (inclusive of interest). The total aggregated claim for Units I and II due is Rs.36,44,84,486/-.

3. The reply was filed vide Diary No. 6368 dated 15.11.2019 wherein it was stated that upon the receipt of Form B dated 06.08.2018 for the amount of Rs.4,65,61,555/-, the respondent verified the same in accordance with Regulation 13 of CIRP, Regulations and admitted the entire claim amount. However, under Regulation 12(2) of CIRP Regulations, the respondent did not have any jurisdiction to consider the claim submitted by the applicant vide Form B dated 30.04.2019 and 07.10.2019 as the Committee of Creditors (hereinafter referred to as CoC) had already approved the Resolution Plan. The respondent had no jurisdiction to accept claims submitted after approval of the Resolution Plan by the CoC.

4. The short written submissions were filed by Applicant vide Diary No.01439/2 dated 02.09.2022 and by Respondent vide Diary No.01439/01 dated 30.08.2022 reiterating the abovementioned facts.

5. The present application was reserved for order on 08.09.2022 and was re-listed on 14.10.2022 seeking certain clarifications. In compliance with the same, an additional affidavit was filed vide diary No.01439/3 dated 31.10.2022 by the applicant wherein it was stated that the claim of the applicant is tax dues under Haryana Value Added Tax Act, 2003 and as per Section 26 the amount due is recoverable as arrears of land revenue. The claim of the applicant should be accepted as the state dues, being secured creditors.

6. We have heard the learned counsel for the respondent and carefully perused the record available.

7. In this connection, a reference is made to Section 26 of the Haryana Value Added Tax Act, 2003 which creates the first charge on the property of the defaulter assessee, reads as under:

"26. Amount due under this Act recoverable as arrears of land revenue. Any amount due under this Act including the Tax admitted to be due acceding to the returns filed, which remains unpaid after the last date specified for payment, shall be the first charge on the property of the defaulter and shall be recoverable from him as if the same were arrears of land revenue."

8. In this context, we summarise the decision of the Hon'ble Apex Court in the case of State Tax Officer Vs. Rainbow Papers Limited (Supra) as under:

"(I) Under the unamended provisions of regulation 12(1) of CIRP Regulations, the State Tax Officer (appellant) was not required to file any claim. Read with

regulation 10, The appellant would only be required to substantiate the claim by the production of such materials: as might be called for. The time stipulations are not mandatory as is obvious from sub-regulation (2) of regulation 14, which enables the Interim Resolution Professional (IRP) or the RP, as the case may be, to revise the amounts of claims admitted, including the estimates of claims made under the Sub-Regulation (1) of the said Regulation as soon as might be practicable, when he came across additional information warranting such revision. (Para-24)

(II) There was no obligation on the part of the State to lodge a claim in respect of dues which are statutory dues for which recovery proceedings have also been initiated. The state was never called upon to produce materials in connection with the claim raised towards statutory dues. (Para-25)

(III) The Books of Accounts of the Corporate Debtor would have reflected the liability of the Corporate Debtor to the State in respect of its statutory dues. In abdication of its mandatory duty, the RP failed to examine the Books of Accounts of the Corporate Debtor, verify and include the same in the information memorandum and make provision for the same in the Resolution Plan. The Resolution Plan does not conform to the statutory requirements of the Code and is, therefore, not binding on the State. (Para-26)

(IV) Regulation 12 of the 2016 Regulations deals with the time period for submission of a claim along with proof, as stipulated in the public announcement under section 15 of the Code. The time period is, however, not mandatory but only directory. (Para-39)”

(V) In view of the statutory charge in terms of section 48 of the GVAT Act, the claim of the Tax Department of the State squarely falls within the definition of “Security Interest” under section 3(31) of the Code, and the State becomes a secured creditor under section 3(30) of the Code.

(VI) Such security interest could be created by the operation of law. The definition of a secured creditor in the Code does not exclude any Government or Governmental Authority.

9. Thus, following the decision of the Hon’ble Apex Court in the case of State Tax Officer Vs. Rainbow Papers Limited (Supra) we hold that the Excise and Taxation Department is under no obligation to lodge the claim in respect of the statutory dues and the department should have been called upon to produce the materials in connection with their claims. Further, the filing of dues within the prescribed period does not apply to the present case. Section 26 of Haryana Value Added Tax, 2003 creates the first charge for the dues under the said Act on the properties of the defaulter. The Excise demands in the present application have been raised under the provisions of the said Act. The Resolution Professional, thus, is directed to consider the claims of the applicant after verifying the said claims with respect to the materials produced before him. He is directed to convene the meeting of CoC in this respect to treat this claim under section 53(1)

(b)(ii) at par with the debts owed to a secured creditor, ranking equally with other specified debts. As the resolution plan has already been approved by the COC on 02.04.2019 with 78.43% of the voting share, the same is sent back to the COC for reconsideration of the claims discussed above within 30 days.

10. In the result, with aforesaid directions IA No. 976/2019 is disposed of accordingly.

IA No. 750/2022

11. The present application has been filed by HSIIDC Ltd. with the inter alia, prayer to direct the Resolution Professional to accept the objections regarding the resolution plan of the applicant and seeking payment of the enhanced cost of the demised plot No.257 (measuring 1800 sq mtrs.), situated at Sector-6, IMT, Manesar ("hereinafter referred to as the 'Demised plot') as per the regular letter of allotment dated 14.08.2003 and acceptance agreements dated 10.09.2003 and Estate Management Policy of the Applicant cooperation by virtue of conveyance deed dated 28.05.2009 as non-payment of cost of the demised plot was awarded by the Courts under the Land Acquisition Act, absolute ownership of the said plot was not transferred in the name of Corporate Debtor. It is further prayed that the respondent to disclose how the demised plot is mentioned in the information memorandum and place a fresh resolution proposal before the Committee of Creditors.

12. The brief facts of the case are that the applicant cooperation is a wholly owned State Government Agency and allotted the plot No.257 (measuring 1800 sq mtrs.), situated at Sector-6, IMT, Manesar to M/s Lakshmi Precisions Screws Limited (Hereinafter referred to as "Corporate Debtor") vide RLA dated 14.08.2003 and the allottee was liable to pay any additional price of the plot as a consequence of enhancement in compensation as awarded by the Courts. The possession was offered to Corporate Debtor, and terms and conditions were accepted. The Corporate Debtor paid a tentative cost price as mentioned in the acceptance of the Regulation of Allotment Agreement dated 10.09.2003. The Corporate Debtor was further liable to pay the cost and any additional price of the plot as a consequence of the land acquisition cost awarded by the Courts. The conveyance deed dated 28.05.2009 was executed between the parties. As per the Estate Manager Policy, 2015 and the terms and conditions of acceptance of allotment and agreement the corporate debtor was required to complete the project within three years. However, the Corporate Debtor failed to do the requisite as per the agreement. The applicant issued notice for payment of additional price and demand of Rs.993.96 per square meter was made from the Corporate Debtor (Copy of notices dated 18.06.2009 and 30.09.2009 are annexed as Annexure A-5 and A-5A). The Corporate Debtor failed to make payment of enhanced cost as mentioned in the regular letter of allotment, acceptance agreement and Estate Management Policy, 2015. The Corporate Debtor approached the applicant to vide letter dated 09.05.2012 for issuance of No Objection Certificate for creating an equitable mortgage. The applicant issued

Show Cause Notice on 24.08.2013 for the payment of enhanced cost. The applicant issued a notice dated 02.01.2019 demanding an outstanding amount of Rs.8,01,337/- against enhanced cost and Rs.3,78,380/- towards maintenance charges.

13. The reply was filed vide Diary No.01580/2 dated 03.08.2022, wherein it is stated that the effect of the enhancement of cost clause in conveyance deeds are in the nature that if the Corporate Debtor fails to pay additional cost in time, then the Corporate Debtor will be dispossessed of the title of demise plot which will affect the implementation of Resolution Plan. The applicant has contended that it is entitled to receive enhancement costs and maintenance charges of the demise plot. The enhancement cost and maintenance charges are operational debt, and the applicant has failed to file its claim before RP within the stipulated timeline. The applicant has stated that the Corporate Debtor failed to complete the project within three years and on the other hand, issued NOC to Corporate Debtor for creating an Equitable Mortgage of the demise plot. The applicant issued Show Cause Notice claiming the amount of Rs.8,01,337/- with the rate of 12% interest however, the applicant being a member of the CoC is aware of the initiation of the moratorium and after the initiation of the moratorium no interest and penal charges can be claimed. The applicant filed its claim in Form C claiming an amount of Rs.38.13 crore, the said claim was verified, and the applicant was made part of the Committee of Creditor. Resolution Plan submitted by M/s Micro Turners was approved by a 78.43% voting share of the CoC in its 11th CoC meeting. The applicant being dissenting Financial Creditor of the Corporate Debtor, the payment to the applicant qua its claim as Financial Creditor will be paid as per Section 30(2) of the Code. If the Corporate Debtor fails to pay the enhancement amounts, the title of the demise plot will vest back with the applicant. According to Section 14, no recovery can be made by any Creditor during the CIRP period. The applicant cannot claim priority over secured and unsecured Financial Creditors and workers in accordance with Section 53 of the Code.

14. The short written submissions have been filed by the applicant vide Diary No.01580/1 dated 02.09.2022 reiterating the abovementioned reasons and facts.

15. The present application was reserved for orders on 08.09.2022 and was re-listed on 11.10.2022 seeking certain clarifications. In compliance of the same, an affidavit was filed vide Diary No.01580/3 dated 24.11.2022 stating that the applicant has not filed its claim with the RP for payment of enhancement cost and maintenance charges. The applicant being Financial Creditor is part of the Committee of Creditors and is aware of the status of CIRP. The respondent had no knowledge about the claim, and this issue was never discussed in the CoC meeting.

16. We have heard the learned counsel for the respondent and pursued the record available.

17. In this connection, a reference is made to the following extract from our decision in another application filed by the present applicant HSIIDC against another respondent in the IA No. 40/2020, CP (IB) No.155/Chd/Hry/2018. Dated 21.10.2022.

"In the present case, the issue is

1. whether the applicant has the right to deal with its properties as per the provisions of the applicable laws or subject itself only to the provisions of the IBC especially when the claims pertain to a period prior to the initiation of CIRP and
2. whether the respondent can take recourse to the provision of Section 238 of the Code to assert that the same can override the applicant's rights under the Conveyance Deed.

In this context, it is appropriate to refer to the decision of the Hon'ble Punjab and Haryana High Court in the case of Omniplast Pvt. Ltd. vs. H.S.I.I.D.C. Ltd. and Ors. (14.10.2014 - PHHC) : MANU/PH/3305/2014 in a case where clause 12 incorporated in the conveyance deed executed by the respondent HSIIDC in favour of the petitioner contemplating that the petitioner seeks specific written approval from Haryana State Infrastructure and Industrial Development Corporation ('HSIIDC' for Short) before creating any charge or mortgaging the freehold land or building was challenged as illegal, arbitrary, unjust, discriminatory and unconstitutional. After going through the provisions in minute details, the Hon'ble High Court held that "Clause No. 12 of the regular letter of allotment and Clause No. 13 of the conveyance deed are not invalid or illegal, since the said clauses are inserted to protect the interest of HSIIDC to enable it to recover any outstanding against the said plot.

Furthermore, we place reliance on the decision of the Hon'ble Supreme Court in the case of Municipal Corporation of Greater Mumbai (MCGM) vs. Abhilash Lal and Ors. (15.11.2019 - SC) : Civil Appeal No.6350 of 2019 dealing with the provisions of the IBC vis a vis the provisions of the Mumbai Municipal Corporation Act, 1888, in a case where the facts are similar to the case at hand. After considering the issues involved, the Hon'ble Supreme Court held:

"In the opinion of this Court, Section 238 cannot be read as overriding the MCGM's right - indeed its public duty-to control and regulate how its properties are to be dealt with. That exists in Sections 92 and 92A of the MMC Act. This Court is of opinion that Section 238 could be of importance when the properties and assets are of a debtor and not when a third party like the MCGM is involved. Therefore, in the absence of approval in terms of Section 92 and 92A of the MMC Act, the adjudicating authority could not have overridden MCGM's objections and enabled the creation of a fresh interest in respect of its properties and lands. No doubt, the resolution plans talk of seeking MCGM's approval; they also acknowledge the liabilities of the corporate debtor; equally, however, there are proposals which envision the creation of charge or securities in respect of MCGM's properties. Nevertheless, the authorities under the Code could not have

precluded the control that MCGM undoubtedly has, under law, to deal with its properties and the land in question-which undeniably are public properties. The resolution plan therefore, would be a serious impediment to MCGM's independent plans to ensure that public health amenities are developed in the manner it chooses, and for which fresh approval under the MMC Act may be forthcoming for a separate scheme formulated by that corporation (MCGM)"

(Emphasis Supplied)

After perusing the relevant documents cited in the foregoing paragraphs, we are of the view that the doctrine of caveat emptor i.e. let the buyer beware, is applicable in the present case and if the incoming promoter has not cared to verify title documents, it cannot take shelter behind technicalities. With regard to the first issue framed in para 12 above, we hold that Section 31 of the IBC does not come to the rescue of the petitioner because the Section does not talk about the defect in title and only refers to the statutory dues under Municipal Laws and local laws. In contrast, the present case of non-payment of enhanced land compensation towards the price of the plot and maintenance charges directly affecting the property's title and Section 31 does not cover any such eventuality. The fact that the applicant has also filed a claim on as advised by the RP; to file a claim before the latter does not come in the way of granting the applicant the right to protect its interest and recover the entire outstanding amounts against the plots allotted to the applicant-corporate debtor. With regard to the second issue framed in Para 12 above, we follow the decision of the Hon'ble Supreme Court in the case of Municipal Corporation of Greater Mumbai (MCGM) vs. Abhilash Lal and Ors (supra) and hold that the provisions of Section 238 of the IBC cannot be invoked by the respondent in the present case to deny HSIIDC the right to protect its interest.

As a sequel to the above discussion, we hold that the enhanced dues towards the land acquisition cost and maintenance charges stand outside of the CIR Process and must be considered by the RP in terms of the Estate Management Policy, 2015, Allotment Agreement and Conveyance Deed executed between the parties and not in terms of the provisions of the IBC, 2016".

18. As the facts and issues involved in the case at hand are identical to the aforementioned case, we hold that the enhanced dues towards the land acquisition cost stand outside of the CIR Process and must be considered by the RP as non-payment of enhanced land compensation towards the price of the plot directly affect the property's title and Section 31 does not cover any such eventuality. we send the present CoC-approved plan back to the CoC with the direction to consider the claim of the applicant in the light of our observations in the foregoing paragraphs within 30 days.

19. In the result, with aforesaid directions IA No. 750/2022 is disposed of accordingly.