

(2018) 05 CAL CK 0248
In the Calcutta High Court
Case No : Writ Petition 7023 (W) of 2018

Krishna Kumar Mintri & Ors.

APPELLANT

Vs

Union Of India & Ors.

RESPONDENT

Date of Decision : 31-05-2018

Acts Referred:

Insolvency and Bankruptcy Code 2016 — Section 7, 8, 9, 12, 14, 27, 30, 30(2), 30(3), 31, 61

Citation : (2018) 05 CAL CK 0248

Hon'ble Judges : MOUSHUMI BHATTACHARYA, J

Bench : Single Bench

Advocate : Siddhartha Mitra, Hashnuhana Chakraborty, Neelina Chatterjee, Hiranyak Gangopadhyay, Kaushik Chanda, Rajashree Venket Kundalia, Jatinder Singh Dhatt

Judgement

The petitioners in this writ petition are Guarantors and Directors of a company which has been referred under the provisions of The Insolvency and

Bankruptcy Code 2016 (IBC). The petitioners have challenged the constitutionality of the Code and have asked for, inter alia, dismissing the

application filed under Section 7 of the Code for initiation of the Insolvency Resolution Process by the respondent no. 2 in the National Company Law

Tribunal (NCLT). From the prayers as framed in the writ petition, it appears that the petitioners have sought for immediate steps against the

respondent no. 3 in connection with the proceedings pending before the NCLT. The respondent no. 3 is the Resolution Professional (RP) appointed by

the NCLT in the matter of the insolvency proceeding in relation to Mintri Tea Company Pvt. Ltd. (the company/corporate debtor). The petitioners

submit that they have been constrained to challenge the vires of the IBC since the Code does not make any provision for permanent stay of insolvency

proceedings when all the outstanding creditors of the corporate debtor have been paid off.

Mr. Siddhartha Mitra, learned Senior Counsel appearing for the petitioners submits that on an application by Punjab National Bank, being the financial

creditor of the company for initiation of corporate insolvency resolution process under the Code, an order was passed by the NCLT on 20th

September, 2017 showing that the company was indebted to Punjab National Bank (PNB/the financial creditor) for an amount of Rs.10,37,69,840.06

as on 31st May, 2017 inclusive of interest as per the relevant financial contract. Counsel further submits that in an application filed by the Resolution

Professional, before the NCLT on 9th May, 2018 a specific statement was also made that the dues against the corporate debtor amounted to

Rs.10,37,69,840.06 and that such amount was owed to PNB by the corporate debtor. Counsel submits that the entire dues of the corporate debtors to

PNB has since been paid off by the petitioners and that there are no further outstanding amount remaining due and owing to PNB which was the only

financial creditor of the company. The dues have admittedly been paid off by way of various installments from December, 2017 to April, 2018.

Counsel relies upon a Minutes of proceedings of the Committee of Creditors (CoC) of Mintra Tea Company (the corporate debtor) held on 24th May,

2018 which was attended by the respondent no.3/RP and representatives of PNB and Federal Bank, who claimed to be another financial creditor of

the company. The Minutes record that the RP informed the CoC that the entire outstanding dues of the Federal Bank have been cleared and there is

no outstanding claim as on date. The Minutes also record that upon such submission being made, the representative of Federal Bank left the meeting.

It appears from the Minutes that the Committee of Creditors was again reconstituted by the RP excluding the name of the Federal Bank and a list of

creditors together with the amount of claim admitted finds place in the Minutes of the proceedings of the COC meeting. From the amount of claim in

relation to PNB, only an amount of Rs.127.74 lacs is mentioned and only the amount of Rs.10,37,69,840.06 (Rupees Ten Lakhs Sixty Nine Thousands

Eight Hundred Forty) which have been mentioned in the application filed by the RP before the NCLT on 9th May, 2018. It transpires from the

Minutes, that the RP informed the CoC that fresh claims were received from Federal Bank, Jubilant Marketing Pvt. Ltd., ESPEE Cookies, Dharmaraj

Properties and Angela Holdings.

Mr. Mitra relies on Annexure P-22 which contains “No Dues Certificates” from the companies who had been shown to have instituted fresh

claims against the corporate debtor in the Minutes dated 24th May, 2018. Counsel submits that these No Dues Certificates would show that there are

no existing financial creditors against the company as on date, save and except an amount of Rs.127.74 lacs which is the interest calculated on the

principal amount. It is also submitted that the only Member of the CoC is PNB who had initiated the corporate insolvency proceedings against the

company in CP no.421/KB/2017 before the NCLT which had recorded that as on 20th September 2017 an amount of Rs.10,37,69,840.06/- inclusive of

interest had been stated to be due and owing by the company to PNB. According to counsel since the amounts due and owing to PNB has been paid

off entirely by the petitioners and there are no other financial creditors existing as on date, there cannot also be any committee of creditors and hence,

the resolution professional, being the respondent no.3 cannot take any further steps pursuant to the insolvency resolution proceedings. Mr. Mitra

submits that urgent orders are called for since 31st May, 2018 has been fixed for the RP to present the resolution plan before the CoC. He cites

various instances of irregular conduct on the part of the RP which are apparently not only in keeping with the duties of a resolution professional. Mr.

Mitra submits that the RP is acting against the best interest of the Company without the knowledge of the petitioners who are the Directors of the

Company. Serious charges have been levelled against the RP and the immediate apprehension is that unless the RP’s hands are stayed, there is

every likelihood that the RP will take steps to sell off the company in favour of third parties.

Mr. Mitra submits that there is a lacuna in the IBC in relation to permanent stay of the insolvency proceedings in the event all outstanding creditors of

the corporate debtors, who had filed their debts with the resolution professional, but have subsequently been paid off. He submits that there is no

provision in the IBC which takes care of a scenario where the committee of creditors has ceased to exist by reason of the entire debt owed to the

creditors being settled leading to a situation where the RP is no longer required to submit any resolution plan in aid of the insolvency resolution process

under Section 12 of the IBC. Although the prayers in the writ petition calls for permanent stay of the insolvency proceedings, Mr. Mitra prays for a limited order restraining the RP from presenting the resolution plan before the Committee of creditors in the course of today. It should be pointed out that 4th June, 2018 is relevant since the application filed by the RP being CA(IB) No.427/KB/2018 for directions on the corporate debtor including the Directors in relation to the management of the affairs of the corporate debtors, has been made returnable on 4th June, 2018. It should also be pointed out in the aforesaid application filed by the RP, an order dated 16th May, 2018 was passed by NCLT restraining the Directors of the company from dealing with the assets of the company without prior permission of the resolution professional. The NCLT made the matter returnable on 4th June, 2018.

Mr. Kaushik Chanda, Learned Additional Solicitor General submits that the writ petition is premature and relies on Sections 30 and 31 of the IBC, in that submission of a resolution plan is subject to various stages before the resolution plan is approved by the adjudicating authority. He submits that the Resolution Plan will be subject to the adjudicating authority being satisfied that the resolution plan has been approved by the committee creditors and meets the requirements under Section 30(2) of the Code. He relies upon Section 61 of the IBC wherein any person aggrieved by the order of the adjudicating authority may prefer an appeal to the National Company Law Appellate Tribunal (NCLAT). He relies on two decisions passed by a learned Single Judge of this court wherein a challenge to the vires of Section 7, 8 and 9 of the IBC had been rejected.

Mr. Anirban Ray, learned counsel appearing for the resolution professional/respondent no.3 submits that no orders are called for in the present writ petition. He submits that as a resolution professional appointed by NCLT, he has carried out his duties as mandated under the Code and has acted in accordance with directions of the NCLT. The primary contention of Mr. Ray is that PNB, the financial creditor of the Company, has yet to give a No Dues Certificate, which would be evident from a letter written by the petitioners to PNB on 25th April, 2018. He submits that after insolvency resolution proceedings have commenced, the Directors of the Corporate debtor have no locus to participate in the insolvency process by virtue of

Section 14 of the Code. He submits that once the insolvency process is set in motion, the entire working of the corporate debtor is given to a resolution

professional who takes charge of the affair of the corporate debtor. He questions the bona fides of the petitioners and refers to a memorandum of

understanding entered into between one of the petitioners and a third party some time in April, 2018 and a communication from which it appears that

the petitioners received money for selling off the company to a third party. He also refers to an earlier meeting of the Committee of Creditors held on

16th May, 2018 which shows that the petitioners had knowledge of the issues sought to be agitated in Court today. He submits that the fact that all

other financial creditors have been paid off has not been brought to his knowledge and hence he is in no position to submit that the company has been

entirely freed of its debts.

Mr. Ray submits that there is no provision in the IBC for dismissal of the insolvency proceeding on the grounds which have been urged in this writ

petition and that the IBC was framed with the objective of speedy and efficacious resolution of the insolvency proceeding without interference of

stake holders of the company. He relies on Sections 30 and 31 for the point that the resolution plan as to go through several stages before being finally

approved by the adjudicating authority and that such stages have not come as yet. Hence, the apprehension of the petitioners is without basis. He

submits that the petitioners have an alternative remedy under section 61 in appeal before the NCLAT. According to him, the fact that the NCLAT is

closed for vacation is not a ground for by passing the alternative remedy available under the Code. He further relies on Section 27 of the Code by

which an RP can be replaced by the Committee of Creditors. Counsel relies on Bhavesh D. Parish & Ors. v. Union of India reported in 2000 (5) SCC

471 on the proposition that Court should be cautious about interfering in matters of economic reforms unless a provision in the concerned statute is

manifestly unjust or unconstitutional. He further relies on the decisions passed by a Learned Single Judge of this Court whereby a challenge to the

constitutionality of the Sections 7, 8 and 9 of the Code was rejected.

I have considered the submissions of counsel appearing for the parties. It is evident from the materials on record, that the amount of

Rs.10,37,69,840.06 was due and owing by the corporate debtor to its financial

creditor, namely PNB. This was also specifically mentioned in the application filed by the RP in the NCLT. It is evident that the said amount has subsequently been paid off in full by the petitioners to PNB as has been recorded in a letter by the petitioners to the RP dated 25th April, 2018 and to PNB on the same date. In the letter to the Bank, the petitioners have in fact demanded a no dues certificate from the Bank within 24 hours on the basis of the entire default amount being paid in full. The minutes of CoC Meeting held on 24th May, 2018 also does not mention Rs.10,37,69,840.06 as the amount of claim admitted in relation to PNB but only mentions Rs.127.24 lacs which I am told is the interest amount which is due to PNB. Annexure P-22 to the writ petition contains all the No Dues Certificates obtained from the companies who have been mentioned under agenda item no.1 as having lodged fresh claims against the company. The No Due Certificates make it clear that these claims have also been settled by the petitioners. An email dated 22nd May, 2018 from Federal Bank confirms that it has also been repaid the entire outstanding amount due to it and had no claims against the corporate debtor as on date. It is on this basis that the Federal Bank was left out of the reconstituted CoC.

On facts, therefore, this court is satisfied that besides the claim on interest of Rs. 127.74 lacs, there are no further outstanding amounts due and owing from the company to any financial creditor as on date. If that be the case, there cannot also be a committee of creditors to which the RP is accountable in terms of presenting a resolution plan. In any event, this court has been informed that there is only one member of the CoC at present, namely, PNB. As stated earlier, PNB has also been paid off by the petitioners save and except the amount of Rs. 127.74 lacs.

From a reading of Sections 30 and 31 of the IBC, it appears that upon receiving a resolution plan from a resolution applicant, the RP shall examine the resolution plan received by him and confirm certain particulars as stated under Section 30(2) of the Code. Under sub-Section (3), the RP shall present the resolution plan to the committee of creditors for its approval upon which the committee of creditors has the option of approving the resolution plan by a vote of not less than 75 per cent. of the voting share of the financial creditors [Section 30(4)]. In the course of dictating this order, I am told that two resolution plans were forwarded to the RP who approached the CoC today at

11 a.m. However, no further steps could be taken in this regard since the required vote of 75 per cent. of the voting share of the financial creditors could not be obtained, since only one out of four creditors were present at the meeting. Re-voting accordingly has been called for within the stipulated period. Since the other creditors mentioned in the COC in the minutes of 24th May, 2018, have all been paid off, I fail to see how such creditors can continue to remain in the CoC or proceed with in terms of resolution plans as mandated under Sections 30 and 31 of the IBC.

It is correct that Sections 30 and 31 of the IBC, do not contemplate of a scenario where the committee of creditors may cease to exist altogether on being paid off by the guarantors of the company/corporate debtor. Sections 30 and 31 have been framed in the backdrop of a functioning committee of creditors who are interested to remain in the committee since they have outstanding amounts due and owing from the company and are hence interested to vet the Resolution Plan. Mr. Ray appearing for the RP, had fairly submitted that since he does not have any personal interest in the affairs of the company, he cannot have any serious objection in waiting till 4th June, 2018 when the parties will be before the NCLT in the proceeding initiated by the RP. In any event, I am told that the resolution professional has time till 18th June, 2018 by which the entire insolvency proceedings has to be completed and the resolution plan in relation to the corporate debtor, approved. Hence, I do not see any difficulty in directing the RP/respondent no. 3 to wait till 4th June, 2018 on which date he can present his case before the NCLT. I appreciate the position of the petitioners in that, as directors of the corporate debtor, they may not have any locus to address the NCLT on 4th June, 2018 since the IBC does not make any provision for such and particularly since the insolvency proceedings are still underway.

In light of the above, the respondent no. 3 is directed not to take any steps in relation to the resolution plan before the committee of creditors until 4th June, 2018. However, this direction will be subject to the petitioners obtaining a No Dues Certificate from PNB, which should take care of Rs. 127.74 lacs as recorded in the minutes of the proceedings dated 24th May, 2018. If the petitioners fail to obtain the No Dues Certificate from PNB within 4th June, 2018, the RP/respondent no. 3 will be at liberty to proceed in accordance with Sections 30 and 31 of the IBC. I make it clear that this order

should not be seen as any form of interference with the order passed by the NCLT on 16th May, 2018 save and except that on the returnable date, the petitioners will have the liberty to go before the NCLT and agitate their grievance. I also make it clear that I have not expressed any view on the charges brought against the RP since elaborate submissions have not been made in that regard. The aforesaid directions have been passed only on the basis that as on date no financial creditors have any existing claim against the Company. Urgent certified website copies of this order, if applied for, be made available to the parties upon compliance of the requisite formalities.