
(2023) 10 GAU CK 0039
In the Gauhati High Court
Case No : Writ Appeal No. 18 Of 2023

Purshottam Gaggar,

APPELLANT

Vs

Dyna Roof Private Ltd

RESPONDENT

Date of Decision : 18-10-2023

Acts Referred:

Constitution Of India, 1950 — Article 14, 19(1)(g)
National Company Law Tribunal Rules, 2016 — Rule 11
Insolvency and Bankruptcy Code, 2016 — Section 10, 12, 12(1), 12(2), 12(3), 33, 60(5)
Insolvency and Bankruptcy Code (Amendment) Act, 2019 — Section 12(1)

Citation : (2023) 10 GAU CK 0039

Hon'ble Judges : Sandeep Mehta, CJ; Susmita Phukan Khaund, J

Bench : Division Bench

Advocate : Nirmal Goenka, Dr. Ashok Saraf, N.N. Dutta, S. Dutta, S. Yasmin, D. Baruah

Final Decision : Dismissed

Judgement

1. The instant intra-Court writ appeal takes exception to the judgment and final order dated 22.12.2022, passed by the learned Single Bench, whereby writ petition, being WP(C) No.6003/2022, preferred by the respondent Nos.1 and 2 herein (writ petitioners) challenging the order dated 25.08.2022, passed by the National Company Law Tribunal (in short, NCLT), Guwahati Bench in IA(IBC) No.60/GB/2022 in C.P.(IB) NO.18/GB/ 2021, granting further extension of 30 days (beyond the 270 days already availed), was accepted.

2. The learned Single Judge, after consideration of the material placed on record, held that the provisions contained in Section 33 of the Insolvency and Bankruptcy Code, 2016 (in short, IBC of 2016) were mandatory and the NCLT had no jurisdiction to extend the limitation for completion of the Corporate Insolvency Resolution Process (hereinafter, for short, referred as the CIRP) beyond the statutory period as prescribed under Section 12 of IBC of 2016.

3. For better appreciation of the controversy, the provisions contained in Section 12 of the IBC of 2016, are reproduced hereinbelow for the sake of ready reference:

"12. Time- limit for completion of insolvency resolution process.-(1) Subject to sub-section (2), the corporate insolvency resolution process shall be completed within a period of one hundred and eighty days from the date of admission of the application to initiate such process.

(2) The resolution professional shall file an application to the Adjudicating Authority to extend the period of the corporate insolvency resolution process beyond one hundred and eighty days, if instructed to do so by a resolution passed at a meeting of the committee of creditors by a vote of [sixty-six] per cent of the voting shares.

(3) On receipt of an application under sub-section (2), if the Adjudicating Authority is satisfied that the subject matter of the case is such that corporate insolvency resolution process cannot be completed within one hundred and eighty days, it may by order extend the duration of such process beyond one hundred and eighty days by such further period as it thinks fit, but not exceeding ninety days:

Provided that any extension of the period of corporate insolvency resolution process under this section shall not be granted more than once.

[Provided further that corporate insolvency resolution process shall mandatorily be completed within a period of three hundred and thirty days from the insolvency commencement date, including any extension of the period of corporate insolvency resolution process granted under this section and the time taken in legal proceedings in relation to such resolution process of the corporate debtor:

Provided also that where the insolvency resolution process of a corporate debtor is pending and has not been completed within the period referred to in the second proviso, such resolution process shall be completed within a period of ninety days from the date of commencement of the Insolvency and Bankruptcy Code (Amendment) Act, 2019]"

4. The background facts necessary for disposal of the writ appeal, are noted hereinbelow.

The respondent No.1 (writ petitioner No.1, Dyna Roof Private Ltd.) is a private limited company, having its registered office in the Ri Bhoi District of Meghalaya, whereas the respondent No.2 (writ petitioner No.2, Rohin Kumar Hansaria), is the proprietor of a firm named, Steel Sales Corporation, having its office at S.J. Road, Athgaon, Guwahati. Both the respondents are unsecured financial creditors of the Corporate Debtor RSH Agro Products Limited.

At the instance of the Corporate Debtor, an insolvency proceeding was initiated

under Section 10 of the IBC of 2016 before the NCLT, Guwahti, which came to be registered as C.P.(IB) No.18/GB/2021.

Vide order dated 11.02.2022, the appellant herein, Mr. Purshottam Gaggar was appointed as the Resolution Professional for the Corporate Debtor. As the proceedings could not be concluded, the proforma respondent No.6 herein, Shri Kamal Kumar Harlalka filed an application under Section 12(2) of the IBC of 2016 seeking time extension of the CIRP. Accordingly, by order dated 13.05.2022, the NCLT, Guwahati Bench granted extension of 90 (ninety) days to the Resolution Professional (appellant herein) to complete the CIRP within the extended period. The Resolution Professional made another application, being I.A.(IBC)/60/GB/2022 in CP(IB)/18/GB/2021 under Section 60(5) of the IBC of 2016 seeking further extension of the period by another 30(thirty) days at the request of Punjab National Bank (respondent No.3 herein).

The said application, preferred by the Resolution Professional, was accepted by the NCLT, Guwahati Bench vide order dated 25.08.2022, whereby the prayer for extension of further period of 30(thirty) days beyond the 270 days already availed, was allowed.

5. As indicated in the order dated 25.08.2022, the reason for granting extension was that a resolution with regard to extension of CIRP was approved with 87.26% voting by the Members of the Committee of Creditors (in short, COC). The order dated 25.08.2022 further recites that the application was made under Section 60(5) of the IBC of 2016 read with Rule 11 of the National Company Law Tribunal Rules, 2016 (in short, NCLT Rules of 2016) and based thereupon, the extension was accepted.

6. The said order dated 25.08.2022 passed by the NCLT, Guwahati Bench was assailed by the respondent Nos.1 and 2/writ petitioners by filing the captioned writ petition, which came to be accepted vide order dated 22.12.2022, which is assailed in this writ appeal preferred by the Resolution Professional, Purshottam Gaggar.

7. While entertaining the writ appeal, vide order dated 27.01.2023, this Court directed that status-quo would be maintained.

8. Mr. Nirmal Goenka, learned counsel representing the appellant, vehemently and fervently contended that the Central Government itself recognized the fact that the resolution proceedings were not being completed within the prescribed period and thus, an amendment has been brought into Section 12 of the IBC of 2016. He submits that in the provisions of Section 12 of IBC of 2016 as they earlier stood, the limitation for completing the insolvency CIRP was curtailed to 90 days beyond the mandatory limit of 180 days provided in Section 12(1) of the Code. However, the Government realized that the time period is proving to be inadequate. Hence, the Section was amended, wherein a proviso has been introduced that the Corporate Insolvency Resolution Process shall be completed within a period of 330 days including any extension of the period of CIRP granted

under this Section. He urged that it has been experienced that even this extended period of 330 days is proving insufficient to conclude the CIRP and thus, the Benches of the NCLTs have been granting appropriate extensions for completion of the resolution process. He urged that the word "mandatorily" as occurring in the second proviso to Section 12(3) of the IBC of 2016, was struck down by Hon'ble the Supreme Court in the judgment rendered in Committee of Creditors of Essar Steel India Limited Vs. Satish Kumar Gupta & Ors., reported in (2020) 8 SCC 531 and thus, the Tribunal was perfectly justified in exercising powers conferred upon it by Section 60(5) of the IBC of 2016 read with Rule 11 of NCLT Rules of 2016.

9. In response to the objection raised by Dr. Ashok Saraf, learned Senior counsel representing the respondent Nos.1 and 2 regarding locus of Resolution Professional to file the present appeal, Mr. Goenka urged that the Resolution Professional has been impleaded as a party respondent in this writ petition and hence, he is entitled to file the present appeal. He further urged that under the IBC 2016, the Resolution Professional is required to perform the duties as envisaged under the Code so as to protect the interest of the Corporate Debtor.

10. In this background, Mr. Goenka contends that the appellant being the Resolution Professional appointed under the Act of 2016 has the locus to file and prosecute the instant writ appeal. He further urged that the Resolution Professional was compelled to move the application for liquidation because of the mandatory requirements of Section 33 of the IBC of 2016. He further submitted that the bar in seeking second extension for conclusion of the CIRP proceeding is restricted to the extensions sought under Rule 12(2) of IBC of 2016. He urged that the instant application for extension was filed under Section 60(5) of the IBC of 2016 read with Rule 11 of the NCLT Rules of 2016 and hence, the application was maintainable.

11. He further urged that since the word "mandatorily" appearing in second proviso of Section 12(3) of the IBC of 2016 has been struck by the Hon'ble Supreme Court in the case of Committee of Creditors of Essar Steel India Limited (supra), the NCLT, Guwahati Bench was justified in exercising powers under Section 60(5) of the Code read with Rule 11 of the NCLT Rules of 2016 for giving the extension and breathing life into the CIRP proceedings.

He further urged that the interpretation given by the learned Single Judge in the impugned judgment that in view of the first proviso to Section 12(3), the extension can be sought only once, would render the second proviso of Section 12(3) redundant. It was his fervent contention that the first proviso and the second proviso should be read harmoniously to gather the true intent of the IBC of 2016 which is to explore every possible possibility to revive the Corporate Debtor. He urged that the further extension of 30 days, which is granted by the NCLT, would mean that the time for completion of the proceedings was being extended to 300 days which is well within the outer limit of 330 days. He thus urged that the order passed by the NCLT, dated 25.08.2022, granting extension

of 30 days for completion of the CIRP, is perfectly valid and unassailable and hence, the learned Single Judge was not justified in causing interference into such a well reasoned order.

12. Dr. Ashok Saraf, learned Senior counsel representing the respondent Nos.1 and 2 (writ petitioners, Dyna Roof Private Limited and Mr. Rohini Kumar Hansaria) has raised a serious objection regarding maintainability of the instant writ appeal at the instance of the appellant, being the Resolution Professional, urging that the Resolution Professional is supposed to act as an independent facilitator and thus, he is not required to act at the behest of any of the parties. The fact that the appellant has approached this Court by way of the instant writ appeal for assailing the judgment of the learned Single Judge, clearly establishes that he is acting in a partisan manner and hence, the appeal, at the instance of the Resolution Professional, should be dismissed, as being not maintainable.

While the matter was pending for judgment, copy of an order dated 25.09.2023, passed by Hon'ble the Supreme Court in Civil Appeal Nos.5985-6001/2023 (Regen Powertech Private Limited -Vs- Giriraj Enterprises & Anr.) has been brought to the notice of the Court, wherein Hon'ble the Supreme Court, recorded its displeasure to the Resolution Professional filing an appeal in the matter.

13. Be that as it may, since the Resolution Professional was impleaded as a party respondent in the writ petition, we propose to dispose of the instant writ appeal on merits rather than non-suiting the appellant on the ground of locus.

14. Dr. Saraf, vehemently and fervently, opposed the submissions advanced by Mr. Goenka. He urged that the provisions contained in Section 12 of the IBC of 2016 are mandatory in nature and the effect thereof cannot be diluted. He further urged that the reliance placed by learned counsel for the appellant on Section 60(5) of the IBC of 2016 in an endeavour to surmount the bar created by Section 12(3), is misplaced because Section 60(5) begins with non-obstante Clause and that the powers conferred upon the NCLT by this sub-Clause are subject to the statutory provisions in operation and the same cannot over-ride the existing law.

15. Dr. Saraf contended that though in the case of Committee of Creditors of Essar Steel India Limited (supra), the word "mandatorily" as appearing in the second proviso to Section 12(3) was read down but inspite of doing so, Hon'ble the Supreme Court did not touch upon or unsettle the mandate of Section 12(1) of the Insolvency and Bankruptcy Code (Amendment) Act, 2019 which provides that mandate of Section 12(1) and the first proviso to Section 12(3) stipulating that the extension of the period of CIRP under this provision shall not be granted more than once. He thus urged that the learned Single Bench was correct in taking the view that the NCLT did not record apposite reasons in terms of Committee of Creditors of Essar Steel India Limited (supra) judgment so as to bring the case within the category of an exceptional case that the time can be extended even beyond the outer limit as provided in Section 12 of the IBC of

2016. He urged that this aspect of the case was minutely examined by the learned Single Judge at para 30 of the impugned judgment, wherein it was observed that extension beyond 330 days would be permissible upon satisfaction of the condition precedent that it would be in the interest of all stakeholders that the Corporate Debtor would be put back on its feet instead of being sent into liquidation.

16. Dr. Saraf pointed out the learned Single Judge, directed the Resolution Professional to produce the records so as to satisfy the Court regarding the existence of a resolution plan which, if implemented, would lead to a situation wherein, the Corporate Debtor would be put back on its own feet. The Resolution Professional produced the minutes of 14th meeting of the COC, dated 12.08.2022 wherein, there is no such indication that any concrete proposal was in place which could satisfy the Court that the Corporate Debtor was likely to be put back on its feet.

17. On these grounds, Dr. Saraf implored the Court to dismiss the writ appeal and affirm the impugned order.

18. We have given our thoughtful consideration to the submissions advanced at Bar and have gone through the impugned order and the material placed on record.

19. At the outset, we are persuaded to affirm the view taken by learned Single Judge, after making interpretation of Section 60(5) of the IBC of 2016 that the same would not prevail over and above the provisions of Section 12 of the Code, is the correct interpretation of the statute and hence, the same does not require any interference.

The only issue which requires deliberation and adjudication is as to whether with striking down of the word "mandatorily" in second proviso to Section 12(3) of the IBC of 2016, by Hon'ble the Supreme Court in Committee of Creditors of Essar Steel India Limited (supra) judgment, the first proviso to Section 12(2) would also be diluted.

20. In this reference, we would like to reproduce the observations made by Hon'ble the Supreme Court at para No.127 of the judgment in the case of Committee of Creditors of Essar Steel India Limited (supra), which have been referred to in the impugned judgment passed by the learned Single Judge, which reads as below:

"127. Both these judgments in Atma Ram Mittal [Atma Ram Mittal v. Ishwar Singh Punia, (1988) 4 SCC 284] and Sarah Mathew [Sarah Mathew v. Institute of Cardio Vascular Diseases, (2014) 2 SCC 62 : (2014) 1 SCC (Cri) 721] have been followed in Neeraj Kumar Sainy v. State of U.P. [Neeraj Kumar Sainy v. State of U.P., (2017) 14 SCC 136 : 8 SCEC 454] , SCC paras 29 and 32. Given the fact that the time taken in legal proceedings cannot possibly harm a litigant if the Tribunal itself cannot take up the litigant's case within the requisite period for no

fault of the litigant, a provision which mandatorily requires the CIRP to end by a certain date — without any exception thereto — may well be an excessive interference with a litigant's fundamental right to non-arbitrary treatment under Article 14 and an excessive, arbitrary and therefore unreasonable restriction on a litigant's fundamental right to carry on business under Article 19(1)(g) of the Constitution of India. This being the case, we would ordinarily have struck down the provision in its entirety. However, that would then throw the baby out with the bath water, inasmuch as the time taken in legal proceedings is certainly an important factor which causes delay, and which has made previous statutory experiments fail as we have seen from *Madras Petrochem [Madras Petrochem Ltd. v. BIFR, (2016) 4 SCC 1 : (2016) 2 SCC (Civ) 478]*. Thus, while leaving the provision otherwise intact, we strike down the word “mandatorily” as being manifestly arbitrary under Article 14 of the Constitution of India and as being an excessive and unreasonable restriction on the litigant's right to carry on business under Article 19(1) (g) of the Constitution. The effect of this declaration is that ordinarily the time taken in relation to the corporate resolution process of the corporate debtor must be completed within the outer limit of 330 days from the insolvency commencement date, including extensions and the time taken in legal proceedings. However, on the facts of a given case, if it can be shown to the Adjudicating Authority and/or Appellate Tribunal under the Code that only a short period is left for completion of the insolvency resolution process beyond 330 days, and that it would be in the interest of all stakeholders that the corporate debtor be put back on its feet instead of being sent into liquidation and that the time taken in legal proceedings is largely due to factors owing to which the fault cannot be ascribed to the litigants before the Adjudicating Authority and/or Appellate Tribunal, the delay or a large part thereof being attributable to the tardy process of the Adjudicating Authority and/or the Appellate Tribunal itself, it may be open in such cases for the Adjudicating Authority and/or Appellate Tribunal to extend time beyond 330 days. Likewise, even under the newly added proviso to Section 12, if by reason of all the aforesaid factors the grace period of 90 days from the date of commencement of the Amending Act of 2019 is exceeded, there again a discretion can be exercised by the Adjudicating Authority and/or Appellate Tribunal to further extend time keeping the aforesaid parameters in mind. It is only in such exceptional cases that time can be extended, the general rule being that 330 days is the outer limit within which resolution of the stressed assets of the corporate debtor must take place beyond which the corporate debtor is to be driven into liquidation.”

21. It is manifest that Hon'ble the Supreme Court, while striking down the word “mandatorily”, was of the view that if the CIRP is on the verge of being settled, then in such exceptional cases, the time for completion of the process may be extended even beyond the period of 330 days as stipulated in second proviso to Section 12(3) of IBC of 2016. Thus, any proposal for extension of CIRP beyond 330 days should clearly reflect that the extension was being granted on account of the fact that the CIRP was nearing completion and grant of one further

extension would result to a positive outcome so that the Corporate Debtor could be put back on its feet.

22. However, bare perusal of the order dated 25.08.2022, passed by the NCLT, Guwahati Bench makes it clear that there is no such indication in the order that the extension was being granted for the reason that the resolution plans submitted on record, were likely to revive and bring the Corporate Debtor back on its feet.

The contents of the order dated 25.08.22 are reproduced hereinbelow for the sake of ready reference.

“ORDER

Date of Order : 25.08.2022

The matter is taken up for hearing through Video Conferencing.

2. This is an Application under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 read with of Rule 11 of National Company Law Tribunal Rules, 2016 filed on behalf of Resolution Professional seeking extension of the Corporate Insolvency Resolution Process period by 30 days.

3. In this matter CIRP was initiated on 23.11.2021 and 270 days are going to expire on 20.08.2022.

4. Heard Mr. P. Gaggar, RP in person along with Mr. Nirmal Goenka and Ms. Vidushi Chokhani. It has been submitted that a resolution with regard to extension of CIRP was approved with 87.26% voting by the Members of Coc.

The prayer of the present application is allowed. We hereby extend the period of CIRP for a further period of 30 days beyond 270 days.

With this order, the present IA stands disposed of.”

Rather a perusal of the order would indicate that the same has been rendered in gross ignorance to the mandate of first proviso to Section 12(3) of the IBC of 2016.

23. In the wake of the discussion made hereinabove, we are of the firm opinion that the impugned order, dated 22.12.2022 passed by learned Single Judge accepting the writ petition, WP(C) No.6003/2022 of the respondent Nos.1 and 2 herein and setting aside the order dated 25.08.2022 passed by NCLT, Guwahati Bench, does not suffer from any infirmity warranting interference of this Court.

As a consequence, the writ appeal fails and is dismissed as being devoid of merit.