

(2024) 01 NCLT CK 0043

In the National Company Law Tribunal

Case No : IA 1129/2020 AND IA 4502/2023 IN CP (IB) No. 4752/MB-VI/2018

Supreme Infrastructure India Ltd Vs Vikas Shuttering Store Pvt Ltd ?

Date of Decision : 30-01-2024

Acts Referred:

Insolvency and Bankruptcy Code, 2016 — Section 5(21), 9, 60(5)(c)
Companies Act, 2013 — Section 230, 231, 232
National Company Law Tribunal Rules, 2016 — Rule 11

Citation : (2024) 01 NCLT CK 0043

Hon'ble Judges : K. R. Saji Kumar, Member (J); Sanjiv Dutt, Member (T)

Bench : Division Bench

Advocate : Ranit Basu, Avinash R. Khanolkar, Ashish Pyasi, Anjali Shahi, Avinash R. Khanolkar, Ranit Basu, Maitri Malde, Dua Shaikh

Final Decision : Dismissed

Judgement

K. R. Saji Kumar, Member (Judicial)]

1. Background

1.1 IA 1129/2020 in CP (IB) No. 4752/MB-VI/2018 was filed on 06.07.2020 by Vikas Shuttering Store Private Limited, the Operational Creditor (OC), under Rule 11 of the NCLT Rules, 2016 seeking revival of CP (IB) No. 4752/MB-VI/2018 (Main Application) filed u/s 9 of the IBC 2016, for initiating Corporate Insolvency Resolution Process (CIRP) under Section 9 of the Insolvency and Bankruptcy Code, 2016 (IBC) in respect of Supreme Infrastructure India Limited, the Corporate Debtor (CD). The Main Application was previously admitted on 30.09.2019. Thereafter, a settlement was arrived at between the parties by way of Consent Terms dated 05.10.2019 and the Main Application was consequently withdrawn vide MA No. 3357/ 2019 on 30.12.2019.

1.2 IA 4502/2023 in CP (IB) No. 4752/MB-VI/2018 has been filed by the CD praying for a declaration that the Consent Terms executed between the parties stand modified/novated in terms of the order dated 16.06.2022, passed by Bench IV (this Tribunal) in the Scheme of Compromise and Arrangement between Supreme Infrastructure India Limited (CD herein) and its operational

creditors; and also praying for rejection of IA No. 1129/2020 in the Main Application as infructuous.

2 Contentions of OC

2.1 The Main Application was filed by the OC being aggrieved of the default by the CD in making payments in respect of renting out shuttering and scaffolding material to the CD for the purpose of carrying out its construction activities.

2.2 The Main Application filed under Section 9 of the IBC for initiating CIRP was admitted by this Adjudicating Authority (this AA) vide order dated 30.09.2019 for a default amount of Rs.14,26,91,442/-. Pursuant to the admission of CIRP, the management of the CD reached out to the OC, and, after extensive negotiations, a settlement was arrived at between the parties and Consent Terms were executed.

2.3 Resultantly, the CD unconditionally agreed to pay the OC a total amount of Rs.9,50,00,000/- (Nine Crore Fifty Lakh Rupees) as full and final settlement of all the claims of the OC against the CD in installments as mentioned in the Consent Terms, out of which the CD paid an amount of Rs.1,50,00,000/- on the very execution of the Consent Terms. Subsequently, an application for withdrawal of the Main Application, under Regulation 30A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, was submitted in Form FA by the Interim Resolution Professional (IRP).

2.4 The IRP filed MA No. 3357/2019 seeking withdrawal of the Main Application which was allowed by this AA. However, after withdrawal of the Main Application, the CD failed to honour their commitments under the Consent Terms and the OC gave many opportunities to the CD to comply with the commitments to pay instalments as agreed. The OC sent emails to the CD dated 06.01.2020, 16.01.2020 and 23.01.2020 for complying with the Consent Terms, but in vain.

2.5 The OC, aggrieved of the lack of response to the emails and continuous breach of the Consent Terms, deposited 11 cheques given to it by the CD. But the said cheques were dishonoured for the reason "insufficiency of funds". Feeling aggrieved by the said conduct and disregard of the Consent Terms and the directions and orders of this AA, the OC agitated the same in CA(CAA)-401(MB)/2020 filed by the CD and the CD was directed to comply with the directions passed in MA No. 3357/2019 in CA(CAA)-401(MB)/2020 filed under Sections 230 and 231 of the Companies Act, 2013. Now the OC prays for revival of the Main Application in IA No. 1129 of 2020 as the CD continues to violate the Consent Terms in spite of the orders and directions of this AA.

3 Contentions of CD

3.1 The CD submits that it is a public limited listed company engaged in the business of infrastructure development. The CD has filed IA No. 4502/2023 in

the Main Application praying for dismissal of IA 1129/2020, as according to it, the Consent Terms stand modified/novated in terms of approval of the Scheme of Compromise and Arrangement (Scheme) under Sections 230-232 of the Companies Act 2013, between the CD and its other operational creditors (other than the OC) in terms of the order dated 16.06.2022 in CP(CAA)/18/MB/2022 in CA(CAA)/401/MB/2020 by this Tribunal (Scheme Order). The CD filed the above Company Petition (Scheme Petition) for arrangement with more than 3300 operational creditors in numbers to whom the CD owed debt having value for more than Rs. 300 crores, before this Tribunal. The CD contends that the Consent Terms have been revised by the Scheme Order, and, hence, the same cannot be enforced on account of modification as it is not permissible under law. The CD states that the OC was aware of the Scheme Petition and the Scheme Approval Order. Though the notice of meeting was duly dispatched and published in newspapers as well as on the website of the CD, the OC sent an email saying that it had not received notice. According to the CD, it was only with malafide intent to cause hurdles to the Scheme that the OC did not participate in the meeting on 13.11.2021 for voting on the Scheme.

3.2 However, as the debt of the OC was very small, even if he had participated and voted against the Scheme, it would not have affected the sanction of the Scheme as it was approved by majority of voting. The operational creditors to whom the CD owed debt having value of Rs. 79.69 Crore were present, out of which creditors aggregating value of Rs. 74.18 Crore voted in favour of the Scheme i.e., 92.96% of the total voting share and only few creditors aggregating to Rs 5.51 Crores i.e., 7.04% voted against the Scheme. The CD in the Scheme Petition had duly complied with all the procedural aspects of public notice, private notice to regulatory authorities and the Scheme was finally allowed vide Order dated 16.06.2022 by Bench IV of this Tribunal. The CD further states that the Scheme provided for the payments to its operational creditors in the manner provided therein and the Scheme is binding on all the operational creditors of the CD including the OC herein.

3.3 In the Extra-Ordinary General Meeting in January 2023, Non-Cumulative Non-Convertible Redeemable Preference Shares (NCNCRPS) were issued as per the Scheme Order. According to the CD, once all the formalities and procedural requirements under the Scheme Order is completed, the Consent Terms entered into by it with the OC stands novated and, thus, the Consent Terms do not have any consequence or effect.

3.4 It is stated by the CD that various steps have already been taken by the Court Trustee in furtherance of the Scheme, and today to reverse the Scheme only on account of the OC attempting recovery of money is against justice and would also set a bad precedent for others who would want to use this AA as a recovery forum. The CD thus prays that IA 1129/2020 in the Main Application is only to be dismissed as balance of convenience is with the CD and no prejudice would be caused to the OC as it can avail of the other remedies available under

the law for recovery. It further submitted that the OC is already pursuing proceedings against the CD for cheque bouncing.

3.5 Admittedly, the Scheme Order is under challenge before the Hon'ble NCLAT and the OC has approached it vide IA No. 3616/2022 and by order dated 28.07.2023, the Hon'ble NCLAT allowed the OC to intervene in the Scheme and the same is pending final disposal.

3.6 The CD further states that the IBC is not a tool for recovery but resolution and the OC is seeking recovery of the amount under the Consent Terms which cannot be enforced. Further, as per the law laid down by the Hon'ble Supreme Court, Hon'ble NCLAT and various Benches of this AA, one cannot use this forum to seek recovery of dues as the proceedings before this AA are of summary nature.

3.7 The CD further contends that it is well within its right to file an application praying for dismissal of IA 1129/2020 after it being reserved for orders and that this AA has the jurisdiction to consider and pass orders on adjudicating the IA 4502/2023 filed by the CD. It is contended by the CD that in IA 4502/2023 its attempt is to bring on record a crucial fact of the case that the OC chose not to apprise this AA.

4 Analysis & Findings

4.1 We have carefully perused all the documents on record and heard the arguments advanced by both the Ld. Counsel for the OC and the CD. In IA 1129/2020, which has been filed by the OC praying for revival of the Main Application, the CD has filed written submissions. However, the OC did not offer any reply/written submissions in IA 4502/2023 filed by the CD for rejecting IA 1129/2020. We have considered the jurisprudence that has evolved as to the treatment of outstanding debts claimed, owing to the breach of consent terms upon entering into settlement agreements, in applications under Section 9 of the IBC. It has been held by the Hon'ble NCLAT and various AAs that such claims lose the substratum to be covered within the definition of "operational debt" under Section 5(21) of the Code.

4.2 We note that by virtue of the Scheme having been approved by this Tribunal, the debt of the OC has been restructured and the same is legally binding on all operational creditors including the OC. The Scheme Order dated 16.06.2022, reads as-

"15. In terms of the provisions of the Companies Act, 2013 this scheme is binding on all the Operational Creditors. All the contracts I agreements I work orders I deeds I understanding I consent terms etc. between the Petitioner Company and its Operational Creditors as on the Cut-Off date stand modified in terms of this Scheme..."

"17. All the operational Creditors as on the Cut-off Date are bound by the Order of this Tribunal with effect from Appointed Date taking into consideration the Cut-

off Date." (Emphasis supplied)

On a careful consideration of Section 231 of the Companies Act 2013, it is clear that this Tribunal is empowered to enforce compromise or arrangement. The said Section also provides for supervision and implementation of compromise or arrangement as also for giving directions making modifications for implementation of compromise or arrangement. Hence, this AA cannot pass an order in IA 1129/2020 to revive the Main Application, unsettling the Scheme already ordered and being implemented under Sections 230 and 231 of the Companies Act. Such an order will have the effect of derogation of the Scheme Order passed under a valid statutory power by this Tribunal. Hence, on this count also, IA 1129/2020 cannot be allowed. Further, this AA cannot be utilised for enforcing specific performance of the Consent Terms which stood modified/unenforceable owing to the Scheme Order. Hence, this position also goes against the OC.

4.3 We further find that both the OC and the CD had prior knowledge about the Scheme and the Scheme Order. However, in IA 1129/2020, the OC had mentioned about the non-compliance of Consent Terms by the CD in the first motion Application in CA(CAA)401/2020. However, during the course of their arguments on IA 1129/2020 and even while reserving it for orders, the parties had not brought to our notice the final outcome of the Scheme. The Scheme Order was only brought on record by the CD vide its written submissions dated 19.10.2023 filed in IA 1129/2020. The Ld. Counsel for the OC vehemently argued that IA 4502/2023 could not have been filed by the CD after IA 1129/2020 was already heard and reserved for orders by us. We feel that there is no harm in entertaining an IA filed by the CD even after the matter was heard and finally reserved for orders, especially when the OC had not brought to our notice the factum of the Scheme Order. We hold that we are well within our jurisdiction to entertain IA 4502/2023, especially when this IA has a bearing on the very maintainability of IA 1129/2020, which was heard first and reserved for orders. Moreover, IA 4502/2023 has brought out the critical aspect of the Scheme Order, which otherwise would have been kept out of our judicial notice. It has been held by the Hon'ble Supreme Court in SBI Vs. S.N. Goyal (2008) 8 SCC 92, Civil Appeal Nos. 4243-44/ 2004 that a quasi-judicial authority will become functus officio only when an order is pronounced, or published/notified or communicated to the party concerned. In the present matter, we had finally heard and reserved for orders IA 1129/2020 but while the order was being prepared, IA 4502/2023 has been filed by the CD and we allowed hearing on the same before pronouncement of the order. Hence, we hold that nothing prevents us from entertaining an IA before the order is finally prepared and pronounced in the open court. We hold that so long as the final order is not pronounced, we are within our authority under Rule 11 of the NCLT Rules to consider, hear and act upon any new fact or legal position that has been brought to our judicial notice, as ignoring such fact or law would amount to miscarriage of justice.

4.4 We observe that the Scheme with the operational creditors of the CD has been duly approved and the same is being duly implemented. We further observe that various Benches of this AA have already taken similar approach and dismissed petitions filed by various operational creditors against the CD by taking cognizance of the implementation of the Scheme Order. In the circumstances, we feel that the Scheme ought not to be disturbed on the ground of a disgruntled operational creditor who chose to take contrary stand and is indulging in continued litigation under Section 9 of the IBC for enforcing Consent Terms under the settlement agreement. We feel that remedy for the OC lies elsewhere and not before this AA for the recovery of money under Consent Terms.

4.5 We hold that this AA does not have the power or authority to disturb the Scheme Order dated 16.06.2022, passed by Bench IV of this Tribunal in CP (CAA) 18/MB/2022 connected with CA (CAA) 401/MB/2020. Allowing the revival application under IA 1129/2020 by the OC in CP (IB) No. 4752/MB-VI/2018 shall have the effect of abrogating the Scheme Order.

ORDER

In view of the above discussions, the Application bearing IA 4502/2023 in CP (IB) No. 4752/MB-VI/2018 filed by the Corporate Debtor praying for rejecting IA 1129/2020 is allowed declaring that the Consent Terms dated 05.10.2019 were modified in terms of the Scheme Order dated 16.06.2022. Consequently, IA 1129/2020 filed by the OC for revival/reinstitution of CP (IB) No. 4752/MB-VI/2018 is rejected.