

IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI, (COURT-II)

Item No. 1
(IB)-266(ND)2019
IA/1005/2021

IN THE MATTER OF:

Mr. R. Tarkeshwar Narayan ... **Applicant/Petitioner**

Vs.

M/s. Horizon BuildconPvt. Ltd. ... **Respondent**

Under Section: 7 of IBC, 2016

Order delivered on 31.05.2021

CORAM:

SHRI. ABNI RANJAN KUMAR SINHA,
HON'BLE MEMBER (J)

SHRI. L. N. GUPTA,
HON'BLE MEMBER (T)

PRESENT:

Mr. Abhishek Anand, Mr. Rahul Adlakha, Mr. Mohak Sharma, Advocates for the RP

ORDER

Order is pronounced in the Open Court today.

Sd/-
(L. N. GUPTA)
MEMBER (T)

Sd/-
(ABNI RANJAN KUMAR SINHA)
MEMBER (J)

2. Since the facts mentioned in the application are almost similar to the facts of the application bearing IA no. 5173/2020, in which this Adjudicating Authority vide order dated 03.02.2021, had granted extension for 40 days beyond the period of 330 days. Therefore, it is needless to repeat the same, except the following: -

- i. That the Applicant filed an Application bearing I.A. No.5173 of 2020 seeking extension of 60 days beyond the period of 270 days and further seeking exclusion of the period from 21.10.2020 to 09.11.2020 w.e.f. 21.10.2020 to 09.11.2020 i.e. 20 days being the time spent in listing of the CIRP extension application. That this Adjudicating Authority vide order dated 03.02.2021 held as under :

"...12. Considering the submissions and averments made in the application and in view of second proviso of Section 12(3) of IBC, 2016, we hereby extend the CIR period for further 60 days beyond the period of 270 days but so far as the exclusion of period from 21.10.2020 to 09.11.2020 i.e. the period of 20 days spent in listing of the CIRP extension application and passing of the order by this Adjudicating Authority is concerned, in view of the second proviso of Section 12(3) of the IBC 2016, we are of the considered view that the exclusion of period on the ground of pendency of the legal proceedings is not permissible under the Law. Hence, we are not inclined to exclude the period of 20 days commencing from 21.10.2020 to 09.11.2020 as prayed by the Applicant in view of the second proviso of Section 12(3) of the IBC. Accordingly, this prayer of applicant is hereby rejected.

13. At this juncture, we notice that the period of CIRP has already expired on 11.11.2020 and even after the extension of the period of 60 days i.e. the period of 330 days too has



expired on 10.01.2021. We further notice that one Resolution Plan is pending with the CoC for approval. Considering these peculiar circumstances, we again refer to the decision of Hon'ble Supreme Court given in the case of **Committee of Creditors Essar Steel India Limited v. Satish Kumar Gupta and Ors. in Civil Appeal No. 8766-67 of 2019** in which in para 79, the Hon'ble Supreme Court held that **"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, 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."**

14. Considering the exceptional circumstances as narrated above, and the decision of the Hon'ble Supreme Court whereby the period of CIRP may be extended beyond the period of 330 days and the fact that the extended period of 60 days has also expired on 10/01/2021, we think it proper to give the last extension of 40 days to enable the CoC to consider the Resolution Plan pending its consideration. Hence, we hereby extend the period of 40 days beyond the period of 330 days, from the expiry of the period of 330 days.

15. Accordingly, the CoC is directed to consider the Resolution plan pending for consideration within the extended period failing which, Resolution Professional is directed to take appropriate steps in accordance with the provisions of law..”

- ii. Further, the 9th meeting of CoC was convened on 06.02.2021 wherein, the Applicant herein apprised the members of CoC



regarding few discrepancies in the Resolution Plan received from the Prospective Resolution Applicant.

- iii. Further, the Applicant herein apprised the members of CoC that the Applicant will send the observations on the Resolution Plan to the Prospective Resolution Applicant and will further request the Prospective Resolution Applicant to submit a rectified/modified Resolution Plan.
- iv. Further, the members of CoC by a voting share of 100% in favour resolved to file an application before this Adjudicating Authority to seek an extension of CIRP period by 60 days beyond the period of 330 days, which was coming to end on 19.02.2021.
- v. Further, the 10th meeting of CoC was convened on 15.02.2021 wherein, the Applicant apprised the members of CoC regarding the observations sent to the Prospective Resolution Applicant on 08.02.2021 and requested them to 'submit a modified Resolution Plan before the Applicant. The Prospective Resolution Applicant vide email dated 10.02.2021 requested the Applicant to grant an extension of 03 days i.e. till 13.02.2021.
- vi. Further, the Prospective Resolution Applicant submitted the modified Resolution Plan to the Applicant on 13.02.2021.
- vii. Further, the Applicant herein presented the modified Resolution Plan before the members of CoC wherein, the Applicant apprised the members of CoC that the Resolution Plan has some typographical errors; which has to be rectified by the Prospective Resolution Applicant. It is pertinent to mention that certain objections were also raised by the financial creditors with respect to the Resolution Plan



and one of the objections raised by the representative of class of creditors is as follows:-

“RA is imposing one condition that in the event the claim of IOB is decided by the Hon'ble NCLT as secured then RA reserves the right to revise or withdraw the Resolution Plan”

- viii. Further, upon discussion and deliberations, the Prospective Resolution Applicant apprised that they have offered Rs. 16 crores to Indian Overseas Bank and are further open to any negotiations with Indian Overseas Bank. Further, the financial Creditor being Indian Overseas Bank submitted that bank will discuss the same with higher authorities and intimate the outcome. Furthermore, it was decided that since there is a time constraint in view of the CIRP period coming to an end on 19.02.2021, the issue needs to be decided at the earliest. In view thereof, it was decided that the 10th meeting of CoC will be continued on 16.02.2021.
- ix. That the continued 10th meeting of the CoC was resumed on 16.02.2021, wherein, the Applicant apprised the members of CoC about the rectified Resolution Plan in terms of typographical errors and the clarifications with respect to objections raised by financial creditors. The Applicant further apprised the members of CoC that since, the claim of Indian Overseas Bank has been treated as unsecured one by the Resolution Applicant, the Plan becomes non-compliant in terms of Section 30(2) of the Code. In view thereof, the Applicant in terms of the provisions of the Code being Section 30(4) of the Code was unable to place the Resolution Plan before the CoC for e-voting. Upon discussions and deliberations, as the issues are still persisting with respect to the Resolution Plan, it was decided to continue the meeting further on 17.02.2021.



- x. That the 10th meeting of the CoC was once again resumed on 17.02.2021, wherein few more objections were raised by the members of CoC in regard to the Resolution Plan. Furthermore, the issue of the claim of Indian Overseas Bank being secured or unsecured is pending adjudication before this Adjudicating Authority and therefore, the outcome may affect the Resolution Plan. In view thereof, the members of CoC instructed the Applicant to file an application seeking a further extension of 60 days in order to consider the Resolution Plan as resolved in the 9th meeting of CoC convened on 06.02.2021.
- xi. It has been further submitted that the outcome of the said application will have a material bearing on the Resolution Plan and the distribution as per Section 30(4) of the Code, which is pending for consideration before the CoC and it is only on the said application regarding the claim of Indian Overseas Bank being secured or unsecured, the CoC can come to a conscious decision about the feasibility, viability and distribution under the Resolution Plan at hand and accordingly, have instructed the Resolution Professional to seek extension of the CIRP period by further 60 days beyond 370 days.

3. Further, the Applicant has filed written submissions and submitted the following:

- i. That the Applicant herein approached the Hon'ble NCLAT against the order dated 03.02.2021 passed by this Adjudicating Authority and prayed as follows-

“...Allow the present appeal and set aside the Impugned Order dated 03.02.2021 passed by the



Hon'ble Adjudicating Authority in I.A. No. 5173 of 2020 preferred in C.P. (IB) No. 266(ND) of 2019 to the extent whereby exclusion of period consumed in legal proceedings before the Adjudicating Authority w.e.f. 21.10.2020 till 09.11.2020 & 12.01.2021 to 03.02.2021 has not been excluded for purposes of calculation of CIRP period..."

ii. That the Hon'ble NCLAT vide judgement dated 23.02.2021 was pleased to allow the Appeal and directed as hereunder-

"3. we find that while the Adjudicating Authority deemed it fit, in the peculiar circumstances of the case, to extend time by 40 days beyond the extended time of 330 days for bringing the CIRP to a logical conclusion, the Adjudicating Authority has not taken care to exclude the period of judicial intervention viz. the period spent in pursuing the application seeking extension for exclusion to render the exercise productive. Mr. Abhishek Anand, learned counsel for the Appellant has brought to our notice that as a result of exclusion of period of judicial intervention not been allowed, the extension granted has virtually proved to be futile and meaningless as even the extended period expired on 19thFebruary,2021.

4. On a careful consideration of the matter, we are of the considered opinion that the period of judicial intervention w.e.f 21stOctober, 2020 till 9thNovember, 2020 (the period covering the time spent in pursuing the extension application in



the first instance) and 12th January, 2021 to 3rd February, 2021 (i.e. the period for which the orders were reserved by the Adjudicating Authority on the application) is justifiably required to be excluded while counting and computing the period of CIRP. We accordingly allow this appeal and direct exclusion of period from 21st October, 2020 till 9th November, 2020 and 12th January, 2021 to 3rd February, 2021 for the purposes of calculation of CIRP period. The Appeal is accordingly disposed off.”

iii. The applicant, in support of his prayer, has placed reliance upon the following decisions :

- a. Committee of Creditors of Essar Steel India Ltd v Satish Kumar Gupta & Ors, Civil Appeal No. 8766-67 of 2019***
- b. Swiss Ribbons Pvt Ltd & Anr v Union of India & Ors, W.P. (c) No. 99 of 2018***
- c. Committee of Creditors of Trading Engineers International Ltd. v. Trading Engineers International Ltd. through Resolution Professional [Company Appeal (AT)(Ins) No. 61 of 2021]***
- d. IDBI Bank Ltd. Vs. Mr. Anuj Jain Interim Resolution Professional, Jaypee Infratech Ltd. & Anr. Company Appeal (AT) (Ins) No. 536 of 2019 with IA. No. 1857 of 2019***

iv. That the intent of the legislature is to maximize the value of the assets of the corporate debtor for the benefit of all the stakeholders of the corporate debtor. However, in the instant case, as the extended period of 40 days as extended



by this Adjudicating Authority beyond 330 days came to an end on 19.02.2021. The Hon'ble NCLAT excluded the period of 40 days and the new date when the CIRP process has come to an end is 05.04.2021. The extension of 60 days is being sought only to consider the resolution plan pending before the Committee of Creditors. Keeping in view the consequence in absence i.e. liquidation, it would be in the best interest of all the stakeholders of the corporate debtor, if the extension of 60 days be granted as sought by the Applicant/RP and as approved by the Committee of Creditors in their 10th meeting held from 15.02.2021 to 17.02.2021.

4. We have heard the Ld. Counsel for the applicant and perused the averments made in the application as well as written submission filed on behalf of the applicant. We notice that the averments made in the written submissions are nothing but the reproduction/repetition of the facts mentioned in the application filed by the applicant.

5. While going through our order dated 03.02.2021, we further notice that we had directed the CoC to consider the Resolution Plan within the extended period of time but from the averments made in the application and the submissions made by the Ld. Counsel on behalf the Resolution Professional, it is seen that the Resolution Plan has not been considered by the CoC as yet and on the similar grounds, the extension of another 60 days beyond 370 days of CIRP period has been prayed by the Resolution Professional.

6. We went through the averments made in the application filed by the RP and we notice that although the applicant in his application has made several averments but has failed to explain the reason why the CoC has not considered the Resolution Plan within the extended period granted by the



Adjudicating Authority in IA/5173/2020 vide order dated 03.02.2021. Of course, it is mentioned in para 30 of the application that in the 9th meeting of the CoC convened on 06.02.2021, the applicant had apprised the members of the CoC regarding the few discrepancies in the Resolution Plan received from the Prospective Resolution Applicant and also apprised the members of the CoC that he will send back the Resolution Plan to the Prospective Resolution Applicant to submit a rectified/modified Resolution Plan. We further notice that another ground taken by the Resolution Professionals that an application is pending for adjudication before this Adjudicating Authority wherein, the issue with respect to the claim of Indian Overseas Bank being secured or unsecured has to be decided and the CoC can come to a conscious decision about the feasibility, viability and distribution under the Resolution Plan at hand only after the disposal of that application.

7. That only after considering the submission of the Resolution Professional that a Resolution Plan was pending for consideration before the CoC, we had granted extension for 40 days beyond the period of 330 days. But on the basis of the averments made in the application and submissions made by the Ld. Counsel, it is seen that the Resolution Plan can only be placed before the CoC, once the application for claim of the Indian Overseas Bank is decided by this Adjudicating Authority. Here, we are constrained to observe that although no stay has been granted by the Adjudicating Authority, as it appears from the averments and submissions, the Resolution Professional has acted suo moto and restrained the functioning of the CoC till disposal of the IA relating to the claim of Indian Overseas Bank by this Adjudicating Authority and on this ground alone, he has filed this application for extension of 60 days.

8. The aforesaid sequence of events shows that instead of complying with the directions of this Adjudicating Authority, the RP has suo moto decided to sit over the matter during the extended period. It is the settled principle



of law, if there is no stay, the matter shall be proceeded in accordance with the provision of law, but this has been ignored by the Resolution Professional.

9. We further notice that during the course of hearing, the applicant has placed reliance upon several decisions, which had already been placed by the applicant in the course of hearing of the earlier IA/5173/2020. The applicant has also placed reliance upon the decision of Hon'ble Supreme Court in the case of Committee of Creditors of Essar Steel India Limited Vs. Satish Kumar Gupta and Ors. in Civil Appeal No. 8766-67 of 2019.

10. At this juncture, we would like to refer to the decision of the Hon'ble Supreme Court in the case of Committee of Creditors of Essar Steel India Limited Vs. Satish Kumar Gupta and Ors. in the Civil Appeal No. 8766-67 of 2019, on which the applicant's counsel has placed reliance and submitted that the word 'mandatorily' shown in the second proviso of Section 12 of the IBC has already been struck down by the Hon'ble Supreme Court. We went through the decision of the Hon'ble Supreme Court and find that the Hon'ble Supreme Court in para 78 of the judgment, while considering the amendment made in Section 12 of the IBC which came into force from 16.08.2019, held that :

“Given the fact that the time taken in legal proceedings cannot possibly harm a litigant if the Tribunal itself cannot take up the litigants 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 litigants fundamental right to non-arbitrary treatment under Article 14 and an excessive, arbitrary and therefore unreasonable



restriction on a litigants 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 (supra). 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 litigants 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”

11. In view of the decision (Supra), we observe that the general rule being that the 330 days is the outer limit, including extensions and the time taken in legal proceedings but only in exceptional circumstances, the period of CIRP can be extended beyond the period of 330 days . Further, the aforesaid decision of the Hon’ble Apex Court mentions about the **extension in exceptional circumstances and not about exclusion of the period of litigation.**



12. At this juncture, we would like to refer to the para 225.5 of decision of the Hon'ble Supreme Court in **Jaypee Kensington Boulevard Apartments Welfare Association &Ors. Vs. NBCC (India) Ltd. &Ors. Civil Appeal No. 3395 of 2020 Order dated 24.3.2021**, in which the Hon'ble Supreme Court while extending the period of CIRP in that matter held that ***"These directions, particularly for enlargement of time to complete the process of CIRP, are being issued in exceptional circumstances of the present case and shall not be treated as a precedent"***.

13. Therefore, in view of the latest decision (Supra) of the Hon'ble Supreme Court, in which the Essar Steel India Limited case has also been considered, while extending the period of CIRP, the Hon'ble Supreme Court has clearly held that the enlargement of time to complete the process of CIRP is in exceptional circumstances and it shall not be treated as a precedent.

14. So in the light of the aforesaid facts and circumstances as well as the decisions referred (Supra), when we consider the case in hand, we are of the considered view that since the applicant through the COC has failed to consider the Resolution Plan pending for consideration within the extended period of 40 days and also could not provide the cogent reasons for not complying with the direction, we are not inclined to extend the CIRP period by another 60 days beyond the period of 370 days.

15. **Accordingly, the present application i.e. IA/1005/2021 stands dismissed.**

— s/d —

(L.N. GUPTA)
Member (T)

A.R.K. — s/d —
24.05.2021

(ABNI RANJAN KUMAR SINHA)
Member (J)