

IN THE NATIONAL COMPANY LAW TRIBUNAL, NEW DELHI
PRINCIPAL BENCH

C.A. No. 221 of 2017

In
(IB)-23(PB)/2017

IN THE MATTER OF:

**Alchemist Asset Reconstruction
Company Ltd.**

..... **Financial Creditor**

V/s

Hotel Gaudavan Private Limited

.... **Corporate Debtor**

AND IN THE MATTER OF

Harendra Singh Rathore

... **Applicant**

Vs.

Mr. Arunava Sikdar & Anr.

.... **Respondents**

Judgement delivered on 16/8/2017
5/9/2017

Coram:

CHIEF JUSTICE M.M.KUMAR
Hon'ble President

Shri R. Varadharajan,
Hon'ble Member (J)

For the Applicant:

For the Respondents

**: Shri K. Datta, Shri Ashu Kansal &
Shri Shantanu Parashar, Advocates for
Resolution Professional
Shri ASM Tripathi & Shri Siddharth
Chaudhary, Advocates**

CHIEF JUSTICE (RETD.) M.M.KUMAR, HON'BLE PRESIDENT

ORDER

On 16.08.2017, this application was dismissed with cost of Rs. 2 lakhs and the reasons were to follow. The following
reasoned order is now being passed.

2. This is an application filed by the erstwhile Management of Corporate Debtor under Section 74(2) and Section 65 of the Insolvency & Bankruptcy Code, 2016 (for brevity 'the Code') with a prayer to pass an order against the Insolvency Professional punishing him with the fine etc. as per the aforesaid provisions.

3. Reply to the application has been filed and the prayer made by the Applicant has been opposed.

4. Few facts may first be noticed. This Tribunal on 31.03.2017 admitted C.P. No. (IB)-23(PB)/2017, which was filed by the Financial Creditor on 09.03.2017 under Section 7 of the Code. In the admission order, we have made it clear that moratorium in terms of Section 14 of the Code shall come in operation and the suspended Board of Directors of the Corporate Debtor is to offer their co-operation to the Interim Resolution Professional, Shri Arunava Sikdar-Respondent No. 1. A copy of the order dated 31.03.2017 is on record (Annexure R-1). The order of this Tribunal was challenged before the Hon'ble High Court of Rajasthan in D.B. Civil Writ Petition No. 4960 of 2017. The order of this Tribunal dated 31.03.2017 on merit was upheld and it was left open to be examined by the National Company Law Appellate Tribunal on appeal to be filed by the applicant.

However, with regard to constitutional validity, the Writ Petition was admitted on 06.04.2017. Even Stay application was dismissed on 06.04.2017. The matter was taken to the Hon'ble Supreme Court and the Special Leave Petition was also dismissed. It is further pertinent to mention that the erstwhile Management-Applicant after 31.03.2017 initiated arbitration proceedings which have also been stayed by the Hon'ble Supreme Court. An Appeal being Company Appeal No. (AT)(Insolvency) No. 48 of 2017 was filed before the NCLAT which has been dismissed as withdrawn. It has been specifically mentioned that no liberty to challenge the order dated 31.03.2017 passed by this Tribunal is granted before us i.e. NCLT. However, the present application has been preferred by levelling allegation of malafide against the Insolvency Professional.

5. According to the allegations made by the erstwhile Management-applicant, the Insolvency Professional issued advertisement under Regulation 6 of the Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 on 01.04.2017 and has deliberately given the last date for filing the claims on or before

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14.02.2017. In that regard, our attention has been drawn to the public announcement dated 14.04.2017 (Annexure A-2).

6. In reply to the aforesaid allegation, the Insolvency Professional has placed reliance on the public notice published in the Times of India, Jaipur dated 02.04.2017 (English Edition) and has stated that in Column-9, the last date of the submission of claim is 14.04.2017 and even in the narration underneath Column 9 the date mentioned is 04.02.2017 which is clearly in compliance with the provisions of Section 15 read with Regulation 6 of the IBBI Regulations, 2016 (supra). Reliance has also been placed by the IRP on Column 9 as published in the Dainik Bhaskar, Jaipur (Hindi Edition) on 02.04.2017 which correctly announced the last date on receipt of the claims i.e. 14.04.2017. It is further pointed out that in the narration, a typographical error has crept in on the part of the printer where the last date mentioned is 14.02.2017. According to the submissions made by the Counsel for the Insolvency Professional, a number of claims have been filed and no prejudice has been caused because of printing error in the fine print whereas in the bold print the correct date 14.04.2017 has been clearly mentioned in both the advertisements.

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7. Apart from the said the Insolvency Professional has highlighted many other mis-adventures of the erstwhile management-applicant after having lost the litigation upto the Supreme Court and before the Appellate Tribunal. It has been disclosed that the erstwhile Board -applicant of the Corporate Debtor held a meeting on 03.05.2017 to invoke arbitration which was void ab initio. In the meeting, an arbitrator was appointed by the suspended Directors. A copy of the minutes of the illegal Board meeting have been placed on record (Annexure R-5). It has further been highlighted that the amounts to the tune of Rs.1.26 crores have been siphoned by the erstwhile management which resulted in filing applications before this Tribunal being C.A. Nos. 87(PB)/2017 and 136 (PB)/2017. This Tribunal on 13.05.2017 passed direction to return the aforesaid amount and a sum of Rs.1.21 crores were deposited back. In respect of arbitration proceeding order in CA No. 173(PB)/2017 was passed and vide order dated 31.05.2017, the arbitration proceedings were declared illegal and unlawful. The so-called arbitrator was restrained from holding any proceedings between the Financial Creditor and Corporate Debtor as the corporate insolvency resolution process had been initiated. Thereafter all the acts

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were to be done by the Insolvency Professional-respondent no. 1. A copy of the order passed by this Tribunal is on record (Annexure R-6). The erstwhile management-applicant still continued with the arbitration proceeding which resulted in filing a contempt application namely CA No. 183(PB)/2017. The suspended management also filed C.A. No. 186 of 2017 for recall of the order dated 31.05.2017 which was patently against the direction issued by the Appellate Tribunal in its order dated 17.07.2017 (R-10) wherein the applicant has been specifically debarred from challenging the order dated 31.03.2017.

8. Reply by respondent no. 2 ^{has} ~~had~~ also been filed. Respondent no. 2 is the Financial Creditor. It has raised preliminary objections with regard to the maintainability of the application and it also brought on record the order of the Supreme Court staying the order passed by the District Judge, Jaisalmer. The order of the Supreme dated 26.04.2017 has been placed on record, whereby the arbitration proceedings and the proceeding before the District Judge, Jaisalmer have been stayed. It has been urged that there is wholesome misuse of the Court.

9. Having heard the learned Counsel for the parties and pursuing the record, we are of the considered view that this application is liable to be dismissed with cost. Firstly, after the initiation of insolvency process appointing Insolvency Professional, any application by the erstwhile Management would not be maintainable because the whole management slips into the hands of the insolvency professional and the management remains in suspended animation. Secondly, application under Section 60(5) would also not be maintainable. The aforesaid provisions read as under:

"Adjudicating Authority for corporate persons

60 (1)

(2)

(3)

(4)

(5) *Notwithstanding anything to the contrary contained in any other law for the time being in force, the National Company Law Tribunal shall have jurisdiction to entertain or dispose of—*

(a) *any application or proceeding by or against the corporate debtor or corporate person;*

(b) *any claim made by or against the corporate debtor or corporate person, including claims by or against any of its subsidiaries situated in India; and*

(c) *any question of priorities or any question of law or facts,*

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arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under this Code.

10. A perusal of the aforesaid provision would show that the Tribunal has been clothed with the jurisdiction to entertain or dispose of any application or proceeding by or against the corporate debtor or corporate person or any claim made by or against the corporate debtor or corporate person or any claim with regard to question of priorities or any question of law or facts. It is obvious that the application would not fall within the four corners of Section 60(5) of the IBC, 2016.

11. However, reliance has also been placed on Section 65 which deals with fraudulent or malicious initiation of proceedings. According to the provisions of Section 65, if any person has initiated insolvency resolution process or liquidation proceedings fraudulently or with malicious intent etc. then the adjudicating authority is competent to impose a penalty which is not be less than one lakh rupees, but may extend to one crore rupees. Similar provision has been made with regard to initiation of voluntary liquidation proceedings with the intent to defraud any person. It is obvious that this provision would also not be

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attracted. Similar is the position with regard to Section 74(2) which deals with punishment for contravention of moratorium or the resolution plan where the creditor violates the provisions of Section 14 etc.

12. Learned Counsel for the applicant has not been able to point out any provision to maintain the instant application. Yet we proceed to examine the allegations made against the Insolvency Professional. On the basis of a typographical error, the allegation has been built up that the insolvency professional has played fraud. In the English edition of the Times of India, Jaipur, the last date of submission of claims is given correctly being dated 14.04.2017 and in the narration also the correct date is given. Even in the Hindi edition of Dainik Bhaskar, Jaipur dated 02.04.2017 in Column-9 the last date for filing of claim is correctly printed i.e. 14.04.2017 but a trivial error during printing has occurred on the part of the press. The erstwhile management-applicant is simply clutching at straws and indulging in frivolous allegations. It is a complete misuse of the process which is highly condemnable. There is no support from the 'Code' for the erstwhile management to file such an application before the adjudicating authority. In any case if some

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claimant was misled by the typographical mistake which has crept in the printing of the notice, then an appropriate application should have been filed by such a claimant. The erstwhile management-applicant could not have cause to file any such application because it has lost *locus standi* in view of the fact that the erstwhile management is in a suspended animation by virtue of the provisions of Section 17 read with Section 18 of the Code.

13. For the aforesaid reasons, we dismiss the application and saddle the applicant-erstwhile management's Director, Mr. Harendra Singh Rathore with a cost of Rs. two lakhs which shall be paid by him from his own account un-connected with the accounts of the Corporate Debtor, namely Hotel Gaudavan Private Limited.

Sd-

(CHIEF JUSTICE M.M.KUMAR)
PRESIDENT

Sd/-

(R. VARADHARAJAN)
MEMBER(JUDICIAL)

Dated: 16.8.2017
05.09.2017