

IN THE NATIONAL COMPANY LAW TRIBUNAL, NEW DELHI
PRINCIPAL BENCH

(IB)-23(PB)/2017

IN THE MATTER OF:

Hotel Gaudavan Pvt. Ltd. (HGPL)

.....Petitioner

**SECTION : UNDER SECTION 7 of Insolvency and Bankruptcy Code,
2016**

Order delivered on 29.08.2017

Coram:

CHIEF JUSTICE M.M. KUMAR
Hon'ble President

Deepa Krishan
Hon'ble Member (T)

For the Petitioner(s) : Mr. Abhirup Dasgupta, Ms. Swati Sharma,
Advocates

For the Respondent(s) : Shri Rahul Senapati, Ms. Mansi Batra,
Advocates for R-1 in CA No. 183(PB)/2017
& for the Applicant in C.A. No. 199(PB)/17

For the Directors (HGPL): Shri ASM Tripathi, Mr. Siddharth Chaudhary,
Advocates

For RP : Shri Sumesh Dhawan, Ms. Vatsala, Advs.

ORDER

CA No. 222 of 2017

This is an application filed by erstwhile Corporate Debtor with a prayer for recall of the order of admission dated 31.03.2017 passed by this Tribunal on the application filed by the Financial Creditor, namely Alchemist Asset Reconstruction Company Limited under Section 7 of the Insolvency & Bankruptcy Code, 2016. It is appropriate to mention, at the outset, that the admission order dated 31.03.2017, passed by this Tribunal, was



challenged by the applicant in a Writ Petition No. 4960 of 2017 before a Division Bench of the Rajasthan High Court. The Rajasthan High Court, vide order dated 06.04.2017, observed as under:

“Office objection stand overruled.

It's a matter where Financial Creditor the respondent herein filed application under Section 7 of the Insolvency and Bankruptcy Code 2016 (Code 2016) read with S.4 of the (Insolvency And Bankruptcy Application to Adjudication Authorities), 2016 before the National Company Law Tribunal on 9/03/2017 and sent the application along with documents annexed thereto by registered post to the Corporate Debtor which as alleged was served on 14.3.2017.

According to the petitioner, the respondent filed application u/S.7 of the Code 2016 and served in the office of the petitioner corporate debtor on 16/03/2017 and the matter was listed before the Tribunal on 16/03/2017 and adjourned to 17/03/2017 and on 17.3.2017, reply could not be filed by the petitioner and filed reply on 20.3.2017 with preliminary objection regarding maintainability of the application and after due adjudication and taking note of the submissions/counter submissions made by the respective parties, it was

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reserved for orders on 23.3.2017 and order was pronounced on 31.3.2017 assigning reasons in support thereof and we consider appropriate to quote the operative part of the order of the Tribunal which reads ad infra

15. Keeping in view all of the above we are inclined to admit the petition as well as grant a moratorium in terms of Sec.14 of the IBC to be enjoyed by the Corporate Debtor. The interim Resolution Professional proposed in Form 1 of the petition who has also given his consent as prescribed in Form 2 is hereby appointed as the Interim Resolution Professional to exercise all powers and subject to all duties as contemplated under the provisions of the IBC”.

16. In the circumstances the petition is admitted on the above terms and the parties will offer their cooperation to the interim Resolution Professional (IRP) to discharge the duties enjoined on him as contemplated under IBC”.

While admitting the petition and grant of moratorium in terms of Sec.14 of the IBC to be enjoyed by the Corporate Debtor and Interim Resolution Professional has been appointed to exercise all powers and subject to all duties as contemplated under the provisions of Sec.18 of the Code and further process has to be followed in terms



of Interim Resolution Professional obviously as per provisions of the Code 2016.

It is indeed appealable order before the National Company Law Appellate Tribunal u/S.61 of the Code 2016 which so far has not been exercised by the petitioner.

Mr. SS Hora, Adv. appearing for the Corporate Debtor submits that validity of certain provisions of the Code 2016 are under challenge for denial of a reasonable opportunity of hearing to submit explanation and to be examined by the Tribunal and further action being taken appointing interim resolution professional to take under control the assets of the Corporate Debtor such provisions being acted upon impinges the valuable rights enshrined in Part III and more particularly Art.14 & 19(1) (g) and Art.21 of the Constitution which can only be looked into by this Court under its jurisdiction u/Art.226 and that is the reason for which he has not availed the remedy of appeal provided under the Code.

Mr. Sudhir Gupta, Sr. Adv. appearing for the Financial Creditor opposed the request and submits that reasonable opportunity has been afforded to the petitioner and only after taking note of the reply being filed, reasoned order has been passed by the Company Law Tribunal dt.31.3.2017 and being appealable u/S.61 of the Code 2016 the defence available with the petitioner can be examined



by the Appellate Tribunal provided he intends to prefer appeal under the Code.

After we have heard counsel for the parties and taking note of the submissions made, since validity of certain provisions of the Code 2016 is under challenge, we consider appropriate to examine the same. However, this court has not looked the issue on merits of the order dt.31.3.2017 and left it open to be examined by the Appellate Tribunal.

Heard. **Admit.**

Issue notice to the unserved respondents. Notices be given dasti, if desired.

Office to proceed”.

It is also pertinent to mention that application for stay of the order dated 31.03.2017 was also pressed and on 06.04.2017 itself, the same Division Bench of the Hon’ble High Court passed the following order:

“ After we have heard the rival submissions of the parties, in our considered view since there was reply being filed at one stage by the petitioner which has been looked into/considered by the Tribunal of which reference has been made in detail under order impugned dated 31.03.2017 which is appealable u/S. 61 of the Code 2016, this Court is not inclined to grant interim relief prayed for at this stage.



Consequently, the stay application is rejected.”

A perusal of the aforesaid order would show that the prayer of the applicant to challenge the order dated 31.03.2017 on merit was not accepted. However, the petition was admitted to examine the constitutional validity of the provisions of Insolvency & Bankruptcy Code, 2016 giving liberty to the applicant to challenge the order dated 31.03.2017 under Section 61 before the National Company Law Appellate Tribunal.

The applicant felt dis-satisfied and challenged the order of Rajasthan High Court before the Hon’ble Supreme Court in SLP no. 12606-12607 of 2017 and the order of the SLP reads as under:

“The Special Leave Petitions are dismissed.

Pending application (s), if any, stands disposed of accordingly”.

It is patent from the order of the Hon’ble Supreme Court that no interference was shown and the order dated 31.03.2017 passed by this Tribunal under Section 7 of the Code was upheld. The Applicant filed an Appeal before the NCLAT. Before the NCLAT on 17.07.2017, the following picture emerged:



"The case was earlier heard in part. Today, when the matter was taken up, learned counsel for the appellant sought permission to withdraw the appeal to enable the petitioner to file appropriate application before the court of competent authority. Learned Counsel appearing for the respondent has no objection to this.

In the circumstances, we dismiss the appeal as withdrawn without any liberty to challenge this very impugned order before the Tribunal"

A perusal of the order passed by the learned Appellate Tribunal shows that the applicant sought permission to withdraw the Appeal to file appropriate application before the court of competent authority. However, the learned Appellate Tribunal dismissed the Appeal as withdrawn without any liberty to challenge the order dated 31.03.2017 before the Tribunal i.e. NCLT.

The aforesaid developments clearly show that the order dated 31.03.2017 has attained finality at all forums from the High Court to Hon'ble Supreme Court and then the Appellate Tribunal. The Applicant has filed this application despite a clear direction by the learned Appellate Tribunal that they are not giving liberty to challenge the order dated 31.03.2017 before this Tribunal. We fail

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to understand how the applicant could invoke Section 60(5) of the Insolvency & Bankruptcy Code, 2016 to file an application once again. In fact, it is a complete misuse of the process of the court to say the least. Moreover, there is an attempt to mislead and overreach this Tribunal if we read the list of dates and events. The last date mentioned at page-10 is 17.07.2017, which is the date of the order passed by the Appellate Tribunal. The order of the Appellate Tribunal has been described by the applicant as under:

"17.07.2017 The Applicant/ Corporate Debtor withdrew the Appeal filed in the Hon'ble NCLAT with a liberty to file a fresh appeal with fresh facts and documents".

A perusal of the aforesaid averment would show as if the Appellate Tribunal has given liberty to file a fresh appeal with fresh facts and documents, which is false to the knowledge of the applicant. This is a clear attempt to over-reach the Tribunal which we condemned.

In view of the above, the Application is dismissed with cost of Rs. Ten lakhs. The cost shall be paid by the applicant from his own account and no account of the Corporate Debtor is to be



debited. The cost shall be paid in the Company Pool of the Corporate Debtor.

C.A. No. 199 (PB)/2017 shall be taken up with C.A. No. 183(PB)/2017. The same be listed for hearing on 18th September, 2017.

Sd/-

(CHIEF JUSTICE M.M. KUMAR)
PRESIDENT

Sd/-

✓ **(DEEPA KRISHAN)**
(MEMBER TECHNICAL)

29.08.2017
V. Sethi