

Calcutta High Court

HON'BLE JUDGE(S): SHEKHAR B. SARAF , J

KOLKATA METROPOLITAN DEVELOPMENT AUTHORITY V. DAGCON (INDIA) PRIVATE LIMITED

AP - 745 of 2022, decided on 25/04/2023

Insolvency and Bankruptcy Code (31 of 2016) , S.31, S.14— Direction to furnish cash security for stay of arbitral award - Application for recall of order - Tenability - Applicant was directed to furnish cash security of Rs.69,43, 73,572.88/- for obtaining stay of arbitral award - Said award was passed in favour of respondent, pending determination of petitioner's claim before resolution professional - Once an entity enters insolvency, individual claims cannot be pursued against it - Petitioner's entitlement had to be determined as per resolution plan and arbitral award had to be enforced in way as it stood - In view of same, for stay of award, amount, as directed, had to be deposited - Application for recall, rejected.

(Para 5, 6)

Case Referred :

Chronological Paras

AIROnline 2021 SC 196

Para No.(4)

AIR 2019 SC 739 : AIR 2019 SC (Civ) 1041

Para No.(3)

AIROnline 2019 Del 2721

Para No.(3)

Name of Advocates

Jishnu Saha, Sr. Adv, Avishek Guha, Ms. Sirsanya Bandopadhyay, Mrs. Debarati Das, Ms. Akansha Chopra for Petitioner; Surajit Nath Mitra, Sr. Adv. Sankarsan Sarkar, Ms. Anshumala Bansal, Ms. Prarthana Singha Roy for Respondent.

1. **ORDER:-**The instant application, being IA NO. GA 2/2022 in AP/745/2022 is for recalling of an order dated December 13, 2022 (hereinafter referred to as 'the Impugned Order') vide which this court had directed the petitioner herein to furnish cash security of Rs. 69,43,73,572.88/- for obtaining stay of the award dated August 1, 2022 (hereinafter referred to as 'the arbitral award').

2. In must be noted that in the arbitration proceeding, the petitioner had raised a counter-claim for a sum of Rs. 80,66,81,775/-. However, since the respondent company had been admitted into CIRP under the provisions of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'the Code'), the counter-claim could not proceed owing to the moratorium imposed under Section 14 of the Code. The petitioner filed his claim for the entire amount that was counter-claimed in the arbitral proceeding with the resolution professional. Pending determination of the petitioner's claim, the arbitral tribunal proceeded with the respondent's claim and passed the arbitral award in favour of the respondent. Thereafter, the Impugned Order was passed pursuant to petitions filed for

setting aside and stay of the award, both dated November 3, 2022. In or around January 23, 2023 the resolution professional wrote to the petitioner to inform him that the entire amount raised in the counter-claim, that is Rs. 80,66,81,775/-, which was not proceeded with in the arbitral proceedings, had been admitted in the resolution plan.

3. The petitioner submitted that subsequent to the resolution professional's admittance of the counter-claim, the entire amount becomes recoverable and is to be set-off against the awarded sum. In-fact, now the petitioner is entitled to recover from the respondent. The petitioner relied upon *Swiss Ribbons Private Limited and Another v. Union of India and Others* (2019) 4 SCC 17 : (**AIR 2019 SC 739**) and *SSMP Industries Ltd. v. Perkan Food Processing Pvt. Ltd.* (2019 SCC OnLine Del 9339 : (**AIR Online 2019 Del 2721**)) to contend that its counter-claim should be set-off against the awarded sum and therefore the Impugned Order should be recalled.

4. On the other hand, the respondent relied upon *Ghanashyam Mishra And Sons Private Limited v. Edelweiss Asset Reconstruction Company Limited* (2021) 9 SCC 657 : (**AIR Online 2021 SC 196**) to underscore the sanctimonious and paramount nature of resolution plans approved by a committee of creditors and the absolute nature of a the moratorium under Section 14 of the Code.

Relevant paragraphs are delineated below:

"61. It could thus be seen that one of the dominant objects of the I and B Code is to see to it that an attempt has to be made to revive the corporate debtor and make it a running concern. For that, a resolution applicant has to prepare a resolution plan on the basis of the information memorandum. The information memorandum, which is required to be prepared in accordance with Section 29 of the I and B Code along with Regulation 36 of the Regulations, is required to contain various details, which have been gathered by RP after receipt of various claims in response to the statutorily mandated public notice. The resolution plan is required to provide for the payment of insolvency resolution process costs, management of the affairs of the corporate debtor after approval of the resolution plan; the implementation and supervision of the resolution plan. It is only after the adjudicating authority satisfies itself that the plan as approved by CoC with the requisite voting share of financial creditors meets the requirement as referred to in sub-section (2) of Section 30, grants its approval to it. It is only thereafter that the said plan is binding on the corporate debtor as well as its employees, members, creditors, guarantors and other stakeholders involved in the resolution plan. The moratorium order passed by the adjudicating authority under Section 14 shall cease to operate once the adjudicating authority approves the resolution plan. The scheme of the I and B Code therefore is, to make an attempt, by divesting the erstwhile management of its powers and vesting it in a professional agency to continue the business of the corporate debtor as a going concern until a resolution plan is drawn up. Once the resolution plan is approved, the management is

handed over under the plan to the successful applicant so that the corporate debtor is able to pay back its debts and get back on its feet.

* * *

64. It could thus be seen, that the legislature has given paramount importance to the commercial wisdom of CoC and the scope of judicial review by adjudicating authority is limited to the extent provided under Section 31 of the I and B Code and of the appellate authority is limited to the extent provided under sub-section (3) of Section 61 of the I and B Code, is no more res integra.

65. Bare reading of Section 31 of the I and B Code would also make it abundantly clear that once the resolution plan is approved by the adjudicating authority, after it is satisfied, that the resolution plan as approved by CoC meets the requirements as referred to in sub-section (2) of Section 30, it shall be binding on the corporate debtor and its employees, members, creditors, guarantors and other stakeholders. Such a provision is necessitated since one of the dominant purposes of the I and B Code is revival of the corporate debtor and to make it a running concern."

5. In my opinion, while it is unfortunate for the petitioner, the 'counter claim' remedy lies under the Code and the receivables, if any, have to be decided as per the resolution plan. The legislative intent is clear, that once any entity enters insolvency, individual claims cannot be pursued against it. The Code is meant for revival of the entity undergoing insolvency and the petitioner's entitlement has to be determined as per the resolution plan. The arbitral award has to be enforced in the way as it stands. Furthermore, for stay of the award, the amount of Rs. 69,43,73,572.88/- has to be deposited as per the Impugned Order.

6. In light of the above findings, I find no merit whatsoever in the recalling application and the same, being IA NO. GA 2/2022 in AP/745/2022, is dismissed without costs.

7. Furthermore, since the award debtor has not complied with the Impugned Order, the execution application has become activated. However, on the prayer of the petitioner, they are given a further period of two weeks from date to deposit the amount of Rs. 69,43,73,572.88/- to obtain a stay of the award. In default, there shall automatically be an order in terms of prayer (h) of the tabular statement in EC/434/2022.

8. An urgent photostat-certified copy of this order, if applied for, should be made available to the parties upon compliance with requisite formalities.

Petition Dismissed