

2023 PLRonline 0125 (NCLAT)

National Company Law Appellate Tribunal

[Justice Ashok Bhushan] Chairperson, [Barun Mitra] Member (Technical)

Bharat Pipe Fitting Co. Ltd. v. Prowess International Private Limited

Company Appeal(AT) (Ins) - 1070/2022

06.12.2023

IBC S. 9 – Operational Creditor not having filed their claims before the Resolution Professional and the resolution plan having already been approved and CIRP having terminated, claims which did not constitute part of the resolution plan stood extinguished and, if so, whether the Appellant can file a Section 9 application at this stage in respect of such extinguished claims – CIRP has been terminated way back in 2017 and the Corporate Debtor is already in saddle after following the due process, allowing a Section 9 application to proceed on the basis of an extinguished claim which had not been preferred before the Resolution Professional within the stipulated time cannot be countenanced – The Operational Creditor has endeavoured to indirectly assail the approval of a resolution plan after more than 5 years by initiating a separate Section 9 proceeding which to our minds is legally not tenable – A resolution applicant cannot be expected to make a provision in relation to any creditor who has failed to make a claim within the stipulated time-line. It logically follows therefore that there is no legitimate scope in the IBC framework for agitating or initiating any proceeding in respect of a claim which was not part of the resolution plan or was not preferred at the relevant time.

J U D G M E N T

[Per: Barun Mitra, Member (Technical)]

The present appeal filed under Section 61 of Insolvency and Bankruptcy Code, 2016 (“**IBC**” in short) by the Appellant arises out of the Order dated 13.06.2022 (hereinafter referred to as “**Impugned Order**”) passed by the Adjudicating Authority (National Company Law Tribunal, Kolkata Bench-I) in CP(IB) No.1337/KB/2019. By the impugned order, the Adjudicating Authority rejected the Section 9 application filed by Bharat Pipe Fitting Company-Operational Creditor/present Appellant seeking initiation of Corporate Insolvency Resolution Process (“**CIRP**” in short) against Prowess International Private Limited, Corporate Debtor/present Respondent and held that the resolution plan of the Corporate Debtor having already been approved and the claims of the Operational Creditor not being part of the resolution plan, the right of the Operational Creditor in respect of their claims stood extinguished. Aggrieved by the impugned order, the present appeal has been filed by the Operational Creditor.

2. Briefly coming to the factual matrix of the case, it is noticed that the Operational Creditor had supplied goods to the Corporate Debtor pursuant to purchase orders issued between

23.07.2013 and 10.10.2015. The materials having been delivered, tax invoice and challans were raised on the Corporate Debtor. Though payments were made from time to time, the Corporate Debtor defaulted in this regard and according to the Operational Creditor the alleged date of default was 24.07.2013 following which several reminders for making payments were issued by the Operational Creditor with the last one being issued on 14.06.2019. Since the reminder emails remained unresponded and payments were not forthcoming, a Section 8 demand notice was issued on 06.07.2019 which also was not replied to. On the basis of balance confirmation, after due reconciliation of accounts, purportedly issued by the Corporate Debtor to the Operational Creditor, the Operational Creditor filed a Section 9 application and claimed an outstanding amount of Rs. 59.32 lakhs including an interest amount of Rs. 30.68 lakhs. In the meantime, prior to filing the present Section 9 application, CIRP was initiated against the present Corporate Debtor on 20.04.2017. Subsequently, a resolution plan was also approved by the Adjudicating Authority and CIRP was completed on 17.10.2017 vide orders issued in CP No. 150/IB/KB/2017. As the Appellant/Operational Creditor had not filed any claim with the Resolution Professional after the Corporate Debtor was admitted into CIRP and has now filed the Section 9 petition only after the approval of the resolution plan, the Adjudicating Authority held that the right of the Operational Creditor to seek remedy under Section 9 of the IBC stood extinguished and rejected their application leading to this appeal.

3. It is submitted by the Learned Counsel for the Appellant that the Corporate Debtor having received goods from the Operational Creditor which had been accepted without any demur cannot evade payment. The date of default in making payments by the Corporate Debtor with regard to goods received was 24.07.2013 but this date fell within the limitation period since the Corporate Debtor had issued several balance confirmations of the defaulted amount as due and payable by them to the Corporate Debtor. These balance confirmations were issued from time to time and finally on 01.04.2018. It is the claim of the Operational Creditor that since the Corporate Debtor issued confirmation of accounts time and again acknowledging liability in respect of the operational debt, this has the effect of a continuous admission of liability. Moreover, these balance confirmations having not been disputed by the Corporate Debtor, the question of limitation does not arise. Furthermore, the Operational Creditor had reminded the Corporate Debtor by sending emails regarding outstanding debt. Since the Corporate Debtor refused to issue any balance confirmation in favour of the Operational Creditor after 21.02.2019 and also failed to make any payments, the Appellant/Operational Creditor was compelled to institute Section 9 proceedings before the Adjudicating Authority.

4. It is further submitted by the Learned Counsel for the Appellant that the Operational Creditor was entitled for admission of the Section 9 petition since their claims in respect of the invoices raised were an undisputed claim and there was clear default by the Corporate Debtor. Further keeping in view that supply of goods was admitted and operational debt acknowledged by issuance of Balance Confirmation Statements the debt was established and default having occurred, it was a fit case for admission of Section 9 application. Given this backdrop, the decision of the Adjudicating Authority dated 17.10.2017 in CP No. 150/IB/KB/2017 approving the resolution plan without settling the dues of the Appellant, being one of the Operational Creditors, it was contended that the Corporate Debtor cannot

start on a clean slate. Under such circumstances, the present impugned order by holding that the claims as provided in the resolution plan stood frozen and that claims which are not part of the resolution plan stands extinguished does not hold to reason. It was contended that the resolution plan was not approved in conformity with Sections 30 and 31 of the IBC.

5. Making rival submissions, it has been contended by the Learned Counsel for the Respondent that the Corporate Debtor did not have any debt outstanding qua the Operational Creditor. It has been strongly refuted that the Corporate Debtor had admitted any debt payable to the Operational Creditor. It has been further stated that the balance confirmation purportedly submitted by the Corporate Debtor is a forged document. It has thus been denied by the Corporate Debtor that any balance confirmation was issued by them to the Operational Creditor after reconciliation of accounts. Post- reconciliation of accounts, the Corporate Debtor was not required to make any payments to the Operational Creditor and this has been correctly adjudicated by the Adjudicating Authority. Since the claims of the Operational Creditor had already been settled, there arose no default on the part of the Corporate Debtor. Further, the claim made by the Operational Creditor in the demand notice of 08.07.2019 pertain to the period 2013 to 2015 which was prior to the period of CIRP. Since these outstanding amounts pertained to period prior to CIRP, the same cannot be entertained at this stage as the said claims are barred by limitation.

6. Since the Corporate Debtor has started on a clean slate on the basis of a resolution plan duly approved and dues of all creditors as per list finalized by the Resolution Professional and approved by the CoC having been settled, the claim of the present Appellant/Operational Creditor has no merit and hence the rejection of their claims by the Adjudicating Authority is well reasoned.

7. We have duly considered the arguments advanced by the Learned Counsel for the parties and perused the records carefully.

8. The moot question before us is whether in the facts of the present case where the Appellant as Operational Creditor not having filed their claims before the Resolution Professional and the resolution plan having already been approved and CIRP having terminated, claims which did not constitute part of the resolution plan stood extinguished and, if so, whether the Appellant can file a Section 9 application at this stage in respect of such extinguished claims.

9. The Learned Counsel for the Appellant has relied on the judgment of the Hon'ble Supreme Court in [Swiss Ribbons \(P\) Ltd. v. Union of India \(2019\) 4 SCC 17](#) to contend that Appellant has a right of payment in respect of operational debt particularly when the debt has been acknowledged vide balance confirmations and goods had been received and acknowledged through the issuance of C-Forms. It is their case that these balance confirmations were issued from time to time and finally on 01.04.2018. The Appellant has also submitted that the subsequent balance confirmations for FY 2016-17, 2017-18 and 2018-19 have been placed on page 178-180 of the Appeal Paper Book ("**APB**" in short). We also notice that it is the case of the Appellant that these balance

confirmations have not been disputed by the Corporate Debtor and hence do not attract the question of limitation. The first time the balance confirmation was denied was only after the Operational Creditor had filed the Section 9 application. Submission has also been pressed that reminders for payments were sent by way of emails which have been placed at pages 184-197 of the APB which emails have not been denied by the Corporate Debtor either. It is further the case of the Operational Creditor that the Corporate Debtor neither replied to the Section 8 demand notice nor made any payments in respect of the outstanding debt and hence Section 9 application against the Corporate Debtor was justified.

10. The counter submissions pressed by the Respondent is that the Appellant/Operational Creditor did not file any claim with the Resolution Professional after the Corporate Debtor was admitted into CIRP on 20.04.2017. Placing reliance on the judgement of the Hon'ble Apex Court in **Ghanshyam Mishra & Sons Pvt. Ltd. v. Edelweiss Asset Reconstruction Company Ltd. (2021) 9 SCC 657** ("Ghanshyam" in short), the Learned Counsel for the Respondent has asserted that all unpaid liabilities and claims that are not filed with the Resolution Professional before the approval of the resolution plan and those which are not included in the said resolution plan would stand extinguished. Moreover, these debts having been claimed by the Operational Creditor way back in 24.07.2013 makes the debt barred by limitation. It is further contested that the three opening balances shown by the Appellant to show continuing liability cannot be relied upon as these are ex-facie forged documents. Both the stamp of the Corporate Debtor on the balance confirmation statement and the signature thereon by one Mr. Sumit Kumar on behalf of the Corporate Debtor are forged since no such person was ever in the employment rolls of the Corporate Debtor. It was emphasized that his name did not figure in the list of employees maintained by the resolution applicant as part of the resolution plan which was submitted before the Adjudicating Authority. It is also the claim of the Corporate Debtor that the so-called emails sent by the Operational Creditor from 27.01.2018 to 14.06.2018 also cannot be relied upon since these were created with mala-fide motives. These emails do not mention the fact that CIRP has already been initiated against the Corporate Debtor on 20.04.2017. Moreover, the Corporate Debtor was not obliged to respond to any statutory notice once it had started its operations on a clean slate after the Adjudicating Authority had terminated the CIRP.

11. Before we dwell into the issue outlined for our consideration at para 8 above, it may be useful and constructive to see how the Adjudicating Authority has dealt with the said matter. The relevant excerpts of the impugned order are as reproduced below:

"25. The date of default mentioned by the Operational Creditor is 24 July 2013, and the instant petition was filed on 09 August 2019. It is to be noted that the Corporate Debtor had been admitted into CIRP vide order dated 20 April 2017 in Company Petition 150/2017. Subsequently, a resolution plan also been approved by this Adjudicating Authority vide order dated 17 October 2017. The Operational creditor had not filed any claim with the Resolution Professional after the Corporate Debtor was admitted into CIRP and has filed the instant petition after the approval of the resolution plan. The same indicates gross negligence on part of the Operational Creditor.

26. The Hon'ble National Company Law Appellate Tribunal, in the matter of **Sanjay Chemicals (India) Private Limited vs. Sharon Bio-Medicine Limited**, held that since the outstanding dues were prior to the period of initiation of 'Corporate Insolvency Resolution Process' and the creditor had not filed the claim at that stage, the application under Section 9 of the Code after completion of the 'Corporate Insolvency Resolution Process' against 'Corporate Debtor' was not maintainable [Para 3].

27. Further, the judgment of the Hon'ble Supreme Court in **Ghanashyam Mishra & Sons Pvt Ltd v Edelweiss Asset Reconstruction Company Ltd.** lays down that when the resolution plan is approved by the Adjudicating Authority, the claims as provided in the resolution plan shall stand frozen and will be binding on the corporate debtor, and its employees, members, creditors, including the central and state government or any local authority, guarantors and other stakeholders. On the date of approval of resolution plan by the Adjudicating Authority, all such claims which are not a part of resolution plan shall stand extinguished and no person will be entitled to initiate or continue any proceedings in respect to a claim which is not part of the resolution plan. [Para 95]

28. In light of the said legal precedents, this Adjudicating Authority is satisfied that the right of the Operational Creditor to seek remedy under section 9 of the Code has been extinguished and as such, the instant petition being CP(IB) 1337/KB/2019 shall stand dismissed."

(Emphasis supplied)

12. The Operational Creditor has assailed the impugned order on the ground that the essential ingredients required to be met in approving the resolution plan particularly the feasibility or viability of the resolution plan has not been examined by the Adjudicating Authority. It has been contended that since the resolution plan was not approved in conformity with Sections 30 and 31 of the IBC, the principles enunciated in the decision of the Hon'ble Supreme Court of India in the matter of **Ghanashyam** supra do not apply in the present case. It is the contention of the Operational Creditor that the Corporate Debtor having received goods from them which had been accepted without any demur cannot evade payment by claiming that the balance confirmation document is a forged document without prima facie evidence to show that the document is a false creation and has relied on the judgment of this Tribunal in **Prayag Polytech Pvt. Ltd. v. I World Digital Solutions Pvt. Ltd in CA(AT) (Ins.) 625/2019 ("Prayag"** in short) that a document cannot be held as forged unless there is prima-facie evidence to that effect. It has also been pointed out by the Learned Counsel for the Appellant by way of an additional affidavit that the resolution plan provided that Operational Creditors who have not claimed but claims are duly acknowledged by the Corporate Debtor as debt in their books of accounts, the same would continue to be paid. It was therefore asserted that the resolution plan clearly provided that Operational Creditor whose dues have not been settled are required to be settled notwithstanding the resolution of the Corporate Debtor. It has been further stated that in the Balance Sheet of the Corporate Debtor as on 31.03.2017, in the column of "Trade Payables" an amount of Rs. 24,17,46,497/- were shown as due and payable by the Corporate Debtor. This column clearly indicates that the Corporate Debtor had not paid all

operational creditors including the Appellant.

13. Countering these assertions, it is submitted by the Learned Counsel for the Respondent that the contention of the Operational Creditor that some Sumit Kumar had furnished the opening balance of the Corporate Debtor qua the Appellant as on 01.04.2016, 01.4.2017 and 01.04.2018 is a false claim. It was pointed out that his name did not figure in the list of employees maintained by the resolution applicant as part of the resolution plan which was submitted before the Adjudicating Authority. It has been argued that acknowledgment of debt is the prerogative of the Board and/or has to be approved by shareholders in the Annual General Meeting in terms of Section 291 of the Companies Act, 1956. In the present case the Operational Creditor has failed to produce any document to show that there has been acknowledgment of debt by a Director of a Corporate Debtor. In support of their contention, reliance has been placed on the judgment of the Hon'ble Supreme Court in [***Asset Reconstruction Company \(India\) Ltd. v. Bishal Jaiswal* \(2021\) 6 SCC 366**](#) to claim that Sumit Kumar did not have the locus standi to acknowledge the debt of a company under the Companies Act.

14. Analyzing the facts of the present case in the light of the rival contentions made by both parties, material on record and the orders of the Adjudicating Authority dated 17.10.2017 and 13.06.2022, we notice that it is an admitted fact that the Corporate Debtor was admitted into CIRP on 20.04.2017. It has not been controverted or challenged that the Resolution Professional had prepared an updated list of assets and liabilities on the basis of the claims of the creditors. The creditors who had sought their dues to be cleared were paid and their accounts settled. Undisputedly, the Operational Creditor did not file his claims before the Resolution Professional. The resolution plan was approved by the Adjudicating Authority following which CIRP was terminated on 17.10.2017. Moreover, the resolution applicant had been handed over the books of accounts and computer system updated by the Resolution Professional on 17.10.2017 and it is contended by the Corporate Debtor that the name of the Operational Creditor/Appellant was not figuring therein.

15. For reasons of clarity, it may be useful to glance through the orders of the Adjudicating Authority dated 17.10.2017 which has not been challenged by the Appellant which is to the effect:

".....The account with the Punjab National Bank is a standard account, and the Bank has not recalled its dues. Only two other claims from operational creditors (Parker Hannifin India Pvt. Ltd. And Poonam Enterprise) had been received, and both have been settled to the satisfaction of the claimants. No other claim from any other Operational Creditor had been accepted. As per the Regulations, a creditor, who failed to submit proof of claim within the time stipulated in the public announcement, may submit such evidence to the interim resolution professional or the resolution professional, as the case may be, till the approval of a resolution plan by the committee..... Therefore, it is clear that operational creditors' claim has been settled with the corporate debtor and financial creditor Punjab National Bank itself has certified that accounts of the corporate debtor are classified in their books of accounts as a standard asset. So, in this condition it is clear that no debt is outstanding as on today on the corporate debtor and Committee of Creditors

with 100% own shares has made a recommendation for closing the Insolvency Proceedings. Given the resolution passed by Committee of Creditors Resolution Plan submitted by the Resolution Professional deserves to be accepted.....”

16. This order of 17.10.2017 clearly shows that the dues of all claims from operational creditors had been settled by the time the CIRP was terminated. Only two claims from the category of operational creditors (Parker Hannifin India Pvt. Ltd. and Poonam Enterprise) had been received and both were settled to the satisfaction of the claimants. No other claim from any other Operational Creditor had been accepted. As per the Regulations, any creditor, who had failed to submit proof of claim within the time stipulated in the public announcement, was given opportunity to submit such evidence to the interim resolution professional or the resolution professional, as the case may be, till the approval of a resolution plan by the committee. This opportunity had clearly not been availed by the Appellant to submit their claims.

17. The very fact that the Appellant had not formally lodged their claims with the Resolution Professional before the approval of the resolution plan by the Committee of Creditors has rightly been held as gross negligence on the part of the Operational creditor in the instant impugned order. There is no data or document which evidence the existence of the Operational Creditor or their dues prior to termination of the CIRP on 17.10.2017. Even if we accept the contention of the Appellant that there was a “Trade Payables” column in the balance sheet and it showed an amount of Rs 2417 lakhs as amount payable for FY ending 31.03.2017, there is nothing which specifically mentions about the Appellant being one of the Operational Creditors to whom the trade payable was attributable. This brings us to the averment made by the Appellant regarding acknowledgment of outstanding balance by one Sumit Kumar on behalf of the Corporate Debtor and denial thereof by the Corporate Debtor as being a false claim. We have no quarrel with the proposition of law laid down in **Prayag** judgement supra of the need of prima- facie evidence to establish fraudulent creation of a document which has been referred to by the Appellant, we hold that both the Adjudicatory and the Appellate Tribunals having been vested with summary jurisdiction, we desist to enter the realm of finding out whether any fraud has been created in the acknowledgment of debt in the balance-sheet by one Sumit Kumar. In sum, we cannot subscribe to the contention of the Appellant that the claim of the Appellant was reflected in the records of the Corporate Debtor.

18. Having come to the finding that the Appellant had not filed their claims before the Resolution Professional before approval of the resolution plan by the Adjudicating Authority and that there is no unambiguous proof that the claim of the Appellant was reflected in the records of the Corporate Debtor we now make a foray into the question whether the claims which did not constitute part of the resolution plan stood extinguished and, if so, whether the Appellant can file a Section 9 application at this stage in respect of such extinguished claims.

19. It is undisputed that the Corporate Debtor had started its operations with a clean slate after settlement of dues with the creditors in terms of the orders of the Adjudicating Authority dated 17.10.2017. It is also a well settled legal precept that a resolution applicant

cannot be expected to make a provision in relation to any creditor who has failed to make a claim within the stipulated time-line. It logically follows therefore that there is no legitimate scope in the IBC framework for agitating or initiating any proceeding in respect of a claim which was not part of the resolution plan or was not preferred at the relevant time. We would like to refer to the judgement of the Hon'ble Supreme Court in ***Committee of Creditors of Essar Steel India Ltd v Satish Kumar Gupta & Ors (2020) 8 SCC 534*** where the clean slate principle has been enunciated to obviate the possibility of a successful resolution applicant being subjected suddenly to "undecided" claims. In yet another recent judgement of the Hon'ble Supreme Court in ***RPS Infrastructure Ltd v Mukul Kumar & Anr in CA No. 5590 of 2021***, it has been laid down that after approval of the plan by the CoC, the hydra-headed monster of undecided claims cannot be unleashed on the resolution applicant. Applying the above ratios, in the present case, when CIRP has been terminated way back in 2017 and the Corporate Debtor is already in saddle after following the due process, allowing a Section 9 application to proceed on the basis of an extinguished claim which had not been preferred before the Resolution Professional within the stipulated time cannot be countenanced. The Operational Creditor has endeavoured to indirectly assail the approval of a resolution plan after more than 5 years by initiating a separate Section 9 proceeding which to our minds is legally not tenable.

20. We therefore are of the considered view that no error has been committed by the Adjudicating Authority in rejecting the Section 9 application. In this view of the matter, we do not find any reason to interfere with the impugned order. The Appeal is dismissed. No order as to costs.