

2022 SCeJ 008 (NCLAT)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, PRINCIPAL BENCH, NEW DELHI

Justice Ashok Bhushan, Chairperson, Justice Jarat Kumar Jain, Dr. Alok Srivastava

Kanchan Nanubhai Desai Personal Guarantor (Anoushka Medicare & Diagnostics Pvt. Ltd.) v. Finquest Financial Solutions Pvt. Ltd. & Anr.

Comp. App. (AT) (Ins.) No. 1089 of 2021

03.01.2022

Insolvency and Banking Code , 2016 S. 97 - Adjudicating Authority was not required at the stage when report was still to be filed by the Resolution Professional to record a finding regarding default - Adjudicating Authority ought not to have recorded any finding regarding default, which ought to have left for the Resolution Professional to consider and submit a report. We are also not persuaded by the submissions of the Learned Counsel for the Respondents that the observations are only *prima facie* observations. We thus find substance in the above submissions of the Learned Counsel for the Appellants and we are of the view that the observations as quoted above regarding default deserves to be deleted from the judgment and are hereby deleted. [Para 10]

Order

03.01.2022: Heard Learned Counsel for the Appellants as well as Learned Counsel appearing for the Respondents. With the consent of Learned Counsel for the parties, Appeals itself have been heard at the stage of admission finally.

2. These Appeals have been filed against judgment and order dated 30.09.2021 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, Court-III, in I.A. 2495/2020 in C.P.(IB)- 457(MB)/2020. A Petition was filed under Section 95 of the Insolvency and Bankruptcy Code, 2016 ("I&B Code" for short) through the Resolution Professional (RP), Sudha Bhushan, against the three Appellants who are before us in these three Appeals. On the Application filed through the Resolution Professional, the Adjudicating Authority has passed the order directing the Resolution Professional to exercise the powers as enumerated under Section 99 of the 'I&B Code' read with the Rules made thereunder and submit the recommendations with reasons in writing for acceptance or rejection of Application within the stipulated time as envisaged under Section 99. Aggrieved by the order impugned, these Appeals have been filed.

3. Two principal submissions have been made by the Learned Counsel for the Appellant before us. Firstly, as per Section 97 of the 'I&B Code' even though Application was filed by the Resolution Professional, the Adjudicating Authority ought to have asked for confirmation of the Resolution Professional from the Board as required by Section 97 and secondly, at the stage when the report has not come from the Resolution Professional, there was no

occasion to record any finding regarding default. He submits that the finding regarding the default were uncalled for and in view of the said finding, the Resolution Professional shall be handicapped to submit any negative report. Learned Counsel for the Appellant has placed reliance on the judgment of this Tribunal dated 12.08.2021 in Company Appeal (AT) (Ins.) No. 316 of 2021- “Mr. Ravi Ajit Kulkarni vs. State Bank of India”.

4. We have heard Mr. Sunil Fernandes, Learned Counsel for the Respondents. He submits that insofar as the appointment of the Resolution Professional is concerned, it is not the case of the Appellant that there was any disciplinary proceeding pending against the Resolution Professional. Hence, the submission is only a technical submission. It is submitted that the Adjudicating Authority has list of the Resolution Professionals against whom disciplinary proceedings are pending and no disciplinary proceeding is pending against the Resolution Professional. As no disciplinary proceedings pending against the Resolution Professional, the appointment has been confirmed by the Adjudicating Authority in which no error can be pointed out. Insofar as the second submission of the Appellant is concerned, it is contended that as far as the observations made by the Adjudicating Authority regarding default, the same may not affect the Resolution Professional while making the recommendation as required under Section 99.

5. We have considered the submissions of the Learned Counsel for the Appellants and have perused the record.

6. Section 97 of the ‘I&B Code’ which deals with ‘appointment of resolution professional’ with reference to Insolvency Resolution Process under Chapter III, following is a statutory scheme as delineated by Section 97(1) and (2):-

“97. Appointment of resolution professional. - (1) If the application under section 94 or 95 is filed through a resolution professional, the Adjudicating Authority shall direct the Board within seven days of the date of the application to confirm that there are no disciplinary proceedings pending against resolution professional.

(2) The Board shall within seven days of receipt of directions under sub-section (1) communicate to the Adjudicating Authority in writing either -

(a) confirming the appointment of the resolution professional; or

(b) rejecting the appointment of the resolution professional and nominating another resolution professional for the insolvency resolution process.

(3) Where an application under section 94 or 95 is filed by the debtor or the creditor himself, as the case may be, and not through the resolution professional, the Adjudicating Authority shall direct the Board, within seven days of the filing of such application, to nominate a resolution professional for the insolvency resolution process.

(4) The Board shall nominate a resolution professional within ten days of receiving the direction issued by the Adjudicating Authority under sub-section (3).

(5) *The Adjudicating Authority shall by order appoint the resolution professional recommended under sub-section (2) or as nominated by the Board under sub-section (4).*

(6) *A resolution professional appointed by the Adjudicating Authority under sub-section (5) shall be provided a copy of the application for insolvency resolution process."*

7. There cannot be any dispute with the statutory scheme as contained in Section 97 that when Application is filed by the Resolution Professional under Section 95, the Adjudicating Authority shall direct the Board within seven days of the date of the Application to confirm that disciplinary proceedings pending against the Resolution Professional or not and the Board was required within seven days to communicate in writing either confirming the appointment of the Resolution Professional or rejecting the appointment of the Resolution Professional and nominating another Resolution Professional. It is true that the Adjudicating Authority had not asked the Board to confirm the appointment of Resolution Professional as required by Section 97(1). However, looking into the facts of the present case where it is not a case of the Appellants before us that any disciplinary proceedings are pending against the Resolution Professional who has filed the Application, we see no useful purpose in again directing the Adjudicating Authority to send the recommendation to the Board for confirmation. The order having been passed more than three months' prior to the passing of the order, hence we are of the view that due to this reason the order of the Adjudicating Authority does not need to be interfered with.

8. Now coming to the second submission of the Learned Counsel for the Appellants that Adjudicating Authority was not required at the stage when report was still to be filed by the Resolution Professional to record a finding regarding default, the said submission is fully supported by the judgment of this Tribunal in the above case namely— "Mr. Ravi Ajit Kulkarni" (supra) in which default has been dealt with in Paragraphs 44 and 47 which is to the following effect:-

"44. In substance, once the application is "filed" (as per Section 95, 96 read with Rule 10) the Adjudicating Authority has to act on it, and following principles of natural justice, give limited notice to Personal Guarantor to appear referring to the Interim Moratorium that has commenced as per terms of Section 96. Then the next stage is of appointing Resolution Professional as per Section 97 read with Rules and Regulations. Third stage will be Resolution Professional acting in terms of Section 99 and submitting Report. At the fourth stage comes in adjudication of the application under Section 100 which ought to be decided by giving hearing to parties keeping in view Application, evidence collected and report under Section 99.

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47. We also find that it was an error on the part of Adjudicating Authority to observe in Para 10 as reproduced above and hold that there is a "default" when matter was at the stage of acting on the application under Section 95 read with Section 96. According to us, as mentioned, the stage for considering default would arrive when the matter is taken up under Section 100 of IBC. The Appellant is right when the Appellant submits that if the

Adjudicating Authority gives such finding in advance, the report under Section 99 could not be in the negative. Again the Adjudicating Authority mentioned in Para 11 of the impugned order that it was “allowing” the application under Section 95. At the stage of Section 95 Adjudicating Authority is to act upon the application to take further steps. The stage for “allowing” Application to admit or reject the application would be under Section 100. At the stage of appointment of Resolution Professional, such allowing is not contemplated. In Section 97 no adjudication as such is involved.”

9. In the impugned judgment, the Adjudicating Authority had made observations to the following effect at page 33:-

“Based on the submissions made by the Applicant and the documents produced and placed on record before this Bench, the Bench has no doubt in its mind that there is a ‘default’ on the part of the Personal Guarantor by not fulfilling the debt owed to the Corporate Debtor, i.e., Anoushka Medicare & Diagnostics Private Limited as per the Deed of Personal Guarantee entered between the parties through the Deed of Personal Guarantee dated 01.08.2017.”

10. Learned Counsel for the Respondents submit that those observations are only *prima facie* observations which did not vitiate the order of the Adjudicating Authority. Be that as it may, in view of the judgment of this Tribunal in the case of “Mr. Ravi Ajit Kulkarni” (Supra), the Adjudicating Authority ought not to have recorded any finding regarding default, which ought to have left for the Resolution Professional to consider and submit a report. We are also not persuaded by the submissions of the Learned Counsel for the Respondents that the observations are only *prima facie* observations. We thus find substance in the above submissions of the Learned Counsel for the Appellants and we are of the view that the observations as quoted above regarding default deserves to be deleted from the judgment and are hereby deleted. Learned Counsel for the Respondent submits that in the last paragraph, the Adjudicating Authority has given full liberty to the Resolution Professional to make a recommendation with reasons in writing for acceptance or rejection of the Application. The above directions do clearly mention that report has to be submitted as per Section 99, but to avoid any prejudice to any of the parties, we are of the view that the observations as quoted above are required to be deleted from the judgment.

11. The Appeals are partly allowed to the extent as indicated above.