

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, PRINCIPAL BENCH, NEW DELHI

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

Radius Infratel Pvt. Ltd. v. Jaiprakash Associates Limited

Company Appeal (AT) (Insolvency) No. 494 of 2021

04.01.2022

Insolvency and Banking Code , 2016 S. 60(5) - Jurisdiction - Whether the Adjudicating Authority has jurisdiction to pass the interim order the effect of which was to stop the implementation of the order passed by the District Magistrate under the provisions of the National Disaster Management Act, 2005 - Wherever the corporate debtor has to exercise a right that falls outside the purview of the IBC, 2016 especially in the realm of the public law, they cannot, through the resolution professional, take a bypass and go before NCLT for the enforcement of such a right - CIRP proceedings completed - The act of providing internet services to the residents by other internet providers apart from the Appellant, emanated from the order of District Magistrate passed in exercise of jurisdiction under National Disaster Management Act, 2005, which action was sought to be indirectly challenged before the Adjudicating Authority - The act of permitting the residents to avail the internet service of other service providers, did not emanate from any proceedings under the Insolvency Resolution Process and was outside the Insolvency Resolution Process - The Adjudicating Authority by issuing the interim order had virtually stopped the implementation of order of the District Magistrate which was outside the jurisdiction of the Adjudicating Authority.

(Arising out of Order dated 05.07.2021 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi, Principal Bench in IA No.4052 of 2020 in CP(IB)-59 (PB)/2018)

For Appellant: Mr. Aditya Dewan and Mr. Sahil Chandra, Advocates. For Respondents: Mr. Vishal Gupta and Mr. Tenzen Tashi Negi, Advocates for R-1.

JUDGMENT

ASHOK BHUSHAN, J.

This Appeal has been filed against the order dated 5th July, 2021 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi, Principal Bench, rejecting the I.A. No.4052(PB)/2020 filed by the Appellant.

2. Brief facts of the case, necessary to be noted for deciding this Appeal are:

(i) Corporate Insolvency Resolution Process (CIRP) was initiated against the Corporate

Debtor – Radius Infratel Pvt. Ltd. by order dated 23rd July, 2018 of the Adjudicating Authority.

(ii) the Adjudicating Authority directed for liquidation of the Corporate Debtor.

(iii) Corporate Debtor had entered into a Indefeasible Right of Use (IUR) Capacity Agreement with Jaypee Infratel Private Limited in the year 2013. Under the terms of Agreement, the Corporate Debtor had agreed to build own, operate, manage, maintain, update and upgrade the sole ICT (Information, Communication & Technology) network (hereinafter called the ‘NANO Infrastructure’) in the project to transmit various information, communication and entertainment services at the said project. These services were being provided to the residents of Jaypee Greens, Wishtown Noida and Jaypee Greens, Greater Noida using the Corporate Debtor’s NANO network.

(iv) Complaints were submitted before the District Magistrate, Gautam Buddha Nagar that in Jaypee Greens, Wishtown Noida and certain other projects, the Appellant was adopting monopolistic practice in regard to providing internet services through the Corporate Debtor only whereas the residents wanted the avail internet services of Reliance Jio or Airtel.

(v) A meeting was held in the Office of the District Magistrate between the residents and Facility Management at Wishtown, Noida, where it was stated by the residents that broadband services provided by the Corporate Debtor is unsatisfactory and service levels are very poor. The District Magistrate holding the meeting with the authorized representative of the residents and the Corporate Debtor as well as representatives of Bharti Airtel and Reliance Jio, passed an order dated 22nd August, 2020 issuing the following guidelines:

“In the light of the provisions of The Competition Act 2002 (Amendment) Act 2007 and National Disaster Management Act-2005 as mentioned above, the following guidelines are issued in respect of providers providing Internet services in view of the current sensitive circumstances of infection of Covid-19 and preventing the violation of the rights of consumers regarding Internet services:

- 1. The rights of any consumer for internet services will not be violated by any person/ institution/ company/ group housing etc. in the district i.e. no consumer will be forced to take a connection from a particular internet service provider.*
- 2. In accordance with the provisions contained in The Competition Act 2002 (Amendment) Act 2007, all consumer will have the freedom to choose the Internet service provider as per his wish.*
- 3. Strict penal action will be taken under the relevant provisions in the event of improper pressure being made by any person/ institution/ company / group housing etc. to select a particular Internet service provider company to a consumer for his own interest.*
- 4. The said order will be effective with immediate effect. In case of violation of order, punitive action will be ensured under Section 51 of the National Disaster Response Act 2005*

with the imprisonment for a term which may extend to one year or with fine, or with both, and if such obstruction or refusal to comply with directions results in loss of lives or imminent danger thereof, shall on conviction be punishable with imprisonment for a term which may extend to two years.”

(vi) Consequential orders were passed by the City Magistrate, referring to the order dated 22nd August, 2020 that no consumer's right will be violated by any person/ institution/ company/ group housing etc. and no consumer will be forced to take connection of a particular internet service provider. Orders were issued by the City Magistrate on 25th September, 2020, 30th September, 2020 and 23rd October, 2020 addressed to Jaiprakash Associates Ltd. and J.P. Greens Wishtown.

(vii) District Magistrate issued another order dated 27th October, 2020 to Jaiprakash Associates Limited and Jaypee Greens Wish Town.

(viii) An IA No.4052 of 2020 was filed by the Appellant herein before the Adjudicating Authority, in which reference of the order of the District Magistrate dated 22nd August, 2020 was also made. In the Application, the following prayers were made:

“a. Allow the present Application under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 and

i. Stay any steps/ actions taken or to be taken by the Respondents in contravention of the terms of the IRU Agreements, including setting up of any parallel network, and/ or

ii. restrict the Respondents permanently from contravening the terms of the IRU Agreements entered with both the Respondents; and

iii. Direct the Respondents to remove all the unauthorized Internet Service Providers (ISPs) from the premises of the Respondents covered under the IRU Agreements, and/ or

iv. Pass such further Order(s) that this Ld. Adjudicating Authority deems fit and proper to safeguard the interest of the Applicant/ Corporate Debtor; and/or

b. Pass such further Order(s) that this Ld. Adjudicating Authority deems fit and proper in the facts and circumstances of the present case.”

(ix) The Adjudicating Authority on the Application filed by the Appellant passed an interim order dated 27.10.2020 restraining the Respondents from proceeding to have services from other networks. The District Magistrate, Gautam Buddha Nagar was directed to be impleaded as 2nd Respondent.

(x) The Application filed by the Appellant being IA No.4052 of 2020 was taken up for consideration on 5th July, 2021. The Adjudicating Authority observed that a lot of inconvenience was caused to the people who are working from home in the days of Covid-19, since they cannot perform their work in proper manner without there being internet services. The Adjudicating Authority observed that Applicant had breached the

terms of the agreement by not providing internet services to all the residents as agreed by him. The Application filed by the Appellant was dismissed with the liberty to Respondents to provide necessary services through some other agency. The Appellant aggrieved by the said order has filed the present Appeal.

3.Learned Counsel for the Appellant Shri Aditya Dewan submits that as per the Agreement with the Jaypee Infratech Limited and Jayprakash Associates Ltd., Appellant had right to provide internet services through its NANO Infrastructure. He further submits that NANO Infrastructure also allows various service providers to use the infrastructure to transmit voice, video data and any other open IP services to end-users through the term of the Agreement. The Appellant is not opposed to any other internet service provider to provide the services to the residents. Further, the NANO Network/ Infrastructure of the Appellant has to be used. It is submitted that Appellant being Liquidator of the Corporate Debtor has right to protect the properties and interest of the Corporate Debtor. It is submitted that services of the Appellant were up to the mark. Insofar as the order of District Magistrate dated 22nd August, 2020 is concerned, the learned Counsel for the Appellant submits that challenging the said order, the Appellant has already filed a Writ Petition in Allahabad High Court, which Writ Petition is still pending.

4.Learned Counsel for the Respondent Shri Vishal Gupta refuting the submissions of the learned Counsel for the Appellant contends that it was by virtue of District Magistrate's order dated 22nd August, 2020, which permitted other internet service provider to provide services to the residents. The NCLT has no jurisdiction to entertain any challenge to the action consequent to the order of District Magistrate. The order of District Magistrate was passed under National Disaster Management Act, 2005, which could not have been interfered with by the Adjudicating Authority. The citizens have fundamental right to have internet services and they have right to choose internet service provider. The Appellant by virtue of Agreement with Respondent cannot curtail the right of citizens to use internet services. Furthermore, it was during the period of currency of Covid-19 that the use of internet was maximum and right of the residents to choose internet service provider, could not have been interfered with. The Appellant obtained the interim order dated 27.10.2020 from the Adjudicating Authority, which ought not to have been passed, which has rightly been cancelled by the subsequent order dated 5th July, 2021 by the Adjudicating Authority, giving liberty to the Respondents to provide internet services by other service provider.

5.We have heard learned Counsel for the parties and perused the record.

6.The District Magistrate exercising his jurisdiction under National Disaster Manager Act, 2005 has issued the order dated 22nd August, 2020, permitting the residents to use internet services of their choice and the Jaypee Infratech Limited and Jayprakash Associates Ltd. were directed not to interfere in the rights of residents to use the services of any other internet service provider. The Appellant virtually had challenged the action of District Magistrate by filing the Application being I.A. No.4052 of 2020. In the Application, the Appellant has relied on exclusivity clause in the Agreement. The action of the Respondent to have conducted survey to enable other internet provider to provide internet services to the residents was objected to in the Application. The Adjudicating Authority on the

submission of the Appellant has passed an interim order on 27.10.2020. The Adjudicating Authority in its order has noticed that District Magistrate order was stated to be a cause to avail parallel services by the Respondent.

Consequently, the Adjudicating Authority directed that District Magistrate be impleaded as party. The interim order has restrained the Respondent from proceeding to have services from other networks, which order in effect was contrary to the order of the District Magistrate dated 22nd August, 2020, which permitted the residents to avail the network services from any other network service provider.

7. By the order impugned dated 5th July, 2021, the Application filed by the Appellant being IA No. 4052 of 2020 was dismissed, giving liberty to the Respondents to provide necessary services through some other agency. The impugned order dated 5th July, 2021 thus cleared the way for compliance of the order of the District Magistrate dated 22nd August, 2020 and has removed the restrained which was imposed by the interim order dated 27.10.2020 by the Adjudicating Authority. The Application No.4052 of 2020 was filed by the Appellant not out of any action taken in CIRP process, the prayers in the Application were made to stall the implementation of the order of the District Magistrate dated 22nd August, 2020.

8. The question to be answered in this Appeal is as to whether the Adjudicating Authority had jurisdiction to pass the interim order in the Application filed by the Appellant, the effect of which was to stop the implementation of the order dated 22nd August, 2020 passed by the District Magistrate.

9. We may in this context refer the judgment of Hon'ble Supreme Court in **Embassy Property Developments Private Ltd. vs. State of Karnataka and Ors.** (2020) 13 SCC 308. In the above case, Corporate Debtor had been granted a mining lease by the Government of Karnataka, which was to expire on 25th May, 2018. Although notice of premature termination of the lease was issued on 9th August, 2017, but no order of termination was passed till the date of initiation of the Corporate Insolvency Resolution Process. Government of Karnataka on 26.09.2018 rejected the proposal for deemed extension of the lease on the ground that Corporate Debtor had contravened not only terms and conditions of the lease deed, but also the provisions of Rule 37 of the Mineral Concession Rules, 1960 and Rule 24 of the Minerals (Other than Atomic and Hydra Carbons Energy Minerals) Rules, 2016. After withdrawal of the Writ Petition from the High Court, an Application was filed before the NCLT praying for setting aside the order of the Government of Karnataka and seeking declaration that lease should be deemed to be valid upto 31st March, 2020. NCLT Chennai allowed the Application by order dated 11.12.2018. Aggrieved by the said order, Government of Karnataka had filed Writ Petition. The High Court, set aside the earlier order and remanded the matter back to NCLT for fresh consideration. Thereafter, the State of Karnataka filed statement of objections before the NCLT. NCLT overruling the objection of the State passed an order dated 03.05.2019. Challenging the order of NCLT, Government of Karnataka filed a Writ petition, in which the High Court passed an interim order. Against the interim order, the RP and the Committee of Creditors had filed an Appeal before the Hon'ble Supreme Court. In the above context, the Hon'ble Supreme Court held that NCLT have no jurisdiction to adjudicate upon the dispute, which

arose under MMDR Act, 1957 and following was laid down in paragraph 37, 41 and 43

“37. From a combined reading of sub-section (4) and sub-section (2) of Section 60 with Section 179, it is clear that none of them hold the key to the question as to whether NCLT would have jurisdiction over a decision taken by the Government under the provisions of the MMDR Act, 1957 and the Rules issued thereunder. The only provision which can probably throw light on this question would be sub-section (5) of Section 60, as it speaks about the jurisdiction of the NCLT. Clause (c) of sub-section (5) of Section 60 is very broad in its sweep, in that it speaks about any question of law or fact, arising out of or in relation to insolvency resolution. But a decision taken by the Government or a statutory authority in relation to a matter which is in the realm of public law, cannot, by any stretch of imagination, be brought within the fold of the phrase “arising out of or in relation to the insolvency resolution” appearing in clause (c) of sub-section (5). Let us take for instance a case where a corporate debtor had suffered an order at the hands of the Income Tax Appellate Tribunal, at the time of initiation of CIRP. If Section 60(5)(c) of the IBC is interpreted to include all questions of law or facts under the sky, an Interim Resolution Professional/Resolution Professional will then claim a right to challenge the order of the Income Tax Appellate Tribunal before the NCLT, instead of moving a statutory appeal under Section 260-A of the Income Tax Act, 1961. Therefore the jurisdiction of the NCLT delineated in Section 60(5) cannot be stretched so far as to bring absurd results. [It will be a different matter, if proceedings under statutes like Income Tax Act had attained finality, fastening a liability upon the corporate debtor, since, in such cases, the dues payable to the Government would come within the meaning of the expression “operational debt” under Section 5(21), making the Government an “operational creditor” in terms of Section 5(20). The moment the dues to the Government are crystallised and what remains is only payment, the claim of the Government will have to be adjudicated and paid only in a manner prescribed in the resolution plan as approved by the adjudicating authority, namely, the NCLT.

41. Therefore in the light of the statutory scheme as culled out from various provisions of the IBC, 2016 it is clear that wherever the corporate debtor has to exercise a right that falls outside the purview of the IBC, 2016 especially in the realm of the public law, they cannot, through the resolution professional, take a bypass and go before NCLT for the enforcement of such a right.

53. The upshot of the above discussion is that though NCLT and Nclat would have jurisdiction to enquire into questions of fraud, they would not have jurisdiction to adjudicate upon disputes such as those arising under the MMDR Act, 1957 and the Rules issued thereunder, especially when the disputes revolve around decisions of statutory or quasi-judicial authorities, which can be corrected only by way of judicial review of administrative action. Hence, the High Court was justified in entertaining the writ petition and we see no reason to interfere with the decision [State of Karnataka v. Tiffins Barytes Asbestos & Paints Ltd., 2019 SCC OnLine Kar 2463] of the High Court. Therefore, the appeals are dismissed. There will be no order as to costs.”

10. We may now refer to another judgment of Hon’ble Supreme Court in **Tata Consultancy**

Services vs. Vishal Ghisulal Jain, Resolution Professional, SK Wheels Private Limited in Civil Appeal No.3045 of 2020. The Hon'ble Supreme Court in the said judgment again reiterated the same proposition, in paragraph 26 and 27 following was laid down:

“26. In Gujarat Urja (supra), the [contract](#) in question was terminated by a third party based on an ipso facto clause, i.e., the fact of insolvency itself constituted an event of default. It was in that context, this Court held that the contractual dispute between the parties arose in relation to the insolvency of the corporate debtor and it was amenable to the jurisdiction of the NCLT under Section 60(5)(c). This Court observed that “...NCLT has jurisdiction to adjudicate disputes, which arise solely from or which relate to the insolvency of the corporate debtor... The nexus with the insolvency of the corporate debtor must exist” (para 69). Thus, the residuary jurisdiction of the NCLT cannot be invoked if the termination of a contract is based on grounds unrelated to the insolvency of the Corporate Debtor.

27. It is evident that the appellant had time and again informed the Corporate Debtor that its services were deficient, and it was falling foul of its contractual obligations. There is nothing to indicate that the termination of the Facilities Agreement was motivated by the insolvency of the Corporate Debtor. The trajectory of events makes it clear that the alleged breaches noted in the termination notice dated 10 June 2019 were not a smokescreen to terminate the agreement because of the insolvency of the Corporate Debtor. Thus, we are of the view that the NCLT does not have any residuary jurisdiction to entertain the present contractual dispute which has arisen dehors the insolvency of the Corporate Debtor. In the absence of jurisdiction over the dispute, the NCLT could not have imposed an ad-interim stay on the termination notice. The NCLAT has incorrectly upheld the interim order of the NCLT.”

11. It is also relevant to note that in the CIRP proceedings in the present case, order for liquidation was passed on 31st May, 2021 by the Adjudicating Authority. By consequent order dated 16th November, 2021, the Adjudicating Authority has confirmed the auction sale of the Corporate Debtor held on 16th August, 2021. The act of providing internet services to the residents by other internet providers apart from the Appellant, emanated from the order of District Magistrate dated 22nd August, 2020 passed in exercise of jurisdiction under National Disaster Management Act, 2005, which action was sought to be indirectly challenged before the Adjudicating Authority. The act of permitting the residents to avail the internet service of other service providers, did not emanate from any proceedings under the Insolvency Resolution Process and was outside the Insolvency Resolution Process. Although, the order of the District Magistrate dated 22nd August, 2020 is said to have been challenged by the Appellant before the Allahabad High Court by filing a Writ petition, but there is no material to indicate that operation of order dated 22nd August, 2020 of the District Magistrate has been stayed. The Adjudicating Authority by issuing the interim order dated 27.10.2020 had virtually stopped the implementation of order of the District Magistrate dated 22nd August, 2020, which was outside the jurisdiction of the Adjudicating Authority. Impugned order dated 5th July, 2021 has set right, wrong which was done by the interim order dated 27.10.2020. Order dated 5th July, 2021 has done substantial justice, which does not warrant any interference in this Appeal.

12. We do not find any merit in the Appeal. The Appeal is dismissed. No order as to costs.

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