2019 INSC 1213

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. OF 2019

(D. NO.27229/2019)

Jaiprakash Associates Ltd & Anr. … Appellant

Versus

IDBI Bank Ltd. & Anr. … Respondents

WITH

CIVIL APPEAL NO. 6486 of 2019

O R D E R

1. Permission to file the appeal is granted in Diary No.27229/2019.

2. These appeals emanate from the Corporate Insolvency Resolution Process ('CIRP' for short) concerning Jaypee Infratech Ltd. ('JIL' for short) wherein the National Company Law Appellate Tribunal, New Delhi ('NCLAT' for short) disposed of Company

Appeal (AT)(INS) No.536 of 2019 and Company Appeal (AT)(INS) No.708 of 2019 and applications therein by a common judgment and order dated 30th July, 2019. By this judgment, the NCLAT granted relief as sought for by the IDBI Bank to exclude period from 17th September, 2018 till 4th June, 2019 for the purpose of counting 270 days Corporate Resolution Process period and issued consequential directions.

3. Shorn of unnecessary details, the IDBI Bank had filed an application being CP No. (I&B) 77/ALD/2017 under Section 7 of the Insolvency and Bankruptcy Code, 2016 (for short, 'the I & B Code') against JIL before the National Company Law Tribunal, Allahabad ('NCLT' for short), as the JIL had turned NPA (Non-Performing Asset). During the pendency of the said application, writ petitions were filed in this Court by the home buyers concerning the stated project of JIL, which came to be disposed of on 9th August, 2018 in the case of ***Chitra Sharma & Ors.*** vs. ***Union of India & Ors.***[1]. This Court issued the following directions :-

> "42. We, accordingly, issue the following directions:

1 2018 (9) SCALE 490

(i) In exercise of the power vested in this Court under Article 142 of the Constitution, we direct that the initial period of 180 days for the conclusion of the CIRP in respect of JIL shall commence from the date of this order. If it becomes necessary to apply for a further extension of 90 days, we permit the NCLT to pass appropriate orders in accordance with the provisions of the IBC;

(ii) We direct that a CoC shall be constituted afresh in accordance with the provisions of the Insolvency and Bankruptcy (Amendment) Ordinance, 2018, more particularly the amended definition of the expression "financial creditors";

(iii) We permit the IRP to invite fresh expressions of interest for the submission of resolution plans by applicants, in addition to the three short-listed bidders whose bids or, as the case may be, revised bids may also be considered;

(iv) JIL/JAL and their promoters shall be ineligible to participate in the CIRP by virtue of the provisions of Section 29A;

(v) RBI is allowed, in terms of its application to this Court to direct the banks to initiate corporate insolvency resolution proceedings against JAL under the IBC;

(vi) The amount of Rs 750 crores which has been deposited in this Court by JAL/JIL shall together with the interest accrued thereon be transferred to the NCLT and continue to remain invested and shall abide by such directions as may be issued by the NCLT."

4. Consequent thereto, the matter proceeded before the NCLT being the adjudicating authority. The Interim Resolution Professional ('IRP' for short) had issued public notice inviting claims from all JIL's stakeholders including the home buyers. IRP

submitted his report on formation of Committee of Creditors ('CoC' for short) before the adjudicating authority on the following basis :

37.3% in case of Financial Institutions.

62.3% home buyers and

0.4% Fixed Deposit holders

5. One of the home buyers' Association filed application before the NCLT seeking clarification as to the manner in which the voting percentage of the allottees (home buyers) will be reckoned. That application was filed on 17th September, 2018 before the NCLT. After hearing the concerned authorities, the members of NCLT expressed difference of opinion on the issue as a result of which reference was made to the President of the NCLT, to place the matter before the third Member. Eventually, an order was passed by the third Member on 24th May, 2019. The said order dated 24th May, 2019 had been challenged by Jaypee Green Krescent House Buyers Welfare Associations before the NCLAT being Company Appeal (AT)(INS) No.708 of 2019.

6. In the meantime, the IDBI Bank filed an application before the NCLT for excluding the period of pendency of the application for clarification regarding the manner of counting votes of the concerned financial creditors from the period of 270 days of Corporate Insolvency Resolution Process ('CIRP' for short). While the said application was pending, NCLT by order dated 6th May, 2019 called upon the authorities, representatives of the allottees and others to file their reply on the necessity to proceed further with the CIRP in accordance with law, for considering the resolution plan received from the concerned bidder, subject to the outcome of the pending application. The IDBI Bank, feeling aggrieved by the opinion expressed by the NCLT to proceed further with the CIRP despite pending clarificatory motions before the NCLT/NCLAT respectively, including the application to exclude the period during the clarificatory application from the total period of 270 days of the CIRP, assailed the order passed by the NCLT dated 6th May, 2019 by way of Company Appeal (AT)(INS) No.536/2019 before the NCLAT.

7. The NCLAT, accordingly, thought it appropriate to proceed with both the appeals together for consideration and disposed of the same vide the impugned judgment. The relevant discussion and the conclusion arrived at by the NCLAT can be discerned from paragraph 19 onwards of the impugned judgment. The same read, thus :-

> "19. The only question arises for consideration in these appeals is whether in the facts and circumstances of the case and the interest of the Allottees, which is of primary importance in this 'Corporate Insolvency Resolution Process', the 'Jaypee Infratech Ltd.' (Corporate Debtor) should be allowed to go for 'Liquidation' on the ground that 270 days has expired on 6th May, 2019 or the period from '17th September, 2018 to 4th June, 2019' during which the matter remained pending for consideration before the Adjudicating Authority relating to voting share of the Allottees should be excluded for the purpose of counting 270 days in the light of the decision "*Quinn Logistics India Pvt. Ltd. vs. Mack Soft Tech Pvt. Ltd. & Ors.*" – 'Company Appeal (AT) (Insolvency) No.185 of 2018' wherein this Appellate Tribunal observed:
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> > "9. From the decisions aforesaid, it is clear that if an application is filed by the 'Resolution Professional' or the 'Committee of Creditors' or 'any aggrieved person' for justified reasons, it is always open to the Adjudicating Authority/Appellate Tribunal to 'exclude certain period' for the purpose of counting the total period of 270 days, if the facts and circumstances justify exclusion, in unforeseen circumstances.
> >
> > 10. For example, for following good grounds and unforeseen circumstances, the intervening period can be excluded for counting of the total period of 270 days of resolution process:-

(i) If the corporate insolvency resolution process is stayed by 'a court of law or the Adjudicating Authority or the Appellate Tribunal or the Hon'ble Supreme Court.

(ii) If no 'Resolution Professional' is functioning for one or other reason during the corporate insolvency resolution process, such as removal.

(iii) The period between the date of order of admission/moratorium is passed and the actual date on which the 'Resolution Professional' takes charge for completing the corporate insolvency resolution process.

(iv) On hearing a case, if order is reserved by the Adjudicating Authority or the Appellate Tribunal or the Hon'ble Supreme Court and finally pass order enabling the 'Resolution Professional' to complete the corporate insolvency resolution process.

(v) If the corporate insolvency resolution process is set aside by the Appellate Tribunal or order of the Appellate Tribunal is reversed by the Hon'ble Supreme Court and corporate insolvency resolution process is restored.

(vi) Any other circumstances which justifies exclusion of certain period.

However, after exclusion of the period, if further period is allowed the total number of days cannot exceed 270 days which is the maximum time limit prescribed under the Code".

20. Admittedly, no regulation was framed under the 'Insolvency and Bankruptcy Code' as to how the voting share of thousands of Allottees will be counted, all of whom come

within the meaning of 'Financial Creditors' and thereby are members of the 'Committee of Creditors'. It was in this background the Allottees Association preferred the application before the Adjudicating Authority (National Company Law Tribunal), Allahabad Bench on 17th September, 2018 to decide such issue. The two Hon'ble Members of NCLT differed on the principle on 13th December, 2018 as noticed above and referred the matter to the Principal Bench for placing the matter before Third Hon'ble Member who has delivered its decision by the order dated 24th May, 2019. In the meantime, 270 days lapsed, if counted from the date the proceeding was remitted by the Hon'ble Supreme Court, i.e. 6th May, 2019.

21. This is an extra-ordinary situation when the law was silent and there was no guideline, which caused difference of opinion between the two Hon'ble Members and finally decided by the Third Hon'ble Member. In **'Quinn Logistics India P. Ltd. vs. Macksoft Tech P. Ltd.'** taking into consideration different situations including extra ordinary situation, this Appellate Tribunal held that certain period can be excluded while counting the total period of 270 days. The aforesaid principle has also been followed by the Hon'ble Supreme Court in the case of **'Arcelormittal India Private Limited vs. Satish Kumar Gupta &" Ors.'** – (2019) 2 SCC 1 as also in the case of **'Chitra Sharma'** (Supra).

22. In view of aforesaid extra ordinary situation, we are of the view that the period from 17th September, 2018 i.e. the date of application filed by the Association of the allottees for clarification for the order and till the final decision i.e. 4th June, 2019 i.e. the date the matter was finally decided by the Third Hon'ble Member (Total 260 days), can be excluded for the purpose of counting the 270 days. However, as the matter is pending since long, we are not inclined to exclude the total period of 260 days and instead in the interest of the Allottees, we exclude 90 days for the purpose of counting the period of 270 days of 'Corporate Insolvency Resolution Process', which should be counted from the date of receipt of the copy of this order.

23. The aforesaid period is excluded to enable the 'Resolution Professional'/'Committee of Creditors' to call for fresh 'resolution plans' and to consider them, if so required after negotiations pass appropriate order under sub-section (5) of Section 30 of the I&B Code preferably within a period of 45 days. Rest of the period of 45 days margin is given to remove any difficulty and appropriate order as may be passed by the Adjudicating Authority.

The voting share of the allottees should be counted in terms of 'I&B Code' as existing on the date of voting/'Regulation' and/or in accordance with majority decision of the Adjudicating Authority.

24. It is made clear that all the earlier 'resolution plan(s)' including the plan submitted by the 'NBCC', cannot be considered, having been rejected by the 'Committee of Creditors'. However, it will be open to the 'NBCC' to file a fresh improved 'resolution plan. It is informed that 'Adani Infra (I) Ltd.' also proposed to file 'resolution plan' but we are not expressing any opinion with regard to the same. We have given opportunity to all the eligible persons to file 'expression of interest'/(improved) 'resolution plan', individually or jointly or in concert with any person, but those who are ineligible in terms of Section 29A, are barred from filing such plan. No liberty is given to 'Jaiprakash Associates Ltd.', in view of the aforesaid observation and decision of Hon'ble Supreme Court in 'Chitra Sharma' (Supra)

25. In view of the aforesaid observations, we are not inclined to interfere with the impugned order dated 24th (sic) May, 2019. Order of exclusion having already passed by this Appellate Tribunal, C.A. No.115 of 2019 in C.P. No.(IB) 77/ALD/2017 preferred by the 'Resolution Professional' and the order dated 6th May, 2019 as impugned in 'Company Petition (AT) (Insolvency) No.536 of 2019' are declared infructuous.

> Both the appeals stand disposed of with aforesaid observations and directions."

8. This judgment is assailed by Jaiprakash Associates Ltd. ('JAL' for short). JIL is the subsidiary of JAL. Another appeal has been filed by the Wish Town Home Buyers Welfare Society (one of the home buyers' Association). In the appeal filed by the JAL, two principal questions of law have been urged. The first is as to whether the NCLAT had power or authority in law to exclude 90 days from the statutory period of the CIRP, much less for the reasons stated in the impugned judgment. The second question is as to whether despite rejection of resolution plans of Suraksha Realty and NBCC by the CoC on 5th May, 2019 and 10th June, 2019 respectively, could the NCLAT, after excluding 90 days period from the total CIRP period, again start the CIRP afresh by allowing the two bidders to submit their revised resolution plans and/or invite fresh resolution plan from eligible persons and to call upon the CoC to reconsider the same, if so required, after negotiations. The home buyers' Association, in its appeal have also questioned the power of NCLAT to disregard the mandatory provisions of I & B Code and to

issue directions for inviting fresh resolution plans after expiry of the statutory period for completion of the CIRP.

9. The limited issue that needs to be examined in these appeals is about the power of the NCLT or NCLAT, as the case may be, to exclude any period from the statutory period in exercise of inherent powers *sans* any express provision in the I & B Code in that regard. Further, is it open to allow the bidder whose resolution plan has already been rejected by the CoC to submit revised plan or to invite fresh resolution plans to be considered by the CoC after the statutory period specified for submission of such plans? Learned counsel appearing for the concerned parties have invited our attention to the relevant provisions of the I & B Code to buttress their respective arguments.

10. After cogitating over the submissions, it has become clear to us that the inevitable fall out of accepting the stand taken by the appellants would be to set aside the impugned judgment and relegate the parties to a situation where the only option would be to proceed with the liquidation process concerning JIL under Chapter

III of Part II of the I & B Code, on the premise that no resolution plan has been received before the expiry of the Insolvency Resolution Process under Section 12 of the I & B Code or being a case of rejection of the resolution plan under Section 31 of the I & B Code. However, during the arguments, there has been complete unanimity between all the stakeholders including the appellants before this Court that the liquidation of JIL must be eschewed as it would do more harm to the interests of the stakeholders, in particular the large number of home buyers, who aspire to have their home at the earliest.

11. Considering the position taken by the stakeholders before this Court and the pendency of other writ petitions and miscellaneous applications filed by the home buyers and also by JAL to issue directions and pass orders and, if necessary, in exercise of power under Article 142 of the Constitution of India to salvage the situation and provide for a wholesome solution which will subserve the interests of all concerned and in particular of large number of home buyers who have voting share of 62.3% (as mentioned in the

report submitted by IRP) being constituent of CoC, it may not be appropriate nor necessary for us to dilate on the submissions made across the Bar by the concerned parties and to answer the questions of law urged by the appellants noted hitherto. Instead, we may exercise our plenary powers under Article 142 of the Constitution of India to effectuate the exposition in ***Chitra Sharma*** (supra) and to do substantial justice to the parties before us. In doing so, we may have to adopt the same course as noted in paragraphs 22 to 24 of the impugned judgment with some modulation thereto.

12. We are conscious of the fact that a section of the home buyers have come up in appeal against the impugned judgment as they entertain bona fide apprehension that the entire process would get delayed further due to inviting fresh offers from eligible persons. However, we must immediately note that we are not in favour of inviting fresh resolution plans from other eligible persons, as noted by the NCLAT, for being considered by the CoC afresh. We shall elaborate on this a little later.

13. We also take note of the suggestion given by the home buyers Association, appellants before this Court, that the entire process be kept outside the I & B Code dispensation and to be monitored directly by this Court. The temptation of accepting the said submission, however, is fraught with being in conflict with the opinion expressed by the three-Judge Bench of this Court in ***Chitra Sharma*** (surpa). In paragraph 39 of the said decision, the Court observed, thus :-

> "39. …Learned counsel for the IRP submitted that in the CoC which will be reconstituted under the amended IBC, the home buyers would have a substantial voting power so as to be able to effectively protect their interests. Moreover, this Court should follow the discipline of the IBC which has been enacted by Parliament specifically to streamline the resolution of corporate insolvencies. Matters involving corporate insolvencies require expert determination. The legislature has made specific provisions which are conceived in public interest and to facilitate good corporate governance. The Court should not take upon itself the burden of supervising the intricacies of the resolution process. Accepting the suggestion of Mr. Nariman (and one of the two options proposed by Mr. Tripathi) of the Court appointing a Committee to supervise the resolution process outside the IBC will involve the Court in an insuperable burden of evaluating intricate matters of financial expertise on which Parliament has legislated to create specific mechanisms. We are emphatically of the view that it would not be appropriate for the Court to appoint a Committee to oversee the CIRP and assume the task of supervising the

> work of the Committee. We must particularly be careful not to supplant the mechanisms which have been laid down in the IBC by substituting them with a mechanism under judicial directions. Such a course of action would in our view not be consistent with the need to ensure complete justice under Article 142, under the regime of law. Hence, the power under Article 142 should be utilised at the present stage for the limited purpose of recommencing the resolution process afresh from the stage of appointment of IRP by the order dated 9 August 2017 and resultantly renew the period which has been prescribed for the completion of the resolution process..."

The revival of CIRP in relation to JIL is on account of this decision in ***Chitra Sharma*** and would, therefore, be binding on all concerned. It is between the same parties.

14. We are conscious of the fact that adopting the course indicated in the impugned judgment as our direction, may also have the effect of modifying the directions given in paragraph 42(i) in ***Chitra Sharma*** (supra) reproduced above, namely, that the initial period of 180 days for the conclusion of the CIRP in respect of JIL shall commence from the date of the order, i.e., 9th August, 2018 and the further extension could be only for 90 days. However, it is one thing to accept the stand of the stakeholders to provide mechanism outside the I & B Code than to say that the mechanism

provided by I & B Code be modulated in some respect whilst ensuring that such modulation does not do any violence to the legislative intent and at the same time, subserve the cause of justice and provide a window to find out a viable solution to all the stakeholders.

15. We are also conscious of the fact that the recent amendment to the I & B Code has come into effect, thereby amending Section 12 to freeze or peg the maximum period of CIRP to 330 days from the insolvency commencement date which in this case must be taken as 9th August, 2018 in light of the direction given in ***Chitra Sharma*** (supra). It is, however, noticed from several amendments made to the I & B Code from time to time that the Legislature has also continually worked upon introducing changes to the I & B Code so as to address the problems faced in implementation of the new legislation introduced as recently as in 2016. The case on hand is a classic example of how the entire process has got embroiled in litigation initially before this Court and now before the NCLT and NCLAT respectively, because of confusion or lack of clarity in respect of foundational processes to be followed by the

CoC. That becomes evident from the time consumed by IRP or the adjudicating and appellate authority to remove the doubts on matter such as how the vote share of CoC be computed on account of inclusion of allottees/home buyers as financial creditors. The home buyers have also expressed some doubt about their status as secured creditors. All these issues are being ironed out by the adjudicating authority. It is also a matter of record that NCLT was functioning only on two days of the week and when it took decision on the application for clarification, there was difference of opinion between the members which was then required to be resolved by the President of the NCLT. It is not a case where one party was trying to march over the other by resorting to unnecessary or avoidable litigation. The fact remains that the application for clarification made by the home buyers on 17th September 2018 at the earliest opportunity after commencement of the resolution process pursuant to the order dated 9th August, 2018 passed by this Court in ***Chitra Sharma*** (supra), remained pending for quite some time. That delay is attributable to the law's delay. Neither the home buyers nor the other financial creditors can be blamed for the

pendency of the proceedings before the NCLT and later on before the NCLAT. The NCLT realizing the uncertainty in resolving the said issue, wanted to proceed with the resolution plan subject to the outcome of the pending IA as is manifest from its order dated 6th May, 2019. Even that became subject matter of challenge in the appeal filed by the IDBI before the NCLAT which was finally disposed of vide the impugned judgment.

16. Suffice it to note that an extraordinary situation had arisen because of the constant experimentation which went about at different level due to lack of clarity on matters crucial to the decision making process of CoC. Besides that, in view of the recent legislative changes, the scope of resolution plan stands expanded which may now include provision for restructuring the corporate debtor including by way of merger, amalgamation and demerger and more so the power bestowed on the CoC to consider not only the feasibility and viability of the resolution plan but also the manner of distribution proposed, which may take into account the order of priority amongst the creditors. Additionally, the recently inserted Section 12A enables the adjudicating authority to allow the

withdrawal of an application filed under Section 7 or Section 9 or Section 10, on an application made by the applicant with the approval of 90% voting share of the CoC. Similarly, sub-clause (7) of Regulation 36B inserted with effect from 4th July, 2018, dealing with the request for resolution plans unambiguously postulates that the Resolution Professional may, with the approval of the Committee, reissue request for resolution plans, if the resolution plans received in response to earlier request are not satisfactory, subject to the condition that the request is made to all prospective resolution applicants in the final list. In the present case, finally only two bidders had participated and submitted their resolution plan which was placed before the CoC and stated to have been rejected. However, applying the principle underlying Regulation 36B(7), we deem it appropriate to permit the IRP to reissue request for resolution plans to the two bidders (Suraksha Realty and NBCC) and/or to call upon them to submit revised resolution plan(s), which can be then placed before the CoC for its due consideration.

17. In the present case, as aforementioned, there is unanimity amongst all the parties appearing before this Court including the

resolution applicant that liquidation of JIL must be eschewed and instead an attempt be made to salvage the situation by finding out some viable arrangement which would subserve the interests of all concerned.

18. In view of the legislative changes referred to above, we are of the considered opinion that we need to and must exercise our plenary powers to make an attempt to revive the corporate debtor (AIL), lest it is exposed to liquidation process under Chapter III of Part II of the I & B Code. We are inclined to do so because the project has been implemented in part and out of over 20,000 home buyers, a substantial number of them have been put in possession and the remaining work is in progress and in some cases at an advanced stage of completion. In this backdrop, it would be in the interest of all concerned to accept a viable plan reflecting the recent legislative changes.

19. Indeed, the third proviso to Section 12(3) predicates time limit for completion of Insolvency Resolution Process, which has come into effect from 16th August, 2019.The same reads thus :

> "Provided also that where the insolvency resolution process of a corporate debtor is pending and has not been completed within the period referred to in the second proviso, such resolution process shall be completed within a period of ninety days from the date of commencement of the Insolvency and Bankruptcy Code (Amendment) Act, 2019."

Taking an overall view of the matter, we deem it just, proper and expedient to issue directions under Article 142 of the Constitution of India to all concerned to reckon 90 days extended period from the date of this order instead of the date of commencement of the Insolvency and Bankruptcy Code (Amendment) Act, 2019. That means, in terms of this order, the CIRP concerning JIL shall be completed within a period of 90 days from today.

20. We do not deem it necessary to dilate on the arguments of the respective counsel for the nature of order that we intend to pass, including about the *locus standi* of JAL which, in our opinion, already stands answered against JAL by virtue of Section 29A of the Act as expounded in ***Chitra Sharma*** (supra).

21. Accordingly, we pass the following order to do substantial and complete justice to the parties and in the interest of all the stakeholders of JIL:

i) We direct the IRP to complete the CIRP within 90 days from today. In the first 45 days, it will be open to the IRP to invite revised resolution plan only from Suraksha Realty and NBCC respectively, who were the final bidders and had submitted resolution plan on the earlier occasion and place the revised plan(s) before the CoC, if so required, after negotiations and submit report to the adjudicating authority NCLT within such time. In the second phase of 45 days commencing from 21st December, 2019, margin is provided for removing any difficulty and to pass appropriate orders thereon by the Adjudicating Authority.

ii) The pendency of any other application before the NCLT or NCLAT, as the case may be, including any interim

direction given therein shall be no impediment for the IRP to receive and process the revised resolution plan from the above-named two bidders and take it to its logical end as per the provisions of the I & B Code within the extended timeline prescribed in terms of this order.

iii) We direct that the IRP shall not entertain any expression of interest (improved) resolution plan individually or jointly or in concert with any other person, much less ineligible in terms of Section 29A of the I & B Code.

iv) These directions are issued in exceptional situation in the facts of the present case and shall not be treated as a precedent.

v) This order may not be construed as having answered the questions of law raised in both the appeals, including as recognition of the power of the NCLT / NCLAT to issue direction or order not consistent with the statutory

timelines and stipulations specified in the I & B Code and Regulations framed thereunder.

22. Both the appeals are disposed of in terms of this order with no order as to costs. Along with the appeals, applications filed therein also stand disposed of.

……,J.
[A.M. Khanwilkar]

……,J.
[Dinesh Maheshwari]

New Delhi;
November 6, 2019.