

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Ins) No. 715 of 2019

IN THE MATTER OF:

Mr. Savan Godiawala,

Liquidator of Lanco Infratech Ltd.

Deloitte Touche Tohmatsu India LLP,

19th Floor, Shapath-V, S.G. Highway,

Ahmedabad- 380015, India

...Appellant

VERSUS

1. Mr. G. Venkatesh Babu,

Managing Director of Lanco Infratech Ltd.,

Resident of 35A 1, Prithviraj Rad, New Delhi-

110003, Represented by its GPA Holder

Mr. Cherujuri Anjaneyulu, r/o Plot No.

B-34, Pachavati Colony, Manikonda, Hyderabad-

500089

... Respondent No. 1

2. Lanco Infratech Ltd., Plot No. 4, Software Units Layout,

Hitec City, Madhapur, Hyderabad-500081

... Respondent No. 2

3. Chief Commissioner of Income Tax(TDS),

Circle 75(1), 413-Ayakar Bhavan, District Centre,

Laxmi Nagar, New Delhi-110092

... Respondent No. 3

4. Assistant Commissioner of Income Tax (TDS),

Circle 75(1), Ayakar Bhavan, District Centre,

Laxmi Nagar, New Delhi-110092

... Respondent No. 4

Present:**For Appellant:- Ms. Misha, Mr. Vaijayant Paliwal, Advocates for Appellant.****For Respondent:-Mr. Yogesh K Jagia, Ms. Alisha Chopra, Ms. Sumedha Chadha and Mr. Surya Teja, Advocates for Respondent.****JUDGEMENT***[29th May, 2020]***Jarat Kumar Jain. J.**

The Appellant Mr. Savan Godiawala being the liquidator of Linco Infratech Ltd. (Corporate Debtor) (Respondent No. 2 herein) filed this Appeal under Section 61 of Insolvency & Bankruptcy Code 2016 (In Brief I & B Code) against the order dated 10.06.2019 passed by Adjudicating Authority (NCLT) Bench at Hyderabad in Interlocutory Application No. 97/2019 in Company Petition (IB) NO. 111/7/HDB/2017 whereby allowed the Application filed by Mr. G.Venkatesh Babu (Respondent No. 1 herein) the erstwhile Managing Director of the Corporate Debtor.

2. Brief Facts of this Appeal are that the Corporate Debtor (Respondent No.2) is a company engaged in engineering, procurement and construction activity and is one of the biggest player in the power and infrastructure sector. Due to various country level power sector and infrastructure sector problems the Corporate Debtor faced liquidity crises and consequently could not pay salary to its employees. There was also delay in payment of Tax Deducted at Source (TDS) to the relevant authorities. In the meantime Corporate Insolvency

Process was initiated against the Corporate Debtor on a Company Petition filed by IDBI Bank under Section 7 of I&B Code, 2016 and after admission the Corporate Debtor was under moratorium from 07.08.2017. The Adjudicating Authority under Section 7 of the I & B Code appointed Mr. Savan Godiawala as Interim Resolution Professional and subsequently confirmed as Resolution Professional of the Corporate Debtor. The Resolution Professional took charge of the Corporate Debtor Company and the powers of Board of Director were suspended. Thereafter, Adjudicating Authority vide its order dated 27.08.2018 appointed Mr. Savan Godiawala (Appellant) as the official liquidator of the Corporate Debtor. During the pendency of the liquidation proceedings erstwhile Managing Director of the Corporate Debtor Respondent No. 1 filed an Application under Section 33(5), 35(1) (k) read with section 60(5) of I&B Code, 2016 and Rule 11 of NCLT Rules 2016 seeking direction to liquidator (Appellant) to keep on priority, the funds required for payment of compounding fees on behalf of the Corporate Debtor before concerned authorities and filed appropriate application for closing of proceedings pending before Additional Chief Metropolitan Magistrate Tis Hazari Court New Delhi or alternatively permit Respondent No. 1 to pursue and prosecute the Criminal Compliant No. 530366/2016 and further direction to liquidator to reimburse compounding fees to the Respondent No. 1.

3. Above referred complaint case filed by Income Tax Office against the Respondent No. 2 M/s Linco Infratech India Ltd. and Respondent No. 1, a person responsible and in charge of day to day affairs of the Company being

Managing Director of Respondent No. 2 under Section 276-B read with 278-B of the Income Tax Act for the Financial Year 2012-13 alleging that the Respondent No. 1 has deducted Tax and source under various Sections of TDS amounting to Rs. 37,90,87,796/- during the Financial year 2012-13 but has not deposited the Tax deducted to the Government account within stipulated period i.e., on or before 7 days from the end of the month in which the deduction is made as per the provisions of Income Tax Act, read with rule 30 of the Income Tax Rules. Thus, the Respondent No. 1 and 2 have committed offence punishable under Section 276-B r/w 278-B of the Income Tax Act.

4. The Appellant herein opposed the Application on various grounds that the Application is not maintainable under Section 33(5), 35(1)(k) read with Section 60(5) of I&B Code. CIRP started on 07.08.2017 and order of liquidation was passed on 27.08.2018 whereas, Criminal Proceedings were initiated against the Corporate Debtor Company i.e., Respondent No. 2 and Respondent No.1 on 31.3.2016 i.e. prior to CIRP and it is not in connection with any default committed during CIRP. It is also contended that the Respondent no.1 the then Managing Director has committed the offence therefore he has to defend the case. The prayer so made is in complete contravention of the provisions of Section 53 of the I & B Code.

5. After considering the submissions Ld. Adjudicating Authority allowed the Application filed by the Respondent No. 1 and directed the liquidator to reimburse to Respondent No. 1, the amount incurred towards payment of

compounding fee levied by the Court in connection with Criminal Case bearing No. 530366/2016 filed against the Corporate Debtor, being aggrieved with this order, liquidator has filed this Appeal.

6. Learned Counsel for the Appellant submits that the Adjudicating Authority failed to consider that since the prosecution was initiated by the Income Tax Department, against the Respondent No. 1 as he was the person responsible and in charge of the day to day affairs of the Company being Managing Director, therefore, the Respondent No. 1 is defending himself. Learned Counsel for the Appellant further submits that learned Adjudicating Authority has failed to appreciate the precedent i.e., judgment of Hon'ble Kerala High Court in the case of ITO Vs. Joseph (1972) 83 ITR 362 which holds that the Criminal Prosecution launched under the provisions of Section 276-B of the Income Tax Act attached itself personally to the vender not to the Company. Learned Adjudicating Authority erroneously held that the prosecution was lodged against the Corporate Debtor thus compounding fees is payable by Corporate Debtor.

7. Learned Counsel for the appellant further submits that if compounding fees is paid on priority basis it will be in contravention of the mandate of Section 53 of the I&B Code.

8. On the other hand, Learned Counsel for the Respondent supports finding of the Adjudicating Authority and submits that it is the Corporate Debtor, Respondent No. 2 which has defaulted in paying TDS on time and alleged

offence was not committed by the Respondent No. 1. In the Case of ITO Vs. Joseph (Supra). Hon'ble High Court held that the principle employee should have declared himself as a principle officer and has done the TDS deduction personally and failed to pay the deducted Tax to the Department whereas, in the instant case Respondent No. 1 did not declare himself as the Principle Officer of the Company and he has not failed to deposit the Tax Personally and secondly the reimbursement of money to the Respondent No. 1 can be made as part of liquidation cost as compounding fees has to be paid first to save the Corporate Debtor from facing the penalty. The payment of compounding fees is part of liquidation cost as per the mechanism under Section 53 of the I&B Code.

9. Learned Counsel for the Respondent further submits that the Judgment of ITO Vs. Joseph (Supra) relied by the Appellant is misplaced and not applicable to the facts of the present case. Hon'ble High Court has observed that the person to be liable not the Company in different circumstances. It was observed that if the Department has to drag anybody under the provisions of Income Tax Act, they have to establish that deduction was done personally by the particular officer of Company and the Officer did not deposit the TDS with the Department. The Corporate Debtor i.e., Respondent No. 2 is at default and is liable to make the payment of compounding fees. The liquidator in memo of Appeal acknowledged that he has been put in charge of affairs and management of the Corporate Debtor and is responsible to look after the interest of Corporate Debtor during the process of liquidation. Therefore, the

liquidator cannot escape the liability to reimburse the compounding fees to Respondent No. 1. The Adjudicating Authority is rightly held that the Application is maintainable under Section 33, 35 and 60 of the I&B Code.

10. After hearing Learned Counsel for the Parties we have gone through the record.

11. Admittedly the CIRP commenced vide order dated 07.08.2017 by the Adjudicating Authority under Section 7 of the I&B Code and Mr. Savan Godiawala was appointed as Interim Resolution Professional and subsequently confirmed as Resolution Professional of the Corporate Debtor thereafter, vide order dated 27.08.2018 passed by the Adjudicating Authority, the Appellant Mr. Savan Godiawala was appointed as the Official liquidator of the Corporate Debtor i.e., Respondent No. 2. It is also admitted fact that on 31.03.2016 Income Tax Office, Shri Mandip ACIT, Income Tax Department filed complaint under Section 276-B read with Section 278-B of the Income Tax Act against the Respondent No. 1 being Managing Director and person responsible and in charge of day to day affairs of the Company and Respondent No. 2 i.e., Corporate Debtor with the allegation that the Tax deducted at source under various sections of TDS amounting to Rs. 37,90,87,796/- during the financial year 2012-2013 but has not deposited the said tax to the Government account within the stipulated period i.e. on or before 7 days from the end of the month in which the deduction is made as per the provisions of Income Tax Act read with Rule 30 of the Income Tax Rules. Thus, the Respondent No. 1 and 2 have

committed offence punishable under Section 276-B read with Section 278-B of the Income Tax Act for the offence the punishment is prescribed a minimum imprisonment of 3 months which can be extended up to an imprisonment of 7 years. The said compliant filed on 31.03.2016 before Additional Chief Metropolitan Magistrate Tis Hazari Court New Delhi bearing Criminal Case No. 530366/2016.

12. From the Above facts it is clear that much before CIRP Process the alleged offence has been committed by the Respondent No. 1 and 2.

13. The question involved in this Appeal is that actually who has committed the default by non-depositing the TDS in time certainly the alleged offence is committed during the financial year 2012-13. Therefore, the person responsible and in charge of the day to day affairs to the Company at relevant time has committed the default. Therefore, he only can be punished. As per the allegation, the Respondent No. 1 G Venketesh Babu was a person responsible and in charge of day to day affairs of the Company being Managing Director. Thus, as per the allegation, he has committed the offence therefore, if the alleged offence is proved then the Company as well as Respondent No. 1 G Venketesh Babu both will be convicted and the Company being a juristic person cannot be punished with imprisonment only the Respondent No. 1 can be punished with imprisonment, which is minimum three months maximum seven years that is why the Respondent No. 1 filed an application for

compounding the offence and he wants to escape the consequences at the cost of Company which is in liquidation.

14. It is true that as per Section 35(1)(k) of the I&B Code, it is duty of the liquidator to institute or defend any suit, prosecution or other legal proceedings, civil or criminal in the name of on behalf of Corporate Debtor. Compounding of offence is a process whereby the person/entity committing default will file an Application to the compounding authority accepting that it has committed an offence and so that same should be condoned. In the instant case as per the prosecution Respondent No. 1 has committed the offence under Section 276 -B read with Section 278-B of the Income Tax Act, therefore, he has filed the Application before the compounding authority. Liquidator has not committed the alleged offence therefore; he is not required to file Application before compounding authority accepting that he has committed an alleged offence. However it is true that the liquidator has to defend the Respondent No. 2 Company once he has taken the charge of the Company.

15. We are unable to convince with the findings of Ld. Adjudicating Authority that the Respondent No. 1 is appearing in the Criminal Case filed against the Company as he was the then Managing Director. Actually the prosecution is launched against the Company as well as against the Respondent No. 1. in his personal capacity. Therefore, even after the liquidation proceedings have been started the Respondent No. 1 has to face the trial in his personal capacity and ultimately if the offence is proved he will be punished.

16. With the aforesaid we are of the view that the Ld. Adjudicating Authority has misconstrued the provisions of Section 35(1) (k) of I&B Code, and directed the liquidator to reimburse the compounding fees to Respondent No. 1. Thus the impugned order is not sustainable in law and facts, hence it is set aside

The Appeal is allowed, however, no order as to cost.

(Justice Jarat Kumar Jain)
Member (Judicial)

(Mr. Balvinder Singh)
Member (Technical)

(Dr. Ashok Kumar Mishra)
Member (Technical)

NEW DELHI
SC