

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI**

**Company Appeal (AT) (Insolvency) No. 49 of 2020**

(Arising out of Order dated 27<sup>th</sup> November, 2019 passed by the Adjudicating Authority (National Company Law Tribunal), Hyderabad Bench, Hyderabad in I.A. No. 785 of 2019 in CP No. 181/7/HBD/2019)

**IN THE MATTER OF:**

**Bank of India**

**....Appellant**

**Versus**

**M/s. IRIS Electro Optics Pvt. Ltd. & Ors.**

**.....Respondents**

**Present:**

**For Appellant: Mr. Ashish Rana and Mr. Harshit Garg,  
Advocates.**

**For Respondents: Mr. Siddharth Jain, Advocate for  
Respondent Nos. 1 & 2.  
Mr. T.N. Durga Prasad, Advocate for  
Respondent No.3**

**J U D G E M E N T**

**BANSI LAL BHAT, J.**

Aggrieved of the order dated 27<sup>th</sup> November, 2019 passed by the Adjudicating Authority (National Company Law Tribunal), Hyderabad Bench, Hyderabad in I.A. No. 785 of 2019 in CP (IB) No. 181/7/HDB/2019 declining to recall the order of admission dated 28<sup>th</sup>

March, 2019 or replacing the 'Resolution Professional' of Respondent- 'M/s. IRIS Electro Optics Private Limited'- ('Corporate Debtor') by another person, the Appellant- 'Bank of India' has assailed the order dated 27<sup>th</sup> November, 2019 passed by the Adjudicating Authority on several grounds set out in the memo of appeal to which reference will be made in the following paras.

2. The case set up by the Appellant is that the application under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("I&B Code" for short) was filed by 'Laxmi Kantha Rao Thota' (Respondent No.3) against 'M/s. IRIS Electro Optics Private Limited'- ('Corporate Debtor') fraudulently with a malicious intent and not for resolution of 'Corporate Debtor', warranting imposition of penalty in terms of Section 65 of the 'I&B Code'. It is the case of the Appellant that the Appellant- 'Bank of India' is a secured creditor which did not trigger any 'Corporate Insolvency Resolution Process' against the 'Corporate Debtor' but 'Laxmi Kantha Rao Thota' (Respondent No.3), who is a 'related party' of the 'Corporate Debtor', filed an application under Section 7 of the 'I&B Code' in connivance with the 'Corporate Debtor'. According to Appellant, it was brought to the notice of the Adjudicating Authority that the 'Financial Creditor' has triggered 'Corporate Insolvency Resolution Process' against the 'Corporate Debtor' in collusion with the 'Corporate Debtor' being a 'related party' to defeat the legitimate interests with the

object of nullifying the action taken by the Appellant under Section 34 of the SARFAESI Act, 2002. However, the Adjudicating Authority declined to determine the issue raised by the Appellant in terms of the impugned order which is assailed as being illegal and unsustainable.

3. It is contended on behalf of the Appellant that pursuant to the order of admission dated 28<sup>th</sup> March, 2019, the first 'Committee of Creditors' meeting of the 'Corporate Debtor' was convened on 1<sup>st</sup> May, 2019 wherein Respondent No.1 was appointed as 'Resolution Professional' and claim of Respondent No.3 (husband of the suspended Director of the 'Corporate Debtor') was accepted and he was given voting rights in 'Committee of Creditors'. The Appellant claims to have pointed out the irregularity afterwards as first 'Committee of Creditors' meeting was conducted in its absence. It is submitted that in the second 'Committee of Creditors' meeting convened on 28<sup>th</sup> May, 2019, Mrs. Archana Thota (related party) had filed a claim and despite acknowledging her status as 'related party', she had been assigned a share of 42.96%.

4. It is further submitted that the Appellant had filed I.A. No. 461 of 2019 under Section 65 of the 'I&B Code' seeking recall of the order of admission and investigation against Respondent Nos. 1 & 3 for collusion and to nullify the voting rights of the Respondent No.3.

However, the Adjudicating Authority passed order dated 19<sup>th</sup> August, 2019 deferring the decision on the issue of collusion between Respondent Nos. 1 & 3 till final disposal of the application. It is submitted that the Adjudicating Authority directed determination of the voting share of the 'Financial Creditors' including its status as a 'related party' afresh and pursuant to such direction Respondent No.1 determined the voting share allotting 63.95% to Appellant- 'Bank of India' and 36.05% to Respondent No.3, thereby ensuring that the Appellant would not succeed in replacement of the 'Resolution Professional'.

5. The Appellant further submitted that it challenged the voting share by way of I.A. No. 785 of 2019 under Section 65 of the 'I&B Code' seeking enquiry and recall of order of admission dated 28<sup>th</sup> March, 2019 which culminated in passing of the impugned order dated 27<sup>th</sup> November, 2019 by the Adjudicating Authority.

6. Per contra, it is submitted on behalf of Respondent Nos. 1 and 2 that Mrs. Archana Thota had submitted resignation letter dated 30<sup>th</sup> November, 2018 as a Director and the acceptance letter dated 1<sup>st</sup> December, 2018 was issued by the Managing Director of the 'Corporate Debtor', thereby resulting in cessation of the status of Mrs. Archana Thota as one of the Directors of the 'Corporate Debtor'. It is not in

dispute that 'Laxmi Kantha Rao Thota' (Respondent No.3- 'Financial Creditor') is a 'related party' being husband of Mrs. Archana Thota. It is submitted that the document evidencing resignation of Mrs. Archana Thota was not filed before the Registrar of Companies but the same should not be viewed with suspicion as no document has been filed by the 'Corporate Debtor' with the Registrar of Companies right from its inception as is clearly revealed by the Master Data.

7. It is further submitted that despite public announcement by the 'Interim Resolution Professional', the Appellant did not file its claim and a belated claim was submitted after 28 days by which time 'Committee of Creditors' had been constituted. Still the 'Interim Resolution Professional' admitted the claim of the Appellant having regard to its status as a Nationalized Bank. The Respondent No.1 informed the Appellant about voting right of members of the 'Committee of Creditors' by providing an intimation on 8<sup>th</sup> May, 2019.

8. It is further submitted that the Appellant did not approve the resolution for giving extension for receiving Expression of Interest as also for extension of the 'Corporate Insolvency Resolution Process' by another 90 days and since the 'Corporate Insolvency Resolution Process' period of 180 days expired and no 'Resolution Plan' was received, the 'Resolution Professional' was left with no option but to

recommend liquidation of the 'Corporate Debtor' which is now pending before the Adjudicating Authority.

9. It is contended on behalf of the Respondent No.3 that Mrs. Archana Thota- wife of the Respondent No.3 was Ex-Director of the 'Corporate Debtor' and it is only because of this position that Respondent No.3 advanced loan to the 'Corporate Debtor'. However, Mrs. Archana Thota resigned in November, 2018 which was accepted by the Managing Director on 1<sup>st</sup> December, 2018. Thus, Mrs. Archana Thota was not a Director of the 'Corporate Debtor' on the date of filing of the application or on the date of admission of the application under Section 7 of the 'I&B Code'.

10. It is further submitted that the 'Corporate Debtor' had borrowed an amount of Rs. 62,97,825/- from Respondent No.3 with an interest at the rate of 24% per annum based on the Loan Agreement and in the event of default in repaying the debt, Respondent No.3 filed application under Section 7 of the 'I&B Code' before the Adjudicating Authority. It is further submitted that the Adjudicating Authority has no power to review/ recall its own order. The 'Interim Resolution Professional' has decreased the voting share of Respondent No.3 and also drastically decreased the claim amount without legal justification.

11. We have gone through the records and considered the issue raised in this appeal in the light of oral and written submissions made by the parties.

12. It is not in controversy that Mrs. Archana Thota served as a Director on the Board of Directors of the 'Corporate Debtor' and the 'Financial Creditor'- 'Laxmi Kantha Rao Thota' (Respondent No.3) is her Husband. The record bears testimony to the fact that Mrs. Archana Thota submitted her resignation from the Board of Directors of the 'Corporate Debtor' on 30<sup>th</sup> November, 2018 which came to be accepted by the Managing Director on 1<sup>st</sup> December, 2018. Admittedly, the Respondent No.3 filed an application under Section 7 of the 'I&B Code' seeking initiation of the 'Corporate Insolvency Resolution Process' against the 'Corporate Debtor' alleging default in repayment of debt. This happened on 20<sup>th</sup> March, 2019 and on the same day the 'Corporate Debtor' filed its reply admitting its liability on its own account, in pursuance whereof the order of admission dated 28<sup>th</sup> March, 2019 came to be passed at the hands of the Adjudicating Authority.

13. The allegations of collusion *inter se* Respondent Nos. 2 and 3 i.e., the 'Corporate Debtor' and the 'Financial Creditor' have to be viewed in this sequence of events. It is significant to note that the Adjudicating Authority, vide order dated 19<sup>th</sup> August, 2019, while disposing of IA No.

461 of 2019 filed by the Appellant seeking recall of admission order deferred consideration of the issue raised until final disposal of the petition after observing that Respondent No.3 was the Husband of Director Mrs. Archana Thota and that the Appellant being the 'Secured Financial Creditor' was left out when the 'Interim Resolution Professional constituted 'Committee of Creditors' (page 131 of the paper book), thereby resulting in infraction of the provisions of the 'I&B Code' since Respondent No.3 could not be made a member of the 'Committee of Creditors' as Mrs. Archana Thota was a Director of the 'Corporate Debtor' on the date of admission of application. While deferring the decision to final hearing with regard to the issue of collusion between the 'Corporate Debtor' and 'related party', the Adjudicating Authority disposed of application with direction to determine the voting share of 'Financial Creditors' including 'related party'/ 'Financial Creditor' afresh which was subsequently done. However, the Appellant secured 63.95% voting shares which could not empower it to seek replacement of the 'Resolution Professional'. The voting share was challenged by the Appellant by seeking recall of the order of admission and enquiry which was declined in terms of the impugned order.

14. While it is true that the findings recorded by the Adjudicating Authority did demonstrate the status of Respondent No.3 as a 'related party'- 'Financial Creditor' (Respondent No.3) being Mrs. Archana



Thota's Husband while she was a Director on the Board of Directors of the 'Corporate Debtor', and that the 'Interim Resolution Professional' had acted in violation of statutory provisions by excluding the Appellant as the only 'Secured Financial Creditor' from the 'Committee of Creditors', determination of the issue in regard to status of 'Laxmi Kantha Rao Thota' being a 'related party' was very vital as in absence of 'Sole Financial creditor', Responded No.3 became a member of the 'Committee of Creditors', while his status was being assailed as a 'related party'. Deferment of vital issue of 'related party' virtually resulted in assignment of voting share to it, thereby adversely impacting the voting share of the Appellant. It was not prudent on the part of the Adjudicating Authority to defer consideration of the pivotal issue having significant impact on the 'Corporate Insolvency Resolution Process' initiated at the instance of an alleged 'related party', jeopardising the legal interests of the Appellant, who happened to be the 'Sole Secured Financial Creditor'. The exclusion of Appellant from 'Committee of Creditors' should have raised eyebrows about the role of 'Interim Resolution Professional', even though the Adjudicating Authority appears to have passed direction for fresh determination of voting share of 'Financial Creditors'. However, such determination was to the detriment of the Appellant in as much as voting share was directed to be assigned to the alleged 'related party'- 'Financial Creditor'. Such

direction did manifest in fresh determination with Appellant being allotted 63.95% and the 'related party' with 36.05%. Thus, the voting share allotted to the Appellant was woefully inadequate leaving it short of the requisite percentage to seek replacement of the 'Resolution Professional' who was *ex facie* guilty of violating provisions of the 'I&B Code' by convening 'Committee of Creditors' but excluding the 'Sole Financial Creditor' i.e., the Appellant from being a part of it.

15. Having regard to the proposition of facts, findings and observations made by the Adjudicating Authority and provisions of Section 65 of the 'I&B Code' in the context of application under Section 7 having been admitted at the instance of the alleged 'related party', we are of the considered opinion that the Adjudicating Authority has failed to exercise jurisdiction vested in it. The material irregularity brought to our notice in the resolution proceeding goes to the root of the matter and the impugned order cannot be sustained. This is notwithstanding the fact that the order of admission of application under Section 7 has not been assailed in appeal. Once it was brought to the notice of the Adjudicating Authority that the initiation of the 'Corporate Insolvency Resolution Process' was at the instance of Respondent No.3, who was allegedly a 'related party' on the date of filing of application as also on the date of admission of such application, fraudulently i.e. with intent to defraud the Appellant being the 'Sole Secured Financial Creditor' of

the 'Corporate Debtor', the Adjudicating Authority should not have abdicated its duty by deferring the decision on application under Section 65 of the 'I&B Code' preferred by the Appellant until final hearing despite recording findings and making observations that the provisions of the 'I&B Code' had been blatantly infringed by the 'Interim Resolution Professional' by excluding Appellant from the purview of the 'Committee of Creditors'. Admittedly, the Resolution Process has failed to fructify and the Adjudicating Authority is considering the recommendation for liquidation of the 'Corporate Debtor'. It is queer that the pivotal issue remains to be determined while the 'Corporate Debtor' may go into liquidation leaving the Appellant remediless, which would result in great miscarriage of justice. It is for this Appellate Tribunal to step in and ensure that such miscarriage of justice is prevented.

16. Having regard to all relevant aspects of the matter, we find that the impugned order cannot be sustained. While allowing this appeal and setting aside the impugned order dated 27<sup>th</sup> November, 2019, we direct the Adjudicating Authority to accord fresh consideration to I.A. No. 785 of 2019 and record finding about the status of Respondent No.3 as a 'related party' and also a finding on the issue whether Respondent No.3 has fraudulently initiated 'Corporate Insolvency Resolution

Process' by filing application under Section 7 of the 'I&B Code' against the 'Corporate Debtor'.

17. Parties are directed to appear before the Adjudicating Authority. The period of judicial intervention and lockdown shall be excluded from the period of 'Resolution Process'.

[Justice Bansi Lal Bhat]  
Member (Judicial)

[V.P. Singh]  
Member (Technical)

[Alok Srivastava]  
Member (Technical)

NEW DELHI  
22<sup>nd</sup> May, 2020

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