

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI**Company Appeal (AT) (Insol.) No. 89 of 2017****IN THE MATTER OF:****Prowess International Pvt. Ltd.****...Appellant****Vs.****Parker Hannifin India Pvt. Ltd.****...Respondent****Present: For Appellant: - Mr. Akhilesh Shrivastava, Advocate,
Ms. Suhita Mukhopadhyay, PCS
Mr. Arun Kumar Gupta, IRP.****ORDER**

18.08.2017- The Respondent- Parker Hannifin India Pvt. Ltd. 'Operational Creditor' preferred an application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "I & B Code") for initiation of 'Corporate Insolvency Resolution Process' before the National Company Law Tribunal (hereinafter referred to as "Adjudicating Authority"), Kolkata Bench. The Adjudicating Authority by order dated 20th April, 2017 admitted the application and initiated the 'Corporate Insolvency Resolution Process'. Ordered for publication of notice in the newspaper and declared Moratorium.

2. The appellant-'Corporate Debtor' having come to know of order passed by Adjudicating Authority, settled the dispute with the 'Operational Creditor' and other Creditors who applied pursuant to notice and filed an Interlocutory Application for withdrawal of the petition. By impugned order dated 29th May, 2017, the Adjudicating

Authority rejected the application on the ground that after admission of an application, petition for withdrawal cannot be entertained.

3. Ld. Counsel appearing on behalf of the appellant submits that the application was admitted on 20th April, 2017, without notice to the appellant-‘Corporate Debtor’. Subsequently, having come to know of the same, the amount claimed by ‘Operational Creditor’ and other Creditors has already been paid and claims of all the Creditors have been satisfied; in that view of the matter, the Adjudicating Authority ought to have allowed the appellant to withdraw the application.

4. Notice was issued on respondent and the ‘Insolvency Resolution Professional’. In spite of service of notice, the Respondent- ‘Operational Creditor’ has not appeared and not disputed the stand taken by appellant.

5. Mr. Arun Kumar Gupta, Chartered Accountant, ‘Insolvency Resolution Professional’ is present in person and filed an affidavit wherein following statement has been made: -

“2. That in terms of Section 15 of the Code and as required under Regulation 6(2)(b)(i) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate persons) Regulations, 2016, and also per direction of the Hon’ble Bench vide its order passed on 20.4.17, a public announcement was issued in two newspapers in the state of Jharkhand where the

Registered Office of the Corporate Debtor is situated. The public announcement were issued in the Jamshedpur editions of The Telegraph (English) and Chamakta Aaina (Hindi) on 26.4.17. A copy of the public announcement as published in both the newspapers are annexed hereto and collectively marked as Annexure – B.

3. That in terms of Section 15 of the Code and as required under Regulation 6(2)(b)(iii) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, the same public announcement was also uploaded on the website of the Insolvency and Bankruptcy Board of India (IBBI).

4. That the last date for submission of claims was 4, 5, 17 per the Public Announcement. As per Regulations, a creditor, who failed to submit proof of claim within the time stipulated in the public announcement, may submit such proof to the Interim Resolution Professional or the Resolution Professional, as the case may be, till the approval of a resolution plan by the committee.

5. That pursuant to the public announcement, claims from only 2 creditors have been received till date as per details given below –

| SL. NO. | NAME OF CREDITOR | CONTACT PERSON | CATEGORY | SECURITY CREATED | AMOUNT CLAIMED (Rs.) | Date Claimed |
|---------|--------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------|----------------------------------------|--------------------------------------------------------------------------------|----------------------|-----------------|
| 1 | Punjab National Bank, Bistupur Branch, Jamshedpur Account Number-0225003171160 | Preeti Jha, Chief Manager, bo0225@pnb.co.in | Financial Creditor-Cash Credit Account | Fixed Deposit of 1,85,10,505/-, Block assets including Leasehold factory land | 2,87,55,649/- | Email on 4.5.17 |
| 2 | Punjab National Bank, Bistupur Branch, Jamshedpur Account Number-0225003171160 | Preeti Jha, Chief Manager, bo0225@pnb.co.in | Financial Creditor-Bank Guarantee | Cash margin of 100%-54,71,127/-, Block assets including Leasehold factory land | 54,71,127/- | Email on 4.5.17 |
| 3 | Parker Hannifin India Pvt. Ltd. | Priti Baria, Company Secretary, priti.baria@parker.com | Operational Creditor-Applicant | None | 45,73,250/- | Email of 8.5.17 |

6. That the meetings of the Committee of Creditors, consisting solely of Punjab National Bank were held on 6.5.17 and 12.7.17 respectively.

7. That progress reports were submitted by me before the Hon'ble National Company Law Tribunal, Kolkata Bench, Kolkata as per below details –

1st Progress Report on 28.4.17 and 4th Progress Report on 23.6.17.”

6. 'Insolvency Resolution Professional' submits that the claim amount of all the creditors have been paid. The Punjab National Bank has not

declared their account as Non-Performing Asset (NPA) account and the account is standard account from where payment is made.

7. As per Rule 8 of the I & B Code (Application to Adjudicating Authority) Rules 2016, the Adjudicating Authority may permit withdrawal of the application on the request of the applicant before its admission. Tribunal has no power to allow any applicant or any other person to withdraw the application after admission, as apparent from Rule 8 and quoted below:

“8. Withdrawal of application- The Adjudicating Authority may permit withdrawal of the application made under rules 4, 6 or 7, as the case may be, on a request made by the applicant before its admission.”

8. In the aforesaid circumstances, Ld. Adjudicating Authority having refused the applicant- Parker Hannifin India Pvt. Ltd. to withdraw the application after admission of the same, no interference is called for in absence of any illegality.

9. In so far as the order dated 20th April, 2017 by which the application under section 9 was admitted is concerned, we are not deciding the question of legality and propriety of the said order having not challenged. However, we have noticed the submissions made on behalf of the appellant and not disputed by the respondent that order dated 20th April, 2017 has been passed in violation of Rules of natural justice without notice to the ‘Corporate Debtor’. This is also clear from the order

dated 20th April, 2017, wherein the appearance of the applicant/respondent has been recorded but no reference of the appearance of the 'Corporate Debtor' has been made by the Adjudicating Authority.

10. If the order dated 20th April, 2017, would have been challenged by the appellant, it was open to this Appellate Tribunal to set aside the order dated 20th April, 2017 and then to permit the 'Operational Creditor' to withdraw the application, in view of settlement. In the present case as the order of admission is not under challenge and the application cannot be withdrawn, we cannot grant the relief as sought for by the appellant.

11. However, we make it clear that the 'Corporate Insolvency Resolution Process' starts with admission of an application under sections 7 or 9 or 10 of the I & B Code and comes to an end if resolution plan is approved under sub-section (1) of Section 31 and if not approved after completion of liquidation proceeding. As per the procedure, a Committee of Creditors is to be formed under section 21, which reads as follows:

"21. Committee of creditors. – (1) The interim resolution professional shall after collation of all claims received against the corporate debtor and determination of the financial position of the corporate debtor, constitute a committee of creditors.

(2) The committee of creditors shall comprise all financial creditors of the corporate debtor:

Provided that a related party to whom a corporate debtor owes a financial debt shall not have any right of representation, participation or voting in a meeting of the committee of creditors. Personnel to extend cooperation to interim resolution professional. Management of operations of corporate debtor as going concern. Committee of creditors.

(3) Where the corporate debtor owes financial debts to two or more financial creditors as part of a consortium or agreement, each such financial creditor shall be part of the committee of creditors and their voting share shall be determined on the basis of the financial debts owed to them.

(4) Where any person is a financial creditor as well as an operational creditor, —

(a) such person shall be a financial creditor to the extent of the financial debt owed by the corporate debtor, and shall be included in the committee of creditors, with voting share proportionate to the extent of financial debts owed to such creditor;

(b) such person shall be considered to be an operational creditor to the extent of the operational debt owed by the corporate debtor to such creditor.

(5) Where an operational creditor has assigned or legally transferred any operational debt to a financial creditor, the assignee or transferee shall be considered as an operational creditor to the extent of such assignment or legal transfer.

(6) Where the terms of the financial debt extended as part of a consortium arrangement or syndicated facility or issued as securities provide for a single trustee or agent to act for all financial creditors, each financial creditor may—

(a) authorise the trustee or agent to act on his behalf in the committee of creditors to the extent of his voting share;

(b) represent himself in the committee of creditors to the extent of his voting share;

(c) appoint an insolvency professional (other than the resolution professional) at his own cost to represent himself in the committee of creditors to the extent of his voting share; or

(d) exercise his right to vote to the extent of his voting share with one or more financial creditors jointly or severally.

(7) The Board may specify the manner of determining the voting share in respect of financial debts issued as securities under sub-section (6).

(8) All decisions of the committee of creditors shall be taken by a vote of not less than seventy-five per cent. of voting share of the financial creditors:

Provided that where a corporate debtor does not have any financial creditors, the committee of creditors shall be constituted and comprise of such persons to exercise such functions in such manner as may be specified by the Board.

(9) The committee of creditors shall have the right to require the resolution professional to furnish any financial information in relation to the corporate debtor at any time during the corporate insolvency resolution process.

(10) The resolution professional shall make available any financial information so required by the committee of creditors under sub-section (9) within a period of seven days of such requisition."

12. It should be followed by meeting of Committee of Creditors under section 24 for the purpose as mentioned therein and quoted below: -

“24. Meeting of Committee of Creditors. – (1) *The members of the committee of creditors may meet in person or by such electronic means as may be specified.*

(2) All meetings of the committee of creditors shall be conducted by the resolution professional.

(3) The resolution professional shall give notice of each meeting of the committee of creditors to—

(a) members of Committee of creditors;

(b) members of the suspended Board of Directors or the partners of the corporate persons, as the case may be;

(c) operational creditors or their representatives if the amount of their aggregate dues is not less than ten per cent. of the debt.

(4) The directors, partners and one representative of operational creditors, as referred to in sub-section (3), may attend the meetings of committee of creditors, but shall not have any right to vote in such meetings:

Provided that the absence of any such director, partner or representative of operational creditors, as

the case may be, shall not invalidate proceedings of such meeting.

(5) Any creditor who is a member of the committee of creditors may appoint an insolvency professional other than the resolution professional to represent such creditor in a meeting of the committee of creditors:

Provided that the fees payable to such insolvency professional representing any individual creditor will be borne by such creditor. Resolution professional to conduct corporate insolvency resolution process. Meeting of committee of creditors.

(6) Each creditor shall vote in accordance with the voting share assigned to him based on the financial debts owed to such creditor.

(7) The resolution professional shall determine the voting share to be assigned to each creditor in the manner specified by the Board.

(8) The meetings of the committee of creditors shall be conducted in such manner as may be specified.”

13. In the meantime, Interim Resolution Professional is required to perform duties in terms of Section 23 and to protect and preserve the assets of the 'Corporate Debtor' under Section 25.

14. After collection of all the materials, the Committee of Creditors are required to submit a resolution plan to the Resolution Professional on the basis of information memorandum as per Section 30, as quoted below: -

"30. Submission of resolution plan. - (1) A resolution applicant may submit a resolution plan to the resolution professional prepared on the basis of the information memorandum.

(2) The resolution professional shall examine each resolution plan received by him to confirm that each resolution plan—

(a) provides for the payment of insolvency resolution process costs in a manner specified by the Board in priority to the repayment of other debts of the corporate debtor;

(b) provides for the repayment of the debts of operational creditors in such manner as may be specified by the Board which shall not be less than the amount to be paid to the operational creditors in the event of a

liquidation of the corporate debtor under section 53;

(c) provides for the management of the affairs of the Corporate debtor after approval of the resolution plan;

(d) the implementation and supervision of the resolution plan;

(e) does not contravene any of the provisions of the law for the time being in force;

(f) conforms to such other requirements as may be specified by the Board.

(3) The resolution professional shall present to the committee of creditors for its approval such resolution plans which confirm the conditions referred to in subsection (2).

(4) The committee of creditors may approve a resolution plan by a vote of not less than seventy-five per cent. of voting share of the financial creditors.

(5) The resolution applicant may attend the meeting of the committee of creditors in which the resolution plan of the applicant is considered:

Provided that the resolution applicant shall not have a right to vote at the meeting of the committee of creditors unless such resolution applicant is also a financial creditor.

(6) The resolution professional shall submit the resolution plan as approved by the committee of creditors to the Adjudicating Authority.”

15. As noticed above, the Adjudicating Authority, thereafter, if satisfied with resolution plan approved by the committee of creditors and meets the requirements as referred to in sub-section (2) of section 30, it shall by order may approve the resolution plan in terms of sub-section (1) of Section 31, which reads as follows: -

“31. Approval of resolution plan. - *(1) If the Adjudicating Authority is satisfied that the resolution plan as approved by the committee of creditors under sub-section (4) of section 30 meets the requirements as referred to in sub-section (2) of section 30, it shall by order approve the resolution plan which shall be binding on the corporate debtor and its employees, members, creditors, guarantors and other stakeholders involved in the resolution plan. Submission of resolution plan. Approval of resolution plan.*

(2) Where the Adjudicating Authority is satisfied that the resolution plan does not conform to the requirements

referred to in sub-section (1), it may, by an order, reject the resolution plan.

(3) After the order of approval under sub-section (1),—

(a) the moratorium order passed by the Adjudicating Authority under section 14 shall cease to have effect;

and

(b) the resolution professional shall forward all records relating to the conduct of the corporate insolvency resolution process and the resolution plan to the Board to be recorded on its database.”

16. Only if the resolution plan does not confirm the requirements referred to in sub-section (1) of Section 31, the Adjudicating Authority may reject the same. However, if approval of plan under sub-section (1) of Section 31 is granted, the Moratorium order passed by the Adjudicating Authority under Section 14 shall cease to have its effect in view of sub-section (3) of Section 31.

17. In the present case, it is informed that in terms of Section 21 the meeting of the Committee of Creditors has taken place. Meeting of the Committee of Creditors as required under section 24 after notice has also taken place, as informed by Interim Resolution Professional.

18. All the information having received by 'Insolvency Resolution Professional' after publication of notice in the newspaper and all creditors having satisfied, except Punjab National Bank who has reported that there is no default and they intend to proceed with their business with the 'Corporate Debtor', the 'Insolvency Resolution Professional' is required to prepare a memorandum to that extent under section 29 of the I & B Code. Thereafter, in case(s) where all creditors have been satisfied and there is no default with any other creditor, the formality of submission of resolution plan under section 30 or its approval under section 31 is required to be expedited on the basis of plan if prepared. In such case, the Adjudicating Authority without waiting for 180 days of resolution process, may approve resolution plan under section 31, after recording its satisfaction that all creditors have been paid/ satisfied and any other creditor do not claim any amount in absence of default and required to close the Insolvency Resolution Process. On the other hand, in case the Adjudicating Authority do not approve resolution plan, will proceed in accordance with law.

19. It is made clear that Insolvency Resolution Process is not a recovery proceeding to recover the dues of the creditors. I & B Code, 2016 is an Act relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximisation of value of assets of such persons and to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including the Government dues. Such being the object of

the I & B Code 2016, if the interest of all the stakeholders are balanced and satisfied then to promote entrepreneurship and to ensure that the company continue to function as on going concern, it is desirable to close such proceeding without delay and going into technical rigour of one or other provisions, which are all otherwise futile for all purpose.

20. In the circumstances, instead of interfering with the impugned order, we remit the case to the Adjudicating Authority for its satisfaction whether the interest of all stakeholders have been satisfied and whether one or other creditor has not raised any claim like Punjab National Bank, after giving notice to individual claimant and taking into consideration of the Insolvency Resolution plan and report of the Insolvency Resolution Professional as may be prepared, the Adjudicating Authority may close the proceedings.

21. Hope and trust that all the formalities will be completed by group of 'Financial Creditors' and Insolvency Resolution Professional expeditiously and the Adjudicating Authority will pass appropriate order, in accordance with law after notice of hearing the parties

22. The appeal stands disposed of with aforesaid observations and directions. However, in the facts and circumstances, there shall be no order as to cost.

(Justice S.J. Mukhopadhaya)
Chairperson

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