

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 44 of 2018

(Arising out of Order dated 11th December, 2017 passed by the Adjudicating Authority (National Company Law Tribunal), Principal Bench, New Delhi, in C.P. No. (IB)- 196(PB)/2017)

IN THE MATTER OF:

Usha Holdings LL.C. & Anr.

...Appellants

Vs

Francorp Advisors Pvt. Ltd.

....Respondent

Present:

For Appellants: Mr. Siddharth Bhatnagar, Mr. Utsav Trivedi, Mr. Vishal Gehrana and Mr. Shubham Saigal, Advocates.

For Respondent: Mr. Rupinder Singh Suri, Senior Advocate with Mr. Rohit Aggarwal, Mr. Anant Singh, Ms. Rekha Dwivedi, Mr. Varun Khanna and Mr. Mitash Charan, Advocates.

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

This appeal has been preferred by the Appellants against the order dated 11th December, 2017, passed by the Adjudicating Authority (National Company Law Tribunal), Principal Bench, New Delhi, wherein the Adjudicating Authority by detailed order held: -

- (a) In absence of a certified copy of a decree of any of the superior courts of any reciprocating territory, the said decree cannot be executed.

(b) Foreign judgment is not conclusive where it has not been pronounced by a Court of competent jurisdiction and founded on an incorrect view of international law.

(c) The Court shall presume, upon the production of any document purporting to be a certified copy of a foreign judgment, that such judgment was pronounced by a Court of competent jurisdiction, unless the contrary appears on the record; but such presumption may be displaced by proving want of jurisdiction.

2. While holding so, the Adjudicating Authority by impugned order dated 11th December, 2017 also held as follows:

“28. A conjoint reading of Section 44 A of CPC along with Section 13 & 14 CPC would show that the petitioner need to satisfy a number of requirements.

(A) A certified copy is sine qua non for recognizing a decree as valid in India. Moreover, its compliance with the principles of natural justice also need to be shown.

(B) It is required to be executed in the District Court of this Country.

(C) It is also required that the decree should be pronounced by a Court of Competent jurisdiction and on merits.

(D) The decree must not have been obtained by fraud and it must not be founded on a breach of any law in force in this Country.

29. The petitioner has founded its claim and consequential default on the basis of decree dated 05.10.2015 and the order dated 27.03.2014. Both the documents placed on record are not certified copies of the decree and order. We further find that the decree needs to be made rule of the Court before the District Court in India if at all it is executable. The petitioner has miserably failed to show any notification of the reciprocation between United States and India in terms of Section 44A of CPC.

30. We also find force in the arguments advanced by Mr. Suri that the decree dated 05.10.2015 and the order dated 27.03.2014 is in violation of the law prevailing in India in as much as Section 8 of the Arbitration and Conciliation Act, 1996 has not been followed.”

3. The Adjudicating Authority while rejected the application under Section 9 of the 'I&B Code' preferred by the Appellants for the grounds

mentioned above, also held that the Appellants do not come within the meaning of 'Operational Creditor' as the amount due has not been regarded as an 'Operational Debt' within the meaning of Section 5(21) of the 'I&B Code'.

4. Learned counsel appearing on behalf of the Appellants submitted that the Adjudicating Authority has no jurisdiction to decide the legality and viability of foreign decree and no right finding can be given by it. On the other hand, according to learned counsel for the Respondent, not only the foreign decree is *ex parte*, the said judgment and decree dated 5th October, 2015 cannot be treated to be a decree on merits for the following reasons:

i. **The judgment dated 5th October, 2015 is not a decree on merits:**

- No finding as to how a sum of USD 1,661,743 has become due and payable.
- No evidence adduced.
- Decree in the nature of imposing penalty.
- The Appellant does not hold any money decree in its favour.
- Even the order dated 27th March, 2014 only decided preliminary objections with regard to jurisdiction, defective service of summons, lack of personal jurisdiction and the doctrine *forum non-conveniens*.

ii. **The judgment is against the public policy of India:**

- Order dated 27th March, 2014 deciding the question of jurisdiction based entirely on an unsigned 'Commercial Agreement'.
- The said 'Commercial Agreement' provides for arbitration in the event of dispute in accordance with the Arbitration and Conciliation Act, 1996 in India.
- While the US Court places reliance on the 'Commercial Agreement' it brushes aside the issue of governing law and arbitration. Thus, not recognizing the Indian Law is contrary to the public policy.

5. We have heard learned counsel for the parties and perused the records.

6. In ***“Binani Industries Limited Vs. Bank of Baroda & Anr. – Company Appeal (AT) (Insolvency) No. 82 of 2018 etc.”***, this Appellate Tribunal by its judgment dated 14th November, 2018 discussed the principles of 'I&B Code' and held as follows:

1. The objective of the 'I&B Code'

As evident from the long title of the 'I&B Code', it is for 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 to promote entrepreneurship, availability of credit,

and balance the interests of all stakeholders. The recent Ordinance explicitly aims to promote resolution over liquidation.

2. The objective of the 'I&B Code' is Resolution.

*The Purpose of Resolution is for **maximisation of value of assets of the 'Corporate Debtor'** and thereby for all creditors. It is not maximisation of value for a 'stakeholder' or 'a set of stakeholders' such as Creditors and **to promote entrepreneurship, availability of credit and balance the interests.** The first order objective is "resolution". The second order objective is "maximisation of value of assets of the 'Corporate Debtor'" and the third order objective is "promoting entrepreneurship, availability of credit and balancing the interests". This order of objective is sacrosanct.*

*In the matter of "**Arcelor Mittal India Pvt. Ltd. v. Satish Kumar Gupta and Ors.**", the Hon'ble Supreme Court observed that "the 'Corporate Debtor' consists of several employees and workmen whose daily bread is dependent on the outcome of the CIRP. If there is a resolution applicant who can continue to run the corporate*

debtor as a going concern, every effort must be made to try and see that this is made possible”.

3. ‘Financial Creditors’ as members of the ‘Committee of Creditors’ and their Role.

a. The Bankruptcy Law Reforms Committee (BLRC), which conceptualised the ‘I&B Code’, reasoned as under:

i. Under Para 5.3.1, sub-para 4, the BLRC provided rationale for ‘Financial Creditors’ as under:

“4. Creation of the creditors committee

...

*The Committee deliberated on who should be on the creditors committee, given the power of the creditors committee to ultimately keep the entity as a going concern or liquidate it. The Committee reasoned that **members of the creditors committee have to be creditors both with the capability to assess viability, as well as to be willing to modify terms of existing liabilities in negotiations.** Typically, ‘Operational Creditors’ are neither able to decide on matters regarding the insolvency of the entity, nor willing to take the risk*

of postponing payments for better future prospects for the entity. The Committee concluded that for the process to be rapid and efficient, the 'I&B Code' will provide that the creditors committee should be restricted to only the 'Financial Creditors'.

ii. In Para 3.4.2 dealing with 'Principles driving design', the principle IV reads as under:

"IV. The 'I&B Code' will ensure a collective process.

*9. The law must ensure that all key stakeholders will participate to collectively assess viability. The law must ensure that all creditors who have the capability and the willingness to restructure their liabilities must be part of the negotiation process. **The liabilities of all creditors who are not part of the negotiation process must also be met in any negotiated solution."***

*b. **The 'I&B Code' aims at promoting availability of credit.** Credit comes from the 'Financial Creditors' and the 'Operational Creditors'. Either creditor is not enough for business. Both kinds of credits need to be on a level playing field. 'Operational Creditors' need to provide goods and services. If they are not treated*

well or discriminated, they will not provide goods and services on credit. The objective of promoting availability of credit will be defeated.

*c. The 'I&B Code' is for reorganisation and insolvency resolution of corporate persons, ...for **maximisation of value of assets of such persons to.... balance interests of all stakeholders.** It is possible to balance interests of all stakeholders if the resolution maximises the value of assets of the 'Corporate Debtor'. One cannot balance interest of all stakeholders, if resolution maximises the value for a or a set of stakeholder such as 'Financial Creditors'. One or a set of stakeholders cannot benefit unduly stakeholder at the cost of another.*

d. The 'I&B Code' prohibits any action to foreclose, recover or enforce any security interest during resolution period and thereby prevents a creditor from maximising his interests.

e. It follows from the above:

- i. **The liabilities of all creditors who are not part of 'Committee of Creditors' must also be met in the resolution.***

- ii. *The 'Financial Creditors can modify the terms of existing liabilities, while other creditors cannot take risk of postponing payment for better future prospectus. That is, 'Financial Creditors' can take haircut and can take their dues in future, while 'Operational Creditors' need to be paid immediately.*
- iii. *A creditor cannot maximise his own interests in view of moratorium.'*
- iv. *If one type of credit is given preferential treatment, the other type of credit will disappear from market. This will be against the objective of promoting availability of credit.*
- v. *The 'I&B Code' aims to balance the interests of all stakeholders and does not maximise value for 'Financial Creditors'.*
- vi. *Therefore, the dues of creditors of 'Operational Creditors' must get at least similar treatment as compared to the due of 'Financial Creditors'.*

3. 'Resolution Plan'

The 'I&B Code' defines 'Resolution Plan' as a plan for insolvency resolution of the 'Corporate Debtor' as a going concern. It does not spell out the shape, colour and texture of 'Resolution Plan', which is left to imagination of stakeholders. Read

with long title of the 'I&B Code', functionally, the 'Resolution Plan' must resolve insolvency (rescue a failing, but viable business); should maximise the value of assets of the 'Corporate Debtor', and should promote entrepreneurship, availability of credit, and balance the interests of all the stakeholders.

It is not a sale. *No one is selling or buying the 'Corporate Debtor' through a 'Resolution Plan'. It is resolution of the 'Corporate Debtor' as a going concern. One does not need a 'Resolution Plan' for selling the 'Corporate Debtor'. If it were a sale, one can put it on a trading platform. Whosoever pays the highest price would get it. There is no need for voting or application of mind for approving a 'Resolution Plan', as it will be sold at the highest price. One would not need 'Corporate Insolvency Resolution Process', 'Interim Resolution Professional', 'Resolution Professional', interim finance, calm period, essential services, Committee of Creditors or 'Resolution Applicant' and detailed, regulated process for the purpose of sale. It is possible that under a 'Resolution Plan', certain rights in the 'Corporate Debtor', or assets and*

liabilities of the 'Corporate Debtor' are exchanged, but that is incidental.

It is not an auction. *Depending on the facts and circumstances of the 'Corporate Debtor', 'Resolution Applicant' may propose a 'Resolution Plan' that entails change of management, technology, product portfolio or marketing strategy; acquisition or disposal of assets, undertaking or business; modification of capital structure or leverage; infusion of additional resources in cash or kind over time; etc. Each plan has a different likelihood of turnaround depending on credibility and track record of 'Resolution Applicant' and feasibility and viability of a 'Resolution Plan' are not amenable to bidding or auction. It requires application of mind by the 'Financial Creditors' who understand the business well.*

It is not recovery: *Recovery is an individual effort by a creditor to recover its dues through a process that has debtor and creditor on opposite sides. When creditors recover their dues – one after another or simultaneously- from the available assets of the firm, nothing may be left in due course. Thus, while recovery bleeds the 'Corporate Debtor' to death, resolution endeavors to keep the*

‘Corporate Debtor’ alive. In fact, the ‘I&B Code’ prohibits and discourages recovery in several ways.

It is not liquidation: *Liquidation brings the life of a corporate to an end. It destroys organisational capital and renders resources idle till reallocation to alternate uses. Further, it is inequitable as it considers the claims of a set of stakeholders only if there is any surplus after satisfying the claims of a prior set of stakeholders fully. The ‘I&B Code’, therefore, does not allow liquidation of a ‘Corporate Debtor’ directly. It allows liquidation only on failure of ‘Corporate Insolvency Resolution Process’. It rather facilitates and encourages resolution in several ways.”*

7. In view of the aforesaid decision in **“Binani Industries Limited (Supra)”**, we hold that the Adjudicating Authority not being a Court or ‘Tribunal’ and ‘Insolvency Resolution Process’ not being a litigation, it has no jurisdiction to decide whether a foreign decree is legal or illegal. Whatever findings the Adjudicating Authority has given with regard to legality and propriety of foreign decree in question being without jurisdiction is nullity in the eye of law.

8. In so far as second issue is concerned, we agree with the submissions made by the counsel for the Respondent that the debt due to the Appellant

does not come within the meaning of 'Operational Debt' and thereby, the Appellant cannot be held to be the 'Operational Creditor' within the meaning of Section 5(20) read with Section 5(21) of the 'I&B Code' for the following reasons.

9. From the record we find that a private and confidential terms of the 'Memorandum of Understanding' ('MOU') has been enclosed but no date has been shown therein though the year of 2008 has been mentioned. The said terms of MoU has been made between one Sh. Gaurav Marya with one structure 'India JV' to represent and operate 'Francrop License' in India. The agreement set out the broad mutual understanding between the parties.

10. The 'Francorp International, INC.' license agreement with 'Francorp Advisors Private Limited'- ('Corporate Debtor') has been enclosed as Annexure A5. The 'License Agreement' is also undated though year '2008' has been mentioned therein. Such 'License Agreement' has been reached between the 'Licensor' and its Affiliate who have developed and are in the process of further developing a system identified by the trade name and service mark "FRANCORP-®" rating to the establishment and operation of businesses which provide highly specialized franchise consulting and franchise development services, and other services and activities.

11. According to the Appellants, they had contacted by one Mr. Gaurav Marya, Principal and Managing Director of 'Franchise India Holdings Ltd.', who expressed an interest in partnering with the Appellants in utilizing and monetizing the license and associated opportunities within India.

Thereafter, a 'MOU' was reached between the Appellants, Mr. Gaurav Marya and 'Franchise India Holdings Ltd.'. Pursuant to 'MOU', 'Franchise India Holdings Ltd.' and Mr. Gaurav Marya agreed to pay a sum of USD 30,000/- as license fees upon the transfer of the license into the 'Indian Joint Venture Entity', with an additional USD 270,000/- to be paid to the Appellants within one year of the transfer of the First License into the 'Indian Joint Venture Entity'. Subsequently, on 7th October, 2008, the Respondent Company- ('Corporate Debtor') was incorporated in India under the Companies Act, 1956. Thereafter, on 1st November, 2008, 'Franchise India Holdings Ltd.' and Mr. Gaurav Marya caused a 'Commercial Agreement' to be delivered to the Appellants which set out in detail the partnership, the 'Commercial Agreement' and 'License Agreement' but only draft copies of some of them have been enclosed which are 'undated' and thereby cannot be relied upon to give any finding.

12. This apart, we find that the draft agreement neither relates to any sale of goods or services, nor to enforce the claims arising out of various agreements. The Appellants on 14th December, 2012 filed a suit in the US District Court, praying for reliefs for a money judgment to the tune of USD 5,300,000 due to Mr. Gaurav Marya's breach of 'License Agreement' was sought. Further, a money judgment in the amount of USD 10,000,000/- and punitive damages in the amount of USD 3,00,000/- due to Mr. Gaurav Marya's conversion and a declaration about 2nd Appellant that he has 50% ownership in the license has been sought for in the suit.

13. From plain pleadings of the appeal and the statement made by the Appellant and the decree, we find that the money claim do not relate to supply of goods or services and, therefore, the application under Section 9 by the Appellants against the 'Corporate Debtor' was not maintainable.

14. In the circumstances, we answer the first question in favour of the Appellant and hold that the Adjudicating Authority has no jurisdiction to decide the question of legality and propriety of a foreign judgment and decree in an application under Sections 7 or 9 or 10 of the 'I&B Code'. The second question relating to maintainability is answered against the Appellants, they being not the 'Operational Creditor'.

15. In view of the aforesaid findings, no relief can be granted to the Appellants. The appeal is accordingly dismissed. No costs.

[Justice S.J. Mukhopadhaya]
Chairperson

[Justice Bansi Lal Bhat]
Member (Judicial)

NEW DELHI

30th November, 2018

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