

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, PRINCIPAL BENCH,
NEW DELHI

Company Appeal (AT) (Insolvency) No. 1493 of 2019

[Arising out of order dated 16.10.2019 in Company Petition (IB) No. 720/KB/2017 passed by the Adjudicating Authority (National Company Law Tribunal, Kolkata Bench, Kolkata)]

IN THE MATTER OF:

Bihar State Construction Corporation Limited
Employee Union, Khwaja Imli, Anisabad, P.O.
Anisabad P.S. Gardanibagh, Town & District
Patna-800002, thorough its Secretary namely
Jagdish Mandal, age about 59 years, son of late
Lakhan Mandal.

..... Appellant.

Versus

Bihar State Construction Corporation Limited, a
company incorporated under the provisions of
the Companies Act, 1956 and having its
registered office at Khwaja Imli, Anisabad, P.O.
Anisabad P.S. Gardanibagh, Town & District
Patna-800002, thorough its Managing Director.

Through: (IRP)

Mr. Nitesh More,
IB, Rabindra Sarani, Gate No. 1
7th Floor, Room No. 701, Kolkata-700001
more2091@gmail.com

..... Respondent.

Present:**For Appellant: Appearance not marked.****For Respondent:- Appearance not marked.****J U D G M E N T**
(19th September, 2022)**Justice Anant Bijay Singh;**

The present Appeal has been filed by the Appellant - Bihar State Construction Corporation Limited Employee Union under Section 61(1) of the Insolvency and Bankruptcy Code, 2016 (**for short IBC**) being aggrieved and dissatisfied by the order dated 16.10.2019 passed by the Adjudicating Authority (National Company Law Tribunal, Kolkata Bench, Kolkata) in Company Petition (IB) No. 720/KB/2017, by which the Adjudicating Authority has allowed the Application filed by the Respondent herein - Bihar State Construction Corporation Limited under Section 10 of the IBC to initiate Corporate Insolvency Resolution Process (**for short CIRP**) on the ground that the Respondent is unable to pay its debt to Rs. 104,16,98,874/- as on 31.03.2016 and appointed Mr. Nitesh Kumar More as IRP in the matter having registration no. IBBI/IPA-001/IP-P01087/2017-18/11785.

2. The facts giving rise to this Appeal are as follows:

i) The Respondent - Bihar State Construction Corporation Limited (*hereinafter referred as "Company"*) was incorporated in the month of August, 1974 under the Companies Act, 1956 as Public (Pvt.) Company Ltd. by shares/limited by Guarantee/as an Ltd. Company. The nominal capital of the

Company is Rs. 5,00,00,000/- share of Rs. 100/- each. The amount of capital subscribed and paid up is Rs. 5,00,000/-.

ii) That virtually the company's financial position had become so worst that employees had moved before the Hon'ble Patna High Court bearing Writ Petition bearing No. 3171/2002 for payment of their wages and salary and after hearing the parties along with analogous cases was pleased to direct the corporation to pay the lawful dues of the petitioners in all the six writ petitions within a period of 4 months. If the corporation is unable to make pay the admitted dues within the aforesaid period and if it is unable to make itself viable, the State Government and the authorities of the corporation must complete all formalities and initiate winding up proceeding in accordance with law within the period of 4 months.

iii) Further case is that by special resolution of the company duly passed in accordance with Section 189 of the companies Act, 1956 at a general meeting thereof held on 27.08.2004 after due notice as provided in the Act it was resolved unanimously as follows "*Bihar State Construction Corporation Limited is being wind up with immediate effect*" and subsequently vide resolution taken in the minutes of the Board of Directors meeting dated 05.09.2003 it has been further resolved to move before the Hon'ble Company Court for winding up of the company.

iv) The decision of the Hon'ble Tribunal was also placed before the board of Directors of the Corporation in the meeting held on 14.01.2003 and Board of Directors directed that the guidance of the State Government may be sought

for the action be taken according to the guidance. The company requested the Water Resources Department, Government of Bihar for its Guidance vide letter dated 24.01.2003 quoting the decision of the Board of Directors.

v) Further case is that the company under the instruction issued by the Government of Bihar vide its Letter No. 3608 dated 30.04.2003 the Corporation had taken decision to present a company petition before the Hon'ble Company Judge, in compliance thereof and report to the Government made also reference of Letter No. 244 dated 17.04.2003 issued by the then Bureau of public Enterprises. The petitioner/applicant company had earlier moved Hon'ble company court for winding up the company dive company petition No. 5/2003 which was disposed of granting leave to the company to withdraw the company petition with a liberty to file a fresh company petition in accordance with form No. 47 under Rule 95 of the Company Court Rules, 1959.

vi) The Respondent earlier moved company petition bearing No. 22/2004 and the same was taken by the Hon'ble Patna High Court on 19.10.2006 and after hearing the respective parties the Hon'ble Court was pleased to dismiss the company petition and directed to act under section Inter State Corporation Act, 1957 and also under Section 65 of Bihar Reorganization Act, 2000. Thereafter, the State of Bihar preferred company appeal against the aforesaid order and all the appeals bearing 5 of 2007, 6 of 2006, 7 of 2006 and 8 of 2006 were taken up by the Hon'ble Division Bench on 18.01.2008 and after hearing, the Hon'ble Court allowed all the appeals setting aside the orders passed by the Hon'ble Company Judge and matter was remitted back to the Hon'ble

Company Judge. After the matter being remanded by the Hon'ble Division Bench the company petition bearing No. 5/2013 was listed before the Hon'ble Company Judge on 15.02.2008 but most unfortunately the case could not be marked and therefore, no one appeared and the matter remained unattended consequently dismissed by the Hon'ble Court.

vii) Further case is that the State Government finally took a decision not to revive the Corporation and thereafter a meeting of the Board of Directors was convened on 05.09.2013 which again took a decision in Board & 105 meeting to wind up the Corporation by filing company petition before the Hon'ble Company Judge. The Corporation in the light of the minutes of the meeting dated 05.09.2013 moved Hon'ble Company Court vide Company Case No. 6/2014 but the Hon'ble Company Judge after hearing the counsel for the company has been pleased to dismiss the company petition giving liberty to file a Restoration application with certain observation and direction. Thereafter, the restoration application was filed but due to compelling circumstances it was withdrawn.

viii) Further case is that the winding up of the company is being preferred on the basis of the resolution of the Board Company on the ground that the Corporation is not in a position to pay the salary to its employees and all of its commercial activities are closed and there is practically no business being conducted by this corporation. Accordingly, the winding a petition is being filed bearing Company Petition No. 720/2017. Thereafter, the appellants herein filed an objection petition before the NCLT, Kolkata Bench stating that there is no

requisite resolution as required under Section 10(3)(C) of the IBC which is a breach of mandatory provision and hence the petition filed under Section 10 of the IBC is liable to be dismissed. After hearing the parties, the Adjudicating Authority allowed the Application filed under Section 10 of the IBC by the Respondent herein. Hence this Appeal.

3. The Ld. Counsel for the Appellant during the course of argument and in his Momo of Appeal along with written submissions submitted that in terms of the Section 395 of the Companies Act, 2013, the Annual Report on the working and affairs of the company is to be laid before the house of the state legislature together with the copy of Audit Report and comments upon or supplement to the Audit Report. The compliance under Section 395 is mandatory and in failure of compliance of such a mandatory provision the petition under Section 10 is liable to be dismissed.

4. It is further submitted that the Adjudicating Authority committed jurisdictional error while passing the impugned order. The Respondent facts pleaded in the company petition before the Adjudicating Authority is with respect to voluntary winding up of the company which is completely different from the provisions contained in Section 10 of the IBC. The Adjudicating Authority also failed to consider that the mandatory requirement of law as well as requirements under the articles of the association of the Corporate Debtor Company were not complied with.

5. It is further submitted that the Adjudicating Authority failed to consider that the after bifurcation of State of Jharkhand come into existence on

15.11.2000 was also a necessary party since it is also a shareholder of the corporation and in absence of State of Jharkhand being added as a necessary party the company petition was admitted, therefore, it cannot be sustained in the eye of law.

6. It is further submitted that the Adjudicating Authority while passing the impugned order failed to consider the facts that the State of Bihar in view of the undertaking given before the Hon'ble Supreme Court of India in the matter of Bihar State Ardh Sarkari Karamchari Maha Sangh & Ors. Vs. State of Bihar [Special Leave Petition (C) No. 16159 of 2017] had agreed for taking over all the liabilities of all the non-functional corporation and public sector undertaking and is ready to adjust the claims of the employees. As such the application is premature and is liable to be dismissed. Based on these submissions the impugned order is fit to be set aside and the Appeal be allowed.

7. The Ld. Counsel for the Respondent during the course of arguments and in his reply along with written submissions submitted that the State of Bihar already agreed to take care of the liability of the Corporate Debtor, which is a 100% Government Company. It is necessary to mention that the Association of Employees Union earlier preferred an appeal for grant of monetary benefits before the Hon'ble Apex Court, vide S.L.P. No. 16159 of 2017 which has been disposed of in the light of the Notification No. 52 dated 14.03.2018 and No. 132 dated 20.06.2018 issued by the Govt. of Bihar. However, in para 5 of the Notification No. 52 dated 14.03.2018 it has been mentioned that the benefits of

this notification shall be kept in abeyance with respect to the Multi-State Corporations, where bifurcation of Assets and Liability has not taken place.

8. It is submitted that after bifurcation in compliance to letter dated 07.11.2019 sent by the Joint Secretary, Water Resources Department, Stat of Jharkhand, Ranchi. Thereafter, reminder had been sent vide letter No. 4172 dated 20.11.2019 to the State of Jharkhand for fixing the date to decide the issue of bifurcation. But till date bifurcation of Assets and Liability between the State of Jharkhand and Bihar has not taken place.

9. The Resolution Professional has filed the Status Report in which stated that the Seventh Committee of Creditors (**for short CoC**) Meeting held on 30.10.2021, the CoC rejected to reissue Form G again. As no EOI had been received till date. The Corporate Debtor is not carrying any business and has huge losses also. Hence, CoC decided to liquidate the Corporate Debtor.

FINDINGS

10. After hearing the parties and having gone through the pleadings made on behalf of the parties as also facts of the case, we are of the considered view that as the Corporate Debtor is not carrying any business and has huge losses also, therefore, the Adjudicating Authority has rightly passed the impugned order in admitting the Application filed by Bihar State Construction Corporation Limited- the Corporate Person under Section 10 of the IBC.

- Also keeping in view of the facts that the seventh meeting held on 30.10.2021, the CoC rejected to reissue Form G again as no EOI had been received till date, the Corporate Debtor is not carrying any

business and huge losses also. Hence, CoC decided to liquidate the Corporate Debtor. In the same meeting, the resolution for filing of liquidation application and confirming the Resolution Professional as Liquidator was approved by the CoC with 100% voting and as such the liquidation application was filed before the Adjudicating Authority on 01.11.2021 bearing I.A. No. 954 of 2021.

- With these reasons, we do not find any merit in the instant Appeal. The impugned order dated 16.10.2019 passed by the Adjudicating Authority (National Company Law Tribunal, Kolkata Bench, Kolkata) in Company Petition (IB) No. 720/KB/2017 is hereby affirmed. The Appeal is hereby dismissed.

11. Registry to upload the Judgment on the website of this Appellate Tribunal and send the copy of this Judgment to the Adjudicating Authority (National Company Law Tribunal, Kolkata Bench, Kolkata), forthwith.

**[Justice Anant Bijay Singh]
Member (Judicial)**

**[Ms. Shreesha Merla]
Member (Technical)**

New Delhi

19th September, 2022

R. Nath.