

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

Company Appeal (AT) (Insolvency) No. 128 of 2022

[Arising out of Order dated 24.11.2021 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi, Special Bench (Court-II) in CA 734/2018, IA Nos. 5026, 5027 & 5028 of 2021 in Company Petition No. (IB)-525 (ND)/2017]

In the matter of:

M/s. Cimco Projects Ltd. & Ors.

...Appellants

Vs.

**Mr. Anup Kumar (Resolution Professional) M/s.
Shivkala Developers Pvt. Ltd. & Anr.**

...Respondents

For Appellants: Mr. Ashish Makhija and Mr. Deep Bisht, Advocates

For Respondents: Mr. Abhijeet Sinha, Mr. Aditya Shukla, Advocates
for R-1
Ms. Shankari Mishra, Advocate (for erstwhile RP)

J U D G M E N T

Ashok Bhushan, J.

1. This Appeal has been filed against order dated 24.11.2021 passed by the Adjudicating Authority (National Company Law Tribunal), Special Bench, Court II, by which CA 734 of 2018 filed by the Resolution Professional for passing an order for approval of the Resolution Plan has been rejected. I.A Nos. 5026 of 2021, 5027 of 2021 & 5028 of 2021 filed by the Appellants for cancellation of non-bailable warrants have also been

rejected. The Appellant aggrieved by the impugned judgment has come up in this Appeal.

2. The brief facts of the case are that Corporate Insolvency Resolution Process (CIRP) was initiated against 'M/s. Shivkala Developers Pvt. Ltd.'- (Corporate Debtor). The Appellant in pursuance of Application inviting Expression of Interest, submitted his Expression of Interest and thereafter filed the Resolution Plan. The Resolution Plan submitted by the Appellant was approved in the 10th Committee of Creditors' meeting held on 07.11.2018. The Committee of Creditors (CoC) authorised the Resolution Professional to file Application for approval of the Resolution Plan.

CA- 734 of 2018 was filed by the Resolution Professional for approval of the Resolution Plan. The Successful Resolution Applicant- Appellant No.1 was permitted to be impleaded as one of the Respondents in CA- 734 of 2018 by the order of the Adjudicating Authority dated 03.03.2021. The Adjudicating Authority issued notice to the Successful Resolution Applicant to appear.

On 04.08.2021, the Resolution Professional brought into notice of the Court that the Resolution Applicant has failed to deposit the performance guarantee for the Resolution Plan. It was submitted that the Affidavit of service has been filed but no one has appeared on behalf of the Resolution Applicant. The Adjudicating Authority on 04.08.2021 issued bailable warrants against the Resolution Applicant.

On 03.09.2021, the Resolution Applicant did not appear, hence, the Adjudicating Authority issued a non-bailable warrants to arrest the Resolution Applicant.

On 12.11.2021, the Adjudicating Authority reserved the order in CA- 734 of 2018 as well as on I.A Nos. 5026 of 2021, 5027 of 2021 and 5028 of 2021 praying for cancellation of non-bailable warrants. The Adjudicating Authority delivered the impugned order on 24.11.2021 by which CA- 734 of 2018 has been rejected. Application I.A Nos. 5026 of 2021, 5027 of 2021 and 5028 of 2021 have also dismissed and order of liquidation was passed and liquidator was directed to take necessary steps for filing a Complaint under Section 74(3) of the IBC against the Resolution Applicant. The Resolution Applicant aggrieved by the said order has come up in this Appeal.

3. Learned Counsel for the Appellant submits that the Appellant was initially not party to the Application CA- 734 of 2018 and he was made party only on 03.03.2021 by the order of the Adjudicating Authority. He could not appear before the Adjudicating Authority, thereafter, due to certain miscommunications and the Appellant is still ready to abide by the Resolution Plan and ready to comply all terms and conditions for the Resolution Plan. It is submitted that the Resolution Plan did not contemplate giving of any performance guarantee since the provision pertaining bringing requirement of submitting performance guarantee was inserted in the CIRP Regulations only subsequent to approval of the

Resolution Plan. It is submitted that the Appellant is ready to abide by the Resolution Plan.

4. Learned Counsel for the Resolution Professional submits that the Resolution Professional had sent communication to the Appellant of all proceedings in the CIRP even after the order dated 03.03.2021 passed by the Adjudicating Authority impleading the Appellant and directing the Appellant to submit performance guarantee. No steps were taken by the Appellant. The Adjudicating Authority directed issuance of bailable warrants and thereafter non-bailable warrants due to non-appearance of the Resolution Applicant. The Resolution Applicant having not shown interest in abiding by the plan and deliberately not appearing before the Adjudicating Authority, the Adjudicating Authority had no option except to reject the Application for approval of the Resolution Plan.

5. The Respondent No.2- Committee of Creditors has also filed a reply where it is submitted that in pursuance of the order of this Tribunal passed in this Appeal, the proposal given by the Appellant has been considered by the CoC and on 31.03.2022, CoC has rejected the proposal as submitted by the Appellant.

6. We have considered the submissions of the Counsel for the parties and perused the record.

7. The facts of the present case are undisputed that the Resolution Plan of the Appellant was approved by the CoC in its 10th meeting held on 07.11.2018 and thereafter, Resolution Applicant filed CA- 734 of 2018

before the Adjudicating Authority for approval of the Resolution Plan. The Appellant was not party to the said Application and it was only on 03.03.2021 that Appellant was made party to the Application CA- 734 of 2018. The copy of the Application filed by the Resolution Professional has been brought before us by an Additional Affidavit. In the Application filed by the Resolution Professional under Section 60(5) in which prayer was made to implead the Resolution Applicant as Respondent to the Application and further direction was sought to Resolution Applicant to file an undertaking for submission of the performance security and to submit its affidavit stating its eligibility criteria under Section 29A of the IBC. On 03.03.2021, the above Application was allowed. Following is the order passed on 03.03.2021 in I.A No. 1132 of 2021:-

***IA- 1132/2021:** Ld. Counsel appearing for the RP submitted that the RP has filed an amended memo of parties. Heard the Ld. Counsel appearing for the RP. Prayer is allowed.
List this IA along with the CA- 734/C-II/ND/2018.
With this, the present IA is closed.”*

8. On 04.08.2021, when the matter was taken, it was pointed out by the Resolution Professional that the Resolution Applicant has failed to deposit the performance guarantee for the Resolution Plan considering which bailable warrant was issued. An Affidavit of Service was also filed on 18.03.2021. Subsequently, the non-bailable warrant was issued as noticed above.

9. It is relevant to notice that on the date when Resolution Plan was approved i.e. November, 2018, the CIRP Regulations did not provide for submission of the performance guarantee. The provision for submission of performance guarantee was added in Regulation 36 B of the CIRP Regulations by Notification dated 24.01.2019. Regulation 36B (4A) is as follows:-

“36B. Request for resolution plans.

.....[(4A) *The request for resolution plans shall require the resolution applicant, in case its resolution plan is approved under sub-section (4) of section 30, to provide a performance security within the time specified therein and such performance security shall stand forfeited if the resolution applicant of such plan, after its approval by the Adjudicating Authority, fails to implement or contributes to the failure of implementation of that plan in accordance with the terms of the plan and its implementation schedule.*

Explanation I.– For the purposes of this sub-regulation, “performance security” shall mean security of such nature, value, duration and source, as may be specified in the request for resolution plans with the approval of the committee, having regard to the nature of resolution plan and business of the corporate debtor.

Explanation II. – A performance security may be specified in absolute terms such as guarantee from a bank for Rs. X for Y years or in relation to one or more variables such as the term of the resolution

plan, amount payable to creditors under the resolution plan, etc.]”

10. The Resolution Plan when it was approved, thus, did not contain any provision for providing a performance security. It is only after the order of the Adjudicating Authority dated 03.03.2021 that non-submission of the performance guarantee is made an issue by the Resolution Professional. After the order dated 03.03.2021, the Resolution Applicant had not appeared before the Adjudicating Authority due to which bailable and non-bailable warrants were issued. The Adjudicating Authority in its impugned order has observed that despite order of the Adjudicating Authority dated 03.03.2021, Resolution Applicant has not shown any willingness to proceed with the Resolution Plan. In paragraphs 6, 7 and 8 of the impugned order, the Adjudicating Authority has made following observations:-

“6. During the Course of hearing held on 12.11.2021, the Ld. Counsel for the RP submitted that its almost three long years’ i.e., 1099 days since filing of IA- 734 of 2018 for approval of the Resolution Plan of the Corporate Debtor by the CoC. However, till date the Resolution Applicant has neither furnished the performance guarantee as directed by this Tribunal vide order dated 03.03.2021 nor has shown any willingness to proceed with the Resolution Plan approved by CoC. Even on the date of hearing, when asked for furnishing of performance guarantee, the counsel appearing for RA, to the shock and surprise of this Bench, stated that they were not even aware about

these proceedings and the fact that the Resolution Plan approved by them has been approved by the CoC. The said submission made by the Ld. Counsel of the RA shows the non-seriousness of the RA towards the Resolution Plan, it has submitted.

7. It is further brought to the knowledge of this Bench that vide order dated 03.03.2021, the application filed by the RP for amendment of Memo of Parties and including the name of the RA in the memo of parties was allowed in which one of the prayer was for deposit of the performance guarantee. The said order of this Bench has also not been complied with by the RA till date. The above facts make it clear that the RA is not interested in going ahead with the implementation of the Resolution Plan and is only wasting time of everyone, which is causing huge loss to the Creditors of the CD.

8. Looking into the above scenario, where already a period of 3 years have lapsed and till date the RA has not taken any steps towards deposit of performance guarantee as part of the Resolution Plan, this Bench does not think it fit to allow the CA No. 734 of 2018 filed by the RP, as till date the RA has not shown any intention to abide by the Resolution Plan. Thus, the application filed by the RP being CA No. 734 of 2018 is hereby dismissed and the Resolution Plan submitted by the RA being incomplete stands rejected.”

11. The CIRP is a time bound process where timeline has been prescribed for each step. The CIRP cannot be allowed to continue for indefinite period. When Appellant has submitted the Resolution Plan which was approved on

08.11.2018, he cannot just say that he was not aware of the proceedings before the Adjudicating Authority for approval of the Resolution Plan. The Adjudicating Authority has rightly drawn a conclusion that inaction on the part of the Resolution Applicant clearly indicates that he was not willing to proceed with the Resolution Plan approved by the CoC. The Adjudicating Authority when failed to secure the presence of the Resolution Applicant even after issuance of bailable and non-bailable warrants, it has rightly taken a decision for rejecting the CA- 734 of 2018 praying for approval of the Resolution Plan. Due to non-serious, casual and non-diligent conduct of the Resolution Applicant, the Adjudicating Authority has rightly refused to approve the Resolution Plan. We do not find any error in the order of the Adjudicating Authority in rejecting CA-734 of 2018. More than three years have been passed from approval of the Resolution Plan by the CoC, the Adjudicating Authority has rightly also passed an order of liquidation. The Adjudicating Authority has given valid reason in the order for proceeding with the liquidation of the Corporate Debtor.

12. Now, we come to the order passed by the Adjudicating Authority rejecting I.A Nos. 5026 of 2021, 5027 of 2021 and 5028 of 2021 by which the Resolution Applicant has prayed for cancellation of non-bailable warrant. In the entire order, there is no discussion for the grounds given by the Appellant for cancellation of non-bailable warrant. The Application has been dismissed without adverting to any of the reasons given by the Appellant. We, thus, are satisfied that rejection of the Applications I.A Nos. 5026 of 2021, 5027 of 2021 and 5028 of 2021 is unsustainable. We, thus,

allow the said Application and cancel theailable and non-ailable warrants issued to the Appellant.

13. We further are of the view that direction issued by the Adjudicating Authority in paragraph 20 for taking steps for filing a complaint under Section 74(3) of the IBC against the Resolution Applicant was also uncalled for. Section 74(3) is as follows:-

“74. Punishment for contravention of moratorium or the resolution plan. -...(3) Where the corporate debtor, any of its officers or creditors or any person on whom the approved resolution plan is binding under section 31, knowingly and wilfully contravenes any of the terms of such resolution plan or abets such contravention, such corporate debtor, officer, creditor or person shall be punishable with imprisonment of not less than one year, but may extend to five years, or with fine which shall not be less than one lakh rupees, but may extend to one crore rupees, or with both.”

14. The present was not a case where there was any violation of Section 74(3) by the Appellant. Since the Resolution Plan was never approved by the Adjudicating Authority, the Corporate Debtor or its officers or creditors or any other persons cannot be said to have knowingly and wilfully contravened any of the terms of the Resolution Plan. We, thus, are of the view that direction issued in paragraph 20 for filing a complaint under Section 74(3) against the Appellant is also unsustainable. In result, we partly allow the Appeal in the following manner:-

- (i) I.A Nos. 5026 of 2021, 5027 of 2021 and 5028 of 2021 are allowed. Aailable and non-ailable warrants issued against the Appellant are cancelled.

(ii) The direction issued in paragraph 20 to take necessary steps for filing complaint under Section 74(3) against the Resolution Applicant is set aside.

(iii) Except the directions as issued in (i) and (ii), the rest of the order of the Adjudicating Authority dated 24.11.2021 is upheld.

(iv) The Liquidator appointed by the impugned order shall proceed in accordance with the law. It shall be open for the Appellant to participate in liquidation process.

The parties shall bear their own costs.

**[Justice Ashok Bhushan]
Chairperson**

**[Justice M. Satyanarayana Murthy]
Member (Judicial)**

**[Barun Mitra]
Member (Technical)**

**NEW DELHI
1st August, 2022**

Anjali