

2024 SCC OnLine NCLAT 90

In the National Company Law Appellate Tribunal⁺

(BEFORE RAKESH KUMAR JAIN, MEMBER (JUDICIAL) AND NARESH SALECHA,
MEMBER (TECHNICAL))

ACRE - 81 Trust Through its trustee Assets Care &
Reconstruction Enterprise Ltd. and Others ...
Appellants;

Versus

Pawan Kumar Goyal and Others ... Respondents.

Comp. App. (AT) (Ins) No. 447 of 2023 and I.A. No. 1475, 1476 of
2023

Decided on January 17, 2024

Advocates who appeared in this case:

Mr. Arun Kathpalia, Sr. Advocate along with Mr. Ujjal Banerjee & Mr.
Akash Khurana, Advocates for Appellant;

Mr. Rishi Singhal, for IRP/R-1 for Respondent.

The Judgment of the Court was delivered by

RAKESH KUMAR JAIN, MEMBER (JUDICIAL)— This appeal has been filed by ACRE-81 Trust (Appellant No. 1), India Real Estate 2021 Trust (Appellant No. 2), ACRE-100 Trust (Appellant No. 3) and Catalyst Trusteeship Limited (Appellant No. 4), all assenting members of the Committee of Creditors (in short 'CoC') of SARE Realty Projects Pvt. Ltd. (Corporate Debtor) having voted to liquidate the Corporate Debtor, against the order dated 16.03.2023 passed by the Adjudicating Authority (National Company Law Tribunal, New Delhi Bench, Court II) in I.A. No. 3818/ND/2021 in CP (IB) No. 684/ND/2020, by which show cause notice has been issued seeking an explanation of the Appellants as to why the penalty stipulated under Section 65 of the Insolvency and Bankruptcy Code, 2016 (in short 'Code') be not imposed upon them.

2. In brief, one Dharam Vir Gupta, filed an application under Section 9 of the Code, as an operational creditor before the Adjudicating Authority bearing C.P. (IB) No. 684 of 2020 against the Corporate Debtor. The Corporate Debtor did not file any reply nor appeared during the proceedings and was proceeded against ex-parte on 01.03.2021. The Adjudicating Authority admitted the application filed under Section 9 of the Code, vide its order dated 05.03.2021 and appointed the IRP besides imposing the moratorium. The IRP made a public announcement on 09.03.2021 to invite claims from the creditors of the

Corporate Debtor. The IRP conducted first meeting of the CoC on 06.04.2021 and informed the members of the CoC that the office of the Corporate Debtor was closed for more than one year, all the directors of the Corporate Debtor had resigned before the commencement of the CIRP, last audited financial statements of the Corporate Debtor filed with the ROC were for the year ending March 31, 2017 and the secured financial creditors of the Corporate Debtor had initiated enforcement action under SARFAESI Act, 2002 and taken over possession of the project assets. One of the authorized representatives of CoC members, India Real Estate 2021 Trust and ACRE-81 Trust, proposed the liquidation of the Corporate Debtor.

3. Second meeting of the CoC was held on 27.05.2021 in which liquidation of the Corporate Debtor was proposed and publication of Form G was deferred till the CoC take the decision on the issue of early liquidation. The 3rd meeting of the CoC held on 23.06.2021 in which the members of the CoC again discussed the early liquidation of the Corporate Debtor. The IRP also highlighted the high cost involved in the continuation of CIRP. The 4th CoC meeting was held on 27.07.2021 in which members of the CoC proposed to take the issue of liquidation of the CD before other agenda items. The CoC had a detailed deliberation on the issue of liquidation including powers of the CoC to recommend liquidation at any time before the approval of the resolution plan and the members of the CoC decided to liquidate the CD in terms of Section 33 of the Code but at the request of the majority members of the CoC, e-voting on the said agenda was deferred. The IRP sent a notice for conducting the 5th CoC meeting to be held on 13.08.2021. On 12.08.2021, the representative of India Real Estate Trust 2021 and ACRE-81 Trust sent an email to IRP and other members of the CoC proposing early liquidation of the CD. In the 5th meeting of the CoC was held on 13.08.2021 in which the CoC continued their deliberations on the issue of liquidation of the CD which was not voted upon in the 4th CoC meeting. E-voting on the said issue was conducted during the period from 16.08.2021 till 18.08.2021 in which 88.48% of the CoC members including the financial creditors in class, i.e. allottees/homebuyers voted in favour of the liquidation of CD. The IRP filed an application for liquidation of the Corporate Debtor bearing I.A. No. 3818 of 2021 with the following prayers:—

- a. allow the present application.
- b. Pass an order for liquidation of the CD under Section 33(2) r/w Explanation and in terms of sub-clauses (i), (ii) and (iii) of clause (b) of sub-clause (1) of Section 33 of the Code.
- c. Pass an order to appoint the Interim Resolution Professional Pawan Kumar Goval. IBBI Registration No. IBBI/IPA-001/IPP00875/2017

-18/11473 as Liquidator of the Corporate Debtor.

d. Pass any other or further order(s) as this Hon'ble Tribunal deem fit and proper in the facts and circumstances of the matter”

4. In the impugned order, the Adjudicating Authority has observed that until EOI in Form G is published, there is no mechanism under the regime of IBC to discover prospective resolution applicants for a corporate debtor and without publishing Form-G, CoC could not have been in a position to formulate an opinion that there were no prospective buyers available for the CD. It further observed that the scheme of IBC gives every Corporate Debtor a fair chance to stand on their own feet and to come out of financial distress and that is why every Corporate Debtor must go through the IBC mandated CIR process before facing the liquidation proceedings. It was concluded that without taking any steps for seeking resolution of the Corporate Debtor, the CoC has acted contrary to the scheme of IBC. With these observations, the Adjudicating Authority has further observed that it was prima facie of the opinion that the application for liquidation of CD has been filed with malicious intent and therefore, it was found as a fit case for issuance of show cause notice to the assenting CoC members jointly who voted in favour of the liquidation of the CD without even exploring the possibility of resolution of the Corporate Debtor. The Appellants herein have thus been asked to show as to why penalty stipulated under Section 65 of the Code should not be imposed on them.

5. Although, the Adjudicating Authority has asked the present Appellants to file a joint reply to the show cause notice and had also observed that it has not finally adjudicated upon the liquidation application, the fate of which would depend upon the outcome of Section 65 proceedings initiated against the assenting CoC members but aggrieved against the aforesaid impugned order dated 16.03.2023, the present appeal has been filed in which on the date of preliminary hearing held on 13.04.2023, this Court passed the order of stay 'in the meantime, issuance of notice under Section 65 in the impugned order shall remain stayed'. Thus as a matter of fact, no notice was there before the Appellants for the purpose of giving reply to the same.

6. Counsel for the Appellant has vehemently argued that not only the Adjudicating Authority has committed an error in invoking Section 65 of the Code for the purpose of issuance of show cause notice but also it misread the provisions of Section 33(2) of the Code and the explanation of the Code. It is submitted that as per Section 33(2), the Resolution Professional, at any time during the CIRP but before confirmation of resolution plan, intimate the Adjudicating Authority of the decision of the CoC (approved by not less than sixty six per cent. of the voting share) to liquidate the CD. It is further submitted that

explanation to Section 33(2) further provides that the CoC may take the decision to liquidate the CD any time after its constitution and before the confirmation of the resolution plan including at any time before the preparation of the information memorandum. In support of his submissions, he has relied upon a decision of this Appellate Tribunal rendered in the case of *Sunil S. Kakkad v. Atrium Infocom Pvt. Ltd.*, 2020 SCC OnLine NCLAT 1160 in which the question involved was as to whether the Resolution Professional with the approval of CoC with 66 per cent vote share can directly proceed for the liquidation of CD without taking any steps for resolution of the CD? He has submitted that in the said case only three meetings of CoC took place and without making any endeavour for inviting EOI, the CoC unanimously resolved to liquidate the CD. He has further referred to Para 19, 20 and 21 of the said decision in which the power of the CoC has been discussed in respect of Section 33(2) of the Code as per which it can order for liquidation at any stage but before confirmation of resolution plan. It is further submitted that the decision in the case of *Sunil S. Kakkad* (Supra) has further been upheld by the Hon'ble Supreme Court reported as 2021 SCC OnLine SC 723. It is further submitted that in the present case the decision has been taken by the CoC in its fifth meeting for the liquidation of the CD by 88.48% voting share. It is also submitted that the decision relied upon by the Adjudicating Authority in the case of *Swiss Ribbons Pvt. Ltd. v. Union of India* is not applicable because it is prior in time to the amended Section 33(2) of the Code which clearly empowers the CoC to liquidate the CD at any time after the constitution of the CoC and prior to the approval of the resolution plan.

7. As regards the issuance of show cause notice under Section 65 of the Code is concerned, it is argued that the said provision has been invoked without application of mind because it provides that it can be invoked if the proceedings have been initiated with malicious intent for any purpose other than for the liquidation. Whereas in the present case, the proceedings have been initiated for the liquidation, therefore, the said provision would not apply and has been wrongly invoked for the purpose of issuance of show cause notice and in this regard, reliance has been placed upon the orders passed in *Unigreen Global Pvt. Ltd. v. Punjab National Bank CA (AT) (Ins) No. 81 of 2017* in which it has been held that no such penalty under sub-Section (1) or (2) of Section 65 can be imposed by the Adjudicating Authority without recording opinion for coming to the conclusion that a prima facie case is made out to suggest that the person fraudulently or with malicious intent for the purpose other than the resolution of the insolvency or liquidation or with the intent to defraud any person has filed the application. It is submitted that the Adjudicating Authority has though observed that it

has found prima facie that a case has been made out against the Appellant but the reason to frame the opinion much less prima facie is conspicuous by its absence in the impugned order.

8. Counsel on behalf of the RP has also appeared in this case.

9. We have heard Counsel for the parties and perused the record with their able assistance.

10. There is no dispute that the CoC took a decision for liquidation of the CD after holding five meetings and by voting share of 88.48 per cent which meets the criteria laid down in Section 33(2) of the Code. There is an error in the approach of the Adjudicating Authority that for the purpose of taking a decision regarding the liquidation of the CD, the CoC has to complete all the steps regarding resolution of the CD because it would be against the spirit of Section 33(2) and explanation appended to it wherein the legislature has used the word any time twice i.e., firstly, in Section 33(2) and secondly, in the explanation of Section 33(2) of the Code that the CoC has the jurisdiction to pass the order of liquidation of the CD, approving it by not less than sixty six per cent of the voting share, but it should be before the confirmation of the resolution plan. In the case of *Sunil S. Kakkad* (Supra), this Court has categorically framed a question as to whether the RP, with the approval of the CoC with sixty six per cent vote share, directly proceed for the liquidation of CD without taking any steps for resolution of the CD. In the said case, there were three meetings of CoC in which without making endeavour for inviting EOI, the CoC unanimously resolved to liquidate the CD and that issue came for adjudication before this Court in which while referring to Section 33(2) and the explanation appended thereto it has been ordered that the CoC has the power to liquidate the CD before confirmation of the resolution plan. The said decision in the case of *Sunil S. Kakkad* (Supra) has further been affirmed by the Hon'ble Supreme Court when the appeal was filed by Sunil S. Kakkad was dismissed on 07.01.2021 and in so far as the issuance of notice under Section 65 is concerned, firstly, the issuance of notice was stayed by this Court vide its order dated 13.04.2023 and secondly, the Adjudicating Authority has not given any reason for forming an opinion much less prima facie that it was a case of malicious intent on the part of the Applicant/RP with the connivance of assenting members of CoC to whom the show cause notice was given and finally the provision of Section 65 has no application because it would apply if the application is filed for the purpose other than liquidation.

11. Thus, from the aforesaid discussion and looking from any angle, the impugned order does not deserve to survive and hence, the present appeal is allowed and the impugned order is set aside though without any order as to costs.

† Principal Bench New Delhi

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