



IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
ORDINARY ORIGINAL CIVIL JURISDICTION

EXECUTION APPLICATION NO. 2866 OF 2015

CHETRAJ N. KHADKA )...APPLICANT

V/s.

DIGHI PORT LIMITED )...RESPONDENT

WITH  
NOTICE NO. 66 OF 2016  
IN

EXECUTION APPLICATION NO. 2866 OF 2015

Mr.J.P.Sen, Senior Advocate i/by Mr.Mayuresh Lagu a/w. Mr.Girish Paryani, Mr.Sagar Patil and Mr.Shashank Dubey, Advocate for the Applicant in EXA/2866/2015.

Mr.Rohan Cama a/w. Ms.Nikita Mishra and Ms.Kinjal Shah i/by Rashmikant & Partners, Advocate for the Respondent.

CORAM : ABHAY AHUJA, J.

DATE : 4<sup>th</sup> DECEMBER 2024

**ORDER :**

1. This matter has been listed today for considering the Execution Application.

2. Mr.Cama, learned Counsel for the Respondent, has submitted that in view of the finality attained by the order approving the Resolution Plan in respect of the Respondent, the Execution Application does not survive.

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3. Mr.J.P.Sen, learned Senior Counsel appearing for the Applicant would submit that the Execution Application seeks execution of the decree dated 17<sup>th</sup> December 2012 of this Court against the Respondent who was the Defendant in the Suit and now a Judgment debtor and despite the fact that by order dated 5<sup>th</sup> March 2020, the National Company Law Tribunal (“NCLT”), Mumbai Bench, has approved the Resolution Plan under Section 31(1) of the Insolvency and Bankruptcy Code, 2016 (“IBC”) since the Applicant / Decree holder is defined as a Creditor under Section 3(10) of the IBC as a separate class of creditor different from a financial creditor or an operational creditor or a secured creditor and even an unsecured creditor, the Execution Application cannot be said to be infructuous. Mr.Sen draws this Court’s attention to the definition of Creditor in Section 3(10) of the IBC in support of his contention. Mr.Sen relies upon the decision of the Tripura High Court in the case of *Sri Subhankar Bhowmik vs. Union of India and Another*<sup>1</sup>.

4. Mr.Sen, learned Senior Counsel, further submits that, therefore, although the decision in the case of *Ghanshyam Mishra and Sons Private Limited, Through the Authorised Signatory vs. Edelweiss Asset*

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1 WP(C)(PIL)No.04/2022 decided on 14<sup>th</sup> March 2022

***Reconstruction Company Limited, Through the Director and Others<sup>2</sup>***

lays down that once a Resolution Plan is duly approved by the Adjudicating Authority under Section 31(1) of the IBC, the claims as provided in the Resolution Plan stand frozen and binding on all the creditors, however, since a Decree holder forms a separate class as defined under the IBC and paragraph 27 of the order of the NCLT only refers to financial creditors, operational creditors and the CIRP cost but does not refer to the Decree holder, this Court, therefore, after considering the approved Resolution Plan decide as to whether the Applicant / Decree holder would be entitled to seek execution of the decree.

5. Mr.Sen, learned Senior Counsel, also refers to paragraphs 44, 45 and 46 of the said order of the NCLT. Mr.Sen submits that, therefore, until and unless it is ascertained that the claim made by the Applicant was considered and rejected by perusing the approved Resolution Plan, it would not be possible to deny execution of the decree. Mr.Sen submits that the Resolution Applicant is mandatorily required to ensure compliance under all applicable laws and that, therefore also, without knowing the manner in which the Applicant's claim was rejected under

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2 (2021) 9 Supreme Court Cases 657

the CIRP, which would be possible only upon a perusal of the Resolution Plan, it would not be possible to reject the execution of the decree. Mr.Sen further submits that as has been clarified in paragraph 46 of the order of the NCLT that merely because the Resolution Plan has been approved, it does not confer any general power to the Resolution Applicant absolving him of liability of the corporate debtor company without knowing about the liability against which such exemption is sought. That, the reliefs / exemptions from only existing liabilities which are specifically identified can be sought and allowed in the Resolution Plan. Mr.Sen would submit that since the claim of the Applicant as Decree holder does not find place in paragraph 27 or anywhere else in the said order, this Court ought not to reject the Execution Application without looking at the Resolution Plan.

6. On the other hand, Mr.Cama, learned Counsel appearing for the Judgment debtor would submit that the National Company Law Appellate Tribunal (“NCLAT”), Delhi, has in its order dated 6<sup>th</sup> July 2023 clearly held that the Resolution Plan was finally approved by the NCLAT and on 5<sup>th</sup> March 2020 had dismissed the application filed by the Applicant herein under Section 60(5) and Section 9 of the IBC.

7. Mr.Cama would submit that paragraph 27 of the order of the NCLT clearly provides that operational creditors would get NIL payment as per the Resolution Plan. Mr.Cama submits that the Execution Applicant had lodged its claim in Form B with the Resolution Professional as an operational creditor and the operational creditors other than MMB and workmen have got NIL payment as per the payment plan.

8. Mr.Cama also relies upon paragraphs 93, 95, 97, 102.1 and 102.3 of the decision in the case of *Ghanshyam Mishra and Sons Private Limited, Through the Authorised Signatory vs. Edelweiss Asset Reconstruction Company Limited, Through the Director and Others (supra)* in support of his contention. Learned Counsel submits that the said decision of the Hon'ble Supreme Court, while clearly recognizing a Decree holder as a creditor, holds that an operational creditor is a person to whom an operational debt is owed. Learned Counsel submits that in paragraph 97 of the said decision, operational debt has been defined to mean a claim in respect of the provision of goods or services including employment or a debt in respect of the payment of dues arising under any law for the time being in force and in the facts of this case, the debt owed to the Applicant is clearly an operational debt.

Mr.Cama submits that once a Resolution Plan is duly approved by the Adjudicating Authority under Section 31(1), the claims provided in the Resolution Plan stand frozen and are binding on the corporate debtor as well as the creditors and that all claims which are not part of the Resolution Plan are to stand extinguished and no person is entitled to institute or continue any proceedings in respect to a claim which is not part of the Resolution Plan.

9. Mr.Cama submits that, therefore, no proceedings in respect of such dues prior to the date on which the Adjudicating Authority grants its approval under Section 31 can be continued which also includes the claim of the Decree holder pursuant to decree dated 17<sup>th</sup> December 2012 as the same is prior to 5<sup>th</sup> March 2020.

10. Mr.Cama, therefore, submits that this Court dismiss the Execution Application as infructuous as the claim of the Applicant has already been held in the order approving the Resolution Plan to be NIL.

11. Mr.Sen has submitted in rejoinder that even if the claim that was lodged with the Resolution Professional was not in Form "F" but in Form "B" as an operational creditor, the fact that the Execution

Applicant is a Decree holder and a class recognized as a creditor under the IBC, cannot be denied or ignored. That, therefore, this Court consider the Execution Application after perusing the Resolution Plan before passing any orders.

12. I have heard Mr.J.P. Sen, learned Senior Counsel for the Applicant and Mr.Rohaam Cama, learned Counsel for the Respondent and considered their submissions.

13. The law as settled by the Hon'ble Supreme Court in the case of *Ghanshyam Mishra and Sons Private Limited, Through the Authorised Signatory vs. Edelweiss Asset Reconstruction Company Limited, Through the Director and Others (supra)* enunciates that once the Resolution Plan has been approved by the Adjudicating Authority under Section 31(1) of the IBC, all such claims which are not a part of the Resolution Plan shall stand extinguished and no person will be entitled either to initiate or to continue any proceedings in respect of a claim which is not part of the Resolution Plan and if the dues owed are not part of the Resolution Plan, they shall stand extinguished and no proceedings in respect of such dues for the period prior to the date on which the Adjudicating Authority grants its approval under Section 31

can be continued. Neither of the two Counsel have disputed this position of law.

14. The decree is dated 17<sup>th</sup> December 2012. The order of the NCLT approving the Resolution Plan is of 5<sup>th</sup> March 2020. Paragraph 27 of the said order is usefully quoted as under :

*“27. As per the terms of the Approved Resolution Plan, the payment schedule along with the amount to be paid to different categories of stakeholders is as follows :*

Stakeholder	Admitted claim	Payment as per plan	Timing of payment
Financial Creditors	INR 3,056.96 Crores	INR 650 Crores	Within 30 days of effective date (i.e approval of plan by AA and satisfaction of the conditions precedent)
Operational Creditors (other than workmen and employees and MMB)	INR 26.36 Crore (Excluding MMB)	Nil	-
Operational Creditors (MMB)	INR 15.10 Crores	INR 11.38 Crores	Within 30 days of effective date
Operational Creditors (Workmen and employee dues)	INR 0.02 Crores	As per provisions of IBC (as amended)	As per provisions of IBC (as amended)
CIRP Cost	NA	To be paid in full	In priority to other payments



15. It is clear from the aforesaid that operational creditors except workmen, employees and MMB are to receive NIL payment as per the Resolution Plan although some of the claims are admitted.

16. Section 3(10) of the IBC defines a “Creditor” as under :

*“3(10) “creditor” means any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decree-holder;*

17. As observed by the Hon’ble Tripura High Court in the case of *Sri Subhankar Bhowmik vs. Union of India and Another (supra)*, a Decree holder is no doubt a separate class of creditor recognized under the IBC. It also cannot be disputed that the claim of a Decree holder is subject to the rigours of a resolution process and has to be satisfied along with other claims in accordance with the waterfall mechanism envisaged under Section 53 of the IBC. Infact, there is a Form “F” under Regulation 9A which has been provided for filing claims under the Insolvency and Bankruptcy Board of India (Insolvency Resolution process for Corporate Persons) Regulation, 2016, for creditors other than financial creditors and operational creditors. The title to Form “F” reads “proof of claim by creditors (other than financial creditors and operational creditors)”. That, therefore, as noted in the case above, a

Decree holder is one of the creditors and is also distinguished from financial creditors and operational creditors. That, the classification is reasonable and the differentia is also intelligible and that the same cannot be treated to be discriminatory or arbitrary. However, admittedly, the claim has been filed by the Applicant in Form "B" as an operational creditor. The resolution process is over as the Resolution Plan has been approved by the NCLT on 5<sup>th</sup> March 2020. The order of the NCLAT dated 6<sup>th</sup> July 2023 referred to by the learned Counsel for the Respondent also records that the Resolution Plan was finally approved on 5<sup>th</sup> March 2020 and while rejecting the application filed by the Applicant herein under Section 60(5) and Section 9 of the IBC on the ground that the same was filed after expiry of several months from the date of the Resolution Plan approved by the Adjudicating Authority observed that the same was also approved by the Appellate Tribunal, of course with a liberty to either of the parties to pursue legal remedy in accordance with law. The order of the NCLAT has not been challenged any further by the Applicant. The Resolution Plan is, therefore, final, so also once the Resolution Plan has attained finality, in view of the decision of the Hon'ble Supreme Court in the case of *Ghanshyam Mishra and Sons Private Limited, Through the Authorised Signatory vs. Edelweiss Asset Reconstruction Company Limited, Through the Director*

*and Others (supra)*, claims not part of the Resolution Plan stand extinguished and all proceedings with respect to the claims or dues can neither be initiated nor be continued. This Execution Application is one such proceeding.

18. It is pertinent here to refer to paragraph 97 of the decision in the case of *Ghanshyam Mishra and Sons Private Limited, Through the Authorised Signatory vs. Edelweiss Asset Reconstruction Company Limited, Through the Director and Others (supra)* which is usefully quoted as under :

*“97. “Creditor” therefore has been defined to mean “any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decree-holder”. “Operational Creditor” has been defined to mean a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred. “Operation debt” has been defined to mean a claim in respect of the provision of goods or services including employment or a debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority.”*

19. As can be seen that even the Hon'ble Supreme Court has considered that a Decree holder has been included as a creditor in the definition of creditor. The Hon'ble Supreme Court has also explained

that operational creditor has been defined to mean a person to whom an operational debt is owed. Operational debt, the Hon'ble Supreme Court has observed, has been defined to mean a claim in respect of the provision of goods or services including employment or a debt in respect of payment of dues arising under any law for the time being in force.

20. Infact, Section 5(21) of the IBC defines operational debt as under:

*“5(21) “operational debt” means a claim in respect of the provision of goods or services including employment or a debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority.”*

21. Paragraph 2 of the Decree dated 17<sup>th</sup> December 2012 is quoted as under :

*“2. The Plaintiff is managed by its sole Proprietor Mr. Khadka and is engaged in carrying out the work of excavation, earth works and reclamation at various projects. The Defendant-Dighi Port Ltd., is a Company registered under the Companies Act, 1956, and engaged in carrying out the construction of the Dighi Port. The Defendant engaged and appointed the Plaintiff to carry out the excavation works and reclamation at Dighi site.”*

22. It emerges that the Suit had been filed for recovery of dues in respect of invoices for the work done by the Applicant in carrying out the work of excavation, earth works and reclamation at various projects, which suggests that the debt owed by the Respondent to the Applicant was with respect to the services rendered by the Applicant to the Respondent. This, in my view, would fall under the definition of operational debt as above, and therefore, going by the approach of the Hon'ble Supreme Court, the debt would be an operational debt and the Applicant would be an operational creditor. Therefore, even if the claim by the Applicant had been made in Form "F" and not in Form "B" the fact is that the same is an operational debt and the Applicant was an operational creditor and to my mind would not make any difference in the facts of this case, in view of the principles laid down by the Hon'ble Supreme Court in the case of *Ghanshyam Mishra and Sons Private Limited, Through the Authorised Signatory vs. Edelweiss Asset Reconstruction Company Limited, Through the Director and Others (supra)*, although the said approach in that case was in the facts of that case in respect of government or statutory dues.

23. It would also, therefore, not be necessary, in my view, for an operational creditor of the nature of an Applicant, to be shown  
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separately as a Decree holder or dealt with any differently although a Decree holder undisputedly is a separate class of creditor.

24. Further, in my view, paragraphs 44, 45 and 46 of the order approving the Resolution Plan cannot therefore come in the way of the finality of the Resolution Plan. And even while it cannot be denied that merely because the Resolution Plan has been approved, it does not confer any general power to the Resolution Applicant absolving him of liability of the corporate debtor company without knowing about the liability against which such exemption is sought and that, the reliefs / exemptions from only existing liabilities which are specifically identified can be sought and allowed in the Resolution Plan, admittedly, a specific claim had been lodged by the Applicant and as can be seen from paragraph 27 of the said order, the payment as per the plan for operational creditors other than MMB and employees / workmen is NIL as the same has stood extinguished.

25. This Execution Application, which has been filed on 28<sup>th</sup> October 2015 with respect to a claim prior to the date of approval of the Resolution Plan and had admittedly been lodged with the Resolution Professional by the Applicant as an operational creditor, is to receive

NIL payment as per paragraph 27 of the order approving the Resolution Plan. Therefore, as observed above, the claim stands rejected and extinguished and the execution proceeding cannot be continued. Therefore, in my view, no useful purpose would be served in perusing the Resolution Plan or directing the Respondent to furnish the Resolution Plan except to satisfy academic curiosity, in as much as, the Resolution Plan has been approved even by the NCLAT and admittedly there is no challenge to the order of the NCLAT approving the Resolution Plan and even the request for the Resolution Plan by application under Section 60(5) and Section 9 of the IBC, as noted above, has not been entertained by the NCLT as well as the NCLAT.

26. Accordingly, the Execution Application and the connected Notice are dismissed as infructuous.

**(ABHAY AHUJA, J.)**