

IN THE SUPREME COURT OF INDIA  
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO(S).7641/2019

BEACON TRUSTEESHIP LIMITED

APPELLANT(S)

VERSUS

EARTHCON INFRACON PRIVATE LIMITED & ANR.

RESPONDENT(S)

O R D E R

1. Heard learned counsel for the parties.
2. Applications for intervention are allowed. Application for impleadment is allowed to the extent of intervention.
3. The facts, in short, are that Debenture Trust Deed (for short 'DTD') was entered into between Respondent No.1 (Corporate Debtor)/Earthcon Infracon Private Limited and the appellant/Beacon Trusteeship Limited, the Respondent No.1 issued 3000 senior, secured, transferable, unlisted, unrated, redeemable, non-convertible debentures of face value of Rs.1,00,000/- on a private placement basis against the deposit of Rs.30 Crores. On 20.12.2017 and 24.12.2018, DTD was amended twice to raise additional funds of Rs.20 Crores and Rs.2,50,00,000/- on similar basis. The appellant filed petition (CP No.1348/2019) under Section 7 of the Insolvency and Bankruptcy Code, 2016 (for short, 'the IBC') against Respondent No.1/Earthcon Universal Infratech Private Limited, one of the Corporate Guarantors of Respondent No.1. On 11.06.2019, Demand Notice under Section 8 of the IBC was issued by the Operational Creditor/Respondent No.2 against

Respondent No.1. On 03.07.2019, Demand Notice was issued by the appellant calling upon Respondent No.1 to redeem all the debentures and make a payment of Rs.63,39,68,719/- along with all applicable charges/interest etc. Ultimately, the appellant, on 26.07.2019, filed an application under Section 7 of the IBC against Earthcon Construction Pvt. Ltd., being one of the Corporate Guarantors of Respondent No.1 in the DTD. However, on the basis of notice issued on 11.06.2019 under Section 8 of the IBC, Respondent No.2 (Operational Creditor)/Emperos Infrastructure Private Limited filed proceedings including under Section 9 of the Arbitration and Conciliation Act, 1996.

4. An application was admitted on the basis of the admission made by Respondent No.1, as apparent from the order dated 23.08.2019 passed by the NCLT. Aggrieved thereby the appeal was preferred before the NCLAT. The NCLAT by the impugned order has dismissed the appeal. Hence the present appeal.

5. Mr. Gopal Jain, learned senior counsel appearing on behalf of the appellant raised manifold submissions that as per agreement it was necessary to give notice to the appellant before initiating the proceedings before the NCLT which was not given. The three invoices on the basis of which the proceedings have been initiated are vague and prima facie proceedings have been initiated in collusive manner by Respondent Nos. 1 and 2. Reliance has been placed on the provisions contained in Section 65 of the IBC and a decision of this Court in Embassy Property Development Pvt. Ltd. v.

State of Karnataka and Others, (2019) SCC Online SC 1542 (C.A. No.9170/2019 etc. decided on 03.12.2019), in which this Court has observed as under:-

"52. Even fraudulent tradings carried on by the Corporate Debtor during the insolvency resolution, can be inquired into by the Adjudicating Authority under Section 66. Section 69 makes an officer of the corporate debtor and the corporate debtor liable for punishment, for carrying on transactions with a view to defraud creditors. Therefore, NCLT is vested with the power to inquire into (i) fraudulent initiation of proceedings as well as (ii) fraudulent transactions. It is significant to note that Section 65(1) deals with a situation where CIRP is initiated fraudulently "for any purpose other than for the resolution of insolvency or liquidation"."

6. We have also heard learned counsel for the IRP and Respondent No.2. It was submitted by the learned counsel appearing for Respondent No.2 that allegation of collusion is unfounded and has no merit. Learned counsel appearing for the IRP has stated that this aspect has to be considered by the IRP, whether the proceedings have been initiated in collusion or not while submitting a report to the Adjudicating Authority. The provisions contained in Section 65 of the IBC are extracted hereunder:-

"65. Fraudulent or malicious initiation of proceedings. - (1) if, any person initiates the insolvency resolution process or liquidation proceedings fraudulently or with malicious intent for any purpose other than for the resolution of insolvency, or liquidation, as the case may be, the adjudicating authority may impose upon such person a penalty which shall not be less than one lakh rupees, but may extend to one crore rupees.

(2) If, any person initiates voluntary liquidation proceedings with the intent to defraud any person, the adjudicating authority may impose upon such person a penalty which shall not be less than one lakh rupees but may extend to one crore rupees."

7. Considering the provision of Section 65 of the IBC, it is necessary for the Adjudicating Authority in case such an allegation is raised to go into the same. In case, such an objection is raised or application is filed before the Adjudicating Authority, obviously, it has to be dealt with in accordance with law. The plea of collusion could not have been raised for the first time in the appeal before the NCLAT or before this Court in this appeal. Thus, we relegate the appellant to the remedy before the Adjudicating Authority.

8. In case, a proper application is filed, aspect whether the proceedings have been initiated in collusive manner will be looked into, in accordance with law and the appropriate orders have to be passed, considering the facts and circumstances of the case. We have made it clear that we have not commented on the merit of the case. We set aside the impugned order passed by the NCLAT and dispose of the appeal in accordance with the aforesaid direction.

9. The interim protection granted by this Court vide order dated 30.09.2019 shall continue to operate for a period of four weeks from today. In the meantime, it is open to the appellant to file appropriate application for interim protection, if any, before the Adjudicating Authority.

10. Pending application(s), if any, shall stand disposed of.

.....J.  
[ARUN MISHRA]

.....J.  
[INDIRA BANERJEE]

NEW DELHI;  
FEBRUARY 18, 2020.

S U P R E M E C O U R T O F I N D I A  
R E C O R D O F P R O C E E D I N G S

CIVIL APPEAL NO(S). 7641/2019

BEACON TRUSTEESHIP LIMITED

APPELLANT(S)

VERSUS

EARTHCON INFRACON PRIVATE LIMITED &amp; ANR.

RESPONDENT(S)

(FOR ADMISSION and IA No.149891/2019-GRANT OF INTERIM RELIEF)

Date : 18-02-2020 This appeal was called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE ARUN MISHRA  
HON'BLE MS. JUSTICE INDIRA BANERJEEFor Appellant(s) Mr. Gopal Jain, Sr. Adv.  
Mr. Ankur Kashyap, AOR  
(Appearance slip not given)For Respondent(s) Mr. Purushendra Kaurav, Sr. Adv.  
Mr. Sachin Pujari, Adv.  
Mr. Sameer Shrivastava, AORMr. Anupam Lal Das, Sr. Adv.  
Mr. Shikhil Suri, Adv.  
Mr. Shiv Kumar Suri, Adv.  
Ms. Shilpa Saini, Adv.  
Ms. Vinishma Kaul, Adv.K. Shekhar, Adv.  
Ms. Enakshi Mukhopadhyay Siddhanta, AOR  
Ms. Rukhsana Choudhury, IRPMr. Changhez Khan, Adv.  
Shantala S., Adv.  
Mr. Rameshwar Prasad Goyal, AORUPON hearing the counsel the Court made the following  
O R D E R

The appeal is disposed of in terms of the signed order.

(NARENDRA PRASAD)  
A.R-CUM-P.S.(JAGDISH CHANDER)  
COURT MASTER

(Signed order is placed on the file)