NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 346 of 2019

(Arising out of Order dated 11.02.2019 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, in CP No.1718/IBC/NCLT/MB/MAH/2017 & MA 216/2018)

IN THE MATTER OF:

BSE Ltd.,
25th Floor, P.J. Towers,
Dalal Street, Fort,
Mumbai-400001.
Through its Senior Manager .... Appellant

Vs

Asahi Infrastructure & Projects Ltd.,
Room No.302, 3rd Floor,
Yashwant Shopping Centre,
Carter Road No.7, Opp. Railway Station,
Borivali (E) Mumbai – 400066.
Through its Director. .... Respondent

Present:

For Appellant: **Mr. Vijay Valsar and Mr. Dileep Poolakkot, Advocates**

For Respondent: **Mr. Hitetsh A. Biherani, Advocate**

J U D G M E N T

ASHOK BHUSHAN, J.

This Appeal has been filed under Section 61 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the 'IB Code'), challenging the order dated 11.02.2019 passed by National Company Law Tribunal, Mumbai Bench in CP No.1718/IBC/NCLT/MB/MAH/2017 & MA 216/2018.

2. Brief facts of the case necessary for deciding this Appeal are:

(i) The Appellant/ Bombay Stock Exchange Limited (for short 'BSE') filed an Application under Section 9 of the IB Code against the Respondent (Corporate Debtor) claiming an amount of Rs.8,85,526/- as on 1st April, 2017 as Operational Creditor. The Corporate Debtor entered into Listing Agreement dated 30.11.1993 with the BSE - the Appellant.

(ii) The case of the Appellant was that Corporate Debtor defaulted in making payment of listing fees as per Clause 38 of the Listing Agreement. Invoice dated 1st April, 2017 for an amount of Rs.8,85,526 for the Annual Listing Fees payable for the year 2017-18 and arrears payable upto 2016-17 was demanded.

(iii) The Corporate Debtor opposed the Application and prayed that the same may be dismissed at the threshold on the ground of maintainability. The defence of the Corporate Debtor was that listing fees, which is claimed by the Operational Creditor is not an operational debt but a fee payable in pursuance to Regulation 14 of SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015. The fee is a 'regulatory fee' and cannot be termed as an 'operational debt'. The Application filed by the Appellant was not maintainable.

(iv) The learned Adjudicating Authority after considering the submissions of the parties and after referring to Report of the Insolvency Law Committee, rejected the Application under

Section 9 holding that dues of 'regulatory fee' cannot be termed as an 'operational debt'. The Application was dismissed with liberty to the Appellant to approach the appropriate forum and take legal steps.

3. Learned Counsel for the Appellant challenging the judgment passed by the Adjudicating Authority contended that the dues of the Appellant were not covered with the definition of the 'operation debt' as defined in Section 5 sub-section (21) and the Adjudicating Authority committed error in rejecting the Application. It is submitted that there is no procedure prescribed by the SEBI for recovery of dues in respect of 'listing fees', hence, no exception can be taken to filing of the Application by Appellant under Section 9 of the IB Code. The 2015 Regulation do not prescribe any recovery mechanism for the Annual Listing Fees and Regulation only provide for penal consequences for non-compliance. Learned Counsel for the Appellant has relied on judgment of this Appellate Tribunal in ***Company Appeal (AT) (Insolvency) no. 309 of 2018*** in ***Sales Tax Department, State of Maharashtra Through Deputy Commissioner of State Tax vs. M/s Raj Oil Mills Limited & Ors.***, where it was held that statutory dues including Income Tax and Value Added Tax are 'operational debt'.

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

5. The Appellant entered into a Listing Agreement with Corporate Debtor on 30th November, 1993. The Company had agreed to pay to the

Stock Exchange initial listing fees as well as listing fees for in each year as Annual Listing Fees. Subsequently, another Agreement was entered on 1st March, 2016. The invoices issued by the Appellant do indicate that the invoices were issued for payment of Annual Listing Fees as well as arrears of listing fees. Regulation 14 of Securities and Exchange Board of India (Listing Obligations and disclosure Requirements) Regulation, 2015 provides as follows:

> *"Fees and other charges to be paid to the recognized stock exchange(s).*
> *14. The listed entity shall pay all such fees or charges, as applicable, to the recognised stock exchange(s), in the manner specified by the Board or the recognised stock exchange(s)."*

6. The question to be answered in the present Appeal is as to whether claim of the Appellant regarding listing fee and its arrears are 'operational debt' within the meaning of IB Code? The IB Code was enacted with the object of insolvency resolution of corporate persons. The preamble of the Code states:

> *"An Act to consolidate and amend the laws relating to reorganization and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximization of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the order of priority of payment of Government dues and to establish an Insolvency and*

Bankruptcy Board of India, and for matters connected therewith or incidental thereto."

7. The Hon'ble Supreme Court time and again held the purpose and object of IB Code is insolvency resolution of corporate debtor and not the recovery of dues of creditors. In ***(2019) 4 SCC 17, Swiss Ribbons Private Limited & Anr. vs. Union of India and Ors.***, Supreme Court in paragraph 28 has laid down following:

"28. It can thus be seen that the primary focus of the legislation is to ensure revival and continuation of the corporate debtor by protecting the corporate debtor from its own management and from a corporate death by liquidation. The Code is thus a beneficial legislation which puts the corporate debtor back on its feet, not being a mere recovery legislation for creditors....."

8. It is well settled that provisions of a statute have to be interpreted keeping in light of the object and purpose of the enactment. 'Operational Debt' has been defined under Section 5, sub-section (21) in the following words:

(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.

9. The definition of 'operational debt' as contained in above provisions is in very wide terms.

10. Whether the legislative intendment was that for recovery of registration fee, listing fee and other kinds of fee, the provisions of IB Code should be resorted to for recovery of such fees from a Company? In large number of statutes 'registration fee' and fee akin to 'registration fee' are envisaged as fees, which are required to be paid annually by a Company. Whether in event, a default is committed by a Company in payment of such fees, the proceeding for insolvency resolution can be triggered on that account?

11. The Insolvency and Bankruptcy Code, 2016 was published in the Gazette of India on 28th May, 2016. After working the Insolvency and Bankruptcy Code, 2016, the law which consolidate and amend the laws related to reorganization and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximisation of value of assets and working of the Code was keenly watched by all stakeholders, the Government setup a Insolvency Law Committee, to make recommendations to the Government on issues arising from the implementation of the Insolvency and Bankruptcy Code, 2016 as well as on the recommendations received from various stakeholders. A Committee under the Chairmanship of Shri Injeti Srinivas examined the working of the Code and made recommendations proposing amendment to the Code. With regard to Section 5 (8), i.e. 'financial debt', there was lot of debate and several stakeholders recommended to the Committee to make

suitable amendment to protect the rights of home buyers. The Committee recommended for amendment of definition of 'financial debt'. It is useful to extract paragraph 1.9 of the Report, which is to the following effect:

> *"1.9 Finally, the Committee concluded that the current definition of 'financial debt' is sufficient to include the amounts raised from home buyers/ allottees under a real estate project, and hence, they are to be treated as financial creditors under the Code. However, given the confusion and multiple interpretations being taken, at this stage, it may be prudent to explicitly clarify that such creditors fall within the definition of financial creditor, by inserting an explanation to Section 5(8) of the Code. Accordingly, in CIRP, they will be a part of CoC and will be represented in the manner specified in paragraph 10 of this report, and in the event of liquidation, they will fall within the relevant entry in the liquidation waterfall under section 53. The Committee also agreed that resolution plans under the Code must be compliant with applicable laws, like RERA, which may be interpreted through section 30(2)(e) of the Code. It may be noted that there was majority support in the Committee for the abovementioned treatment of home buyers. However, certain members of the Committee, namely Sh. Shardul Shroff, Sh. Sudarshan Sen and Sh. B. Sriram, differed on this matter."*

12. The Committee also deliberated on 'operational debt'. In paragraphs 1.15 to 1.20, 'operational debt' was dealt. One of the issues which was deliberated by the Committee is as to whether 'regulatory dues' need to be included in the 'operational debt'. The Committee negativated the demand.

Paragraphs 1.15 to 1.20 of the Report, which are relevant for the purpose of this case are to the following effect:

"**Operational Debt**

1.15 Section 5(21) of the Code defines operational debt to mean *"a claim in respect of the provision of goods or services including employment or a debt in respect of the repayment 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"*. The definition of 'operational debt' is key to determine the scope of 'operational creditors' envisaged under the Code. Section 5(20) of the Code defines an operational creditor 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"*. Operational creditors are granted significant rights under the Code, including: (i) the right to initiate CIRP under section 9 of the Code; and (ii) the right to payment of at least the liquidation value under a resolution plan in terms of section 30(2)(b) of the Code.

1.16 It was suggested to the Committee that the definition of 'operational debt' under the Code must be widened to include dues payable to regulators. This would ensure that such dues are granted the protection discussed in points (i) and (ii) above.

1.17 With respect to point (i) discussed above, the Committee noted that regulatory dues were intentionally not included in the definition of operational debt. It was discussed that if any claim or obligation arises pursuant to non-payment by a corporate debtor in lieu of any goods or services provided by a regulatory body,

it may be interpreted as 'operational debt' on a case to case basis. For example, the Committee noted that one of the leading stock exchanges had filed applications for initiation of CIRP against certain companies for non-payment of annual listing fees.18 The Committee also noted that, regulators generally have wide ranging powers to enforce their orders and recover dues. For example, section 24(2) of the SEBI Act, 1992 states as follows:

> *"If any person fails to pay the penalty imposed by the adjudicating officer or fails to comply with any of his directions or orders, he shall be punishable with imprisonment for a term which shall not be less than one month but which may extend to ten years, or with fine, which may extend to twenty-five crore rupees or with both."*

1.18 With respect to point (ii), the Committee noted that prior to the coming into force of the Code, preferential payments in relation to winding up of companies was governed by section 327 of the Companies Act, 2013 ("**CA 2013**") (the corresponding provision in the Companies Act, 1956 ("**CA 1956**") was section 530). Neither section 327 of the CA 2013 nor section 530 of the CA 1956 provided any preferential treatment to regulatory dues and only covered *"all revenues, taxes, cesses and rates due from the company to the Central Government or State Government or to a local authority at a relevant date…"*.

1.19 Moreover, the overarching intention of the Code to prioritize debts owed to unsecured financial creditors was sufficiently clear from the Preamble to the Code. In

this regard, the Report of the BLRC Volume 1 (2015) ("**BLRC Report**") states as follows:

> *"The Committee has recommended to keep the right of the Central and State Government in the distribution waterfall in liquidation at a priority below the unsecured financial creditors in addition to all kinds of secured creditors for promoting the availability of credit and developing a market for unsecured financing (including the development of bond markets). In the long run, this would increase the availability of finance, reduce the cost of capital, promote entrepreneurship and lead to faster economic growth. The government also will be the beneficiary of this process as economic growth will increase revenues. Further, efficiency enhancement and consequent greater value capture through the proposed insolvency regime will bring in additional gains to both the economy and the exchequer".*

1.20 **The Committee after due deliberation, unanimously agreed that regulatory dues need not be included in the definition of "operation debt**"."

13. It is relevant to note that when the Report of the Insolvency Law Committee was submitted on 26th March, 2018, the Committee was aware that several Stock Exchanges have filed Application under Section 9 for initiation of CIRP, which fact is clearly noticed any paragraph 1.17 of the Report. By the time the Report was filed, Application under Section 9 by Bombay Stock Exchange had already been filed. Thus, the Committee has given its conclusion in paragraph 1.20 that regulatory dues need not be

included in the definition of 'operational debt', after having noticed that certain Stock Exchanges have filed Application under Section 9.

14. Insolvency Law Committee Report has been referred to and relied by Hon'ble Supreme Court in finding out the object and purpose of different provisions of the IB Code. The same has also been referred to and relied in Civil Appeal No.9597 of 2018 in Transmission Corporation of Andhra Pradesh Limited vs. Equipment Conductors and Cables Limited decided on 23.10.2018.

15. When the Insolvency Law Committee has categorically in the Report, as extracted above, held that 'regulatory dues' need not be included in the definition of 'operational debt', the said opinion of experts, cannot be brushed aside. The recommendations given by Insolvency Law Committee Report is in line with the object of the Code. In event, it is held that all kind of dues including 'regulatory dues', the insolvency resolution process can be triggered, then the entire purpose of the object of the IB Code will be lost and insolvency proceedings will turn into recovery proceedings for the dues of creditors, which is not the object of the IB Code, as has been laid down by the Hon'ble Supreme Court in Swiss Ribbons Private Limited and Anr. (supra) and other judgments.

16. We may now refer to Securities Contracts (Regulation) (Stock Exchanges and Clearing Corporations) Regulations, 2018, in which Regulation 28 provides that the recognized Stock Exchange and recognized Clearing Corporation shall segregate its regulatory departments from other

departments in the manner specified in Part-C of Schedule-II of the Regulations. For ready reference Regulation 28 is extracted as follows:

> *"**Segregation of regulatory department***
>
> *28. The recognized stock exchange and recognized clearing corporation shall segregate its regulatory department from other department in the manner specified in Part-C of Schedule-II of these regulations."*

17. Part-C of the Regulation, which contains 'Measures to ensure segregation of regulatory departments, item 3 of which is as follows:

> (3) Department handling the following functions shall be considered as regulatory departments in a Stock Exchange:
>
> (a) surveillance,
> (b) listing
> (c) member registration
> (d) compliance,
> (e) inspection,
> (f) enforcement,
> (g) arbitration,
> (h) default,
> (i) investor protection,
> (j) investor services.

18. The above statutory provisions indicate that the Department handling listing are Regulatory Department and the 'listing fee' is nothing but a 'regulatory fee'

19. The submission of the learned Counsel for the Appellant that there is no method for recovery of dues provided by the SEBI, cannot be accepted as SEBI is empowered to punish the defaulters for the recovery of regulatory dues. There are ample provisions for recovering under the SEBI Act and the circulars issued by the SEBI from time to time.

20. We may also notice the judgments, which have been relied by learned Counsel for the Appellant. The judgment of this Tribunal in Company ***Appeal (AT) (Insolvency) No. 205 of 2017*** in ***Pr. Director General of Income Tax (Admn. & TPS) vs. M/s. Synergies Dooray Automotive Ltd. & Ors.*** decided on 20th March, 2019 has been relied by the learned Counsel for the Appellant. In the above case, this Tribunal has held that Income Tax Department of the Central Government and the Sales Tax Department(s) of the State Government and other local authorities are Operational Creditors within the meaning of Section 5(2) of the IB Code. There cannot be any quarrel with the law laid down in the aforesaid judgment. But present is a case for 'listing fees', i.e., 'regulatory dues'.

21. Learned Counsel for the Appellant also relied on the judgment of this Tribunal in ***Company Appeal (AT) (Insolvency) No.472 of 2018, B.S.E. Ltd. vs. Neo Corp International Ltd.*** In the above case, Section 9 Application filed by the BSE Ltd. was rejected by the Adjudicating Authority on the ground that it was barred by time. The Appeal was allowed holding that the Application was not barred by time. However, the Tribunal did not enter into the issue as to whether dues are 'operation debt' or not. Hence,

the said judgment also does not cover the issue, which cropped up for consideration in the present case.

22. Learned Counsel for the Appellant referred to another judgment of this Tribunal in ***Company Appeal (AT) (Insolvency) No.734 of 2018, Anju Agarwal, Resolution Professional for Shree Bhavani Paper Mills vs. BSE Ltd.*** The submission, which was contended before this Tribunal that in the above case, the Resolution Professional has challenged the decision of the Adjudicating Authority holding that Regulatory Authorities are not covered under the Moratorium as provided under Section 14 of the IB Code. This Appellate Tribunal in the above case held that by virtue of Section 238 of IB Code the provisions of Section 28A of the SEBI Act, 1992 shall be overridden. It was held that Section 14 of the IB Code will prevail over Section 28 of the SEBI Act. It was held that SEBI cannot recover any amount including penalty from the Corporate Debtor. Present is not a case where effect of Moratorium is to be examined or considered. The question which has come up for consideration in this case is as to whether for recovery of 'listing fees' and its arrears, proceedings under IB Code for insolvency can be resorted to. The said question was not under consideration in the above judgment of this Tribunal dated 23rd April, 2019. Hence, the said judgment does not support the submission, which is advanced by the learned Counsel for the Appellant before us. When we look into the substance of the matter, we find that Appellant has initiated the insolvency proceedings against the Corporate Debtor only as a recovery

mechanism to recover dues of 'listing fees'. IB Code is not meant for recovery of dues of creditors.

23. Taking into overall facts and circumstances of the present case, we are of the view that Adjudicating Authority did not commit any error in rejecting the Application under Section 9 filed by the Appellant. We do not find any merit in the Appeal. The Appeal is dismissed. No order as to cost.

[Justice Ashok Bhushan]
Chairperson

[Dr. Alok Srivastava]
Member (Technical)

NEW DELHI

21st December, 2021

Ash/NN