

NATIONAL COMPANY LAW APPELLATE TRIBUNAL**PRINCIPAL BENCH****NEW DELHI****COMPANY APPEAL (AT)(INSOLVENCY) NO.35/2024**

(Arising out of judgement and order dated 1st December, 2023 passed by the National Company Law Tribunal, Mumbai in IA No.2593/2023 in CP No.(IB)3352/MB/2019)

In the matter of:

Shri Krishna Structure Pvt Ltd
(Successful Resolution Applicant)
501B, Elegant Business Park,
Andheri Kurla Road,
JB Nagar Andheri (East),
Mumbai 400059

Appellant

Vs

1. Ateev Gala,
Member of suspended Board of Directors,
1201, Mont Blane,
JameJamshed Road,
Matunga,
Mumbai 400019

2. Ashish Vyas
(Resolution Professional),
B-1A, Viceroy Court CHS,
Thakur village,\
Kandivali (East),
Mumbai suburban,
Maharashtra

3. Committee of Creditors
Of Corporate Debtor

Respondents

For Appellant: Mr Ravi Prakash, Sr Advocate with Mr Aman Malik, Mr Kumar Anurag Singh, Mr Zain A Khan, Mohd A Khan, Mr Vijay Kumar, Advocates.

For Respondent: Mr Sumesh Dhawan, Mr Chitranshul A Sinha, Ms Pallavi, Mr Shaurya Shyam, Mr Shivam Shoirewala, Ms Rakshita Bhargava, Advocates for R3.

Mr Manaswi Agrawal, Ms Bhavana Duhoon, Ms Saloni Kalwade, Mr Ashish Vyas, Advocates.

JUDGEMENT

JUSTICE YOGESH KHANNA, MEMBER (JUDICIAL)

This appeal is filed by the appellant against an impugned dated 1st December, 2023 whereby IA No.2593/2023 filed under Section 60(5) of the IBC by the Respondent No.1 was allowed and whereas the application IA 2145/2023 seeking approval of the Resolution Plan was rejected.

2. The appellant is a Successful Resolution Applicant (SRA) of the Corporate Debtor namely M/s Vijay Citispace Pvt Ltd. By the impugned order the Ld. NCLT had refused to accord approval to the Resolution Plan submitted by the appellant hence the appellant is aggrieved of the impugned order and has filed this appeal.

3. The facts are *vide* an order dated 20.07.2021, the Ld. NCLT admitted CP (IB) 3352/2023 under Section 9 of the IBC filed by one Regency Ispat Pvt Ltd (Operational Creditor) against M/s Vijay Citispace Pvt Ltd and had directed the commencement of CIRP against the Corporate Debtor and appointed Respondent No.2 as an Interim Resolution Professional.

4. After obtaining valuation from registered IBBI valuers for the assets of the Corporate Debtor, at the 3rd CoC Meeting dated 14th October 2021, the CoC approved publication of Form G – Invitation for Expression of Interest (“EoI”) and the eligibility criteria for prospective Resolution Applicants.

Accordingly, Form G - Invitation for EoI was published on *20th October 2021* and only one EOI was received. Committee of Creditors, in 4th Meeting decided to republish Form G.

5. In response to fresh Form G - Invitation for EoI dated *24th November 2021*, the Respondent No. 2 received 24 enquiries and 11 EoIs. This was discussed at the 5th CoC Meeting and 6 PRAs were shortlisted by the Respondent No. 2. In the 5th CoC Meeting, the Request for Resolution Plan ("RFRP") and Evaluation Matrix was also approved.

6. Respondent No.2 published a fresh Form G – Invitation of EoI on 22nd July 2022 as decided in the 8th CoC Meeting. Respondent No. 2 received 14 enquiries and 11 EoIs. The Provisional List of PRAs was issued by the RP on 16th August 2022. A fresh RFRP and Evaluation Matrix was issued by the Respondent No. 2 on 23rd August 2022. Final List of the PRAs was issued by the Respondent No. 2 on 29th August 2022. Subsequently, the Respondent No. 2 received Resolutions Plans from 4 PRAs on 8th October 2022 viz. **(i)** consortium of the Appellant i.e. Shree Krishna Structure Pvt. Ltd. with JP Infra Realty Pvt. Ltd.; **(ii)** KGK Realty (India) Pvt. Ltd.; **(iii)** Wheelabrator Alloy Casting Ltd. and **(iv)** Kabra & Associates.

7. Accordingly, a letter of Intent dated 13th May 2023 was issued in favour of the Appellant who submitted a performance security for an amount of Rs. 4,72,40,000/- *vide* its letter dated 16th May 2023.

8. Pursuant thereof, on 19th May 2023, the RP filed an Interlocutory Application No. *2145 of 2023*, before the Hon'ble NCLT for approval of the Appellant's Resolution Plan.

9. In June 2023, an Interlocutory Application No. 2593 of 2023 was filed by Respondent No. 1, a Member of the Suspended Board of Directors of the Corporate Debtor.

10. The Appellant filed an affidavit in reply to contend *inter alia* the Respondent No. 1 had failed to show in what manner the appellant falls within the disqualification set out under Section 29A of the IBC.

11. The above I. A. No. 2593 of 2023 was allowed by the Hon'ble NCLT by its Impugned Order dated 1st December 2023.

12. Thus Impugned Order is premised on the disqualification of the Appellant as a Successful Resolution Applicant ("SRA") in the CIRP of Corporate Debtor – M/s Vijay Citispace Pvt. Ltd. ("CD") on the ground of it being barred under Section 29A(e) and (j) , IBC.

13. Ld. NCLT has held since the Resolution Plan of Appellant states the Resolution Plan will be "*backed by the expertise of Mr. Anil Gupta*", hence, Mr. Anil Gupta is a "*connected person*" of Appellant under Section 29A (j) of the Code.

14. Ld. NCLT further held Mr. Anil Gupta is *deemed disqualified* to be a Director under the Companies Act, 2013. The said finding has been returned as his three (3) companies, other than the Appellant i.e. (i) SKS Power Trading Ltd. (ii) SKS Power Generation Ltd. and (iii) SKS Power Holding Ltd., have been struck off by the Registrar of Companies ("RoC") for alleged non compliance under Section 164(2)(b) of Companies Act, 2019 (for non-filing of financial statements for 3 financial years). Accordingly, appellant has been held to be disqualified under Section 29A (e) read with (j) of IBC.

15. Section 29A of IBC read as under:-

“29-A Persons not eligible to be resolution applicant-A person shall not be eligible to submit a resolution plan, if such person, or any other person acting jointly or in concert with such persons:-

(a) Xxx

(b) Xxx

(c) [at the time of submission of the resolution plan has an account,] or an account of a corporate debtor under the management or control of such person or of whom such person is a promoter classified as non performing asset in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949 [or the guidelines of a financial sector regulator issued under any other law for the time being in force,] [Inserted by Act No. 26 of 2018, dated 17.8.2018.] and at least a period of one year has lapsed from the date of such classification till the date of commencement of the corporate insolvency resolution process of the corporate debtor:

Provided that the person shall be eligible to submit a resolution plan if such person makes payment of all overdue amounts with interest thereon and charges relating to non-performing asset accounts before submission of resolution plan;

[Provided further that nothing in this clause shall apply to a resolution applicant where such applicant is a financial entity and is not a related party to the corporate debtor.

Explanation I. - For the purposes of this proviso, the expression "related party" shall not include a financial entity, regulated by a financial sector regulator, if it is a financial creditor of the corporate debtor and is a related party of the corporate debtor solely on account of conversion or substitution of debt into equity shares or instruments convertible into equity shares [or completion of such transactions as may be prescribed,] [Inserted by Act No. 26 of 2018, dated 17.8.2018.] prior to the insolvency commencement date.

Explanation II. - For the purposes of this clause, where a resolution applicant has an account, or an account of a corporate debtor under the management or control of such person or of whom such person is a promoter, classified as non-performing asset and such account was acquired pursuant to a prior resolution plan approved under this Code, then, the provisions of this clause shall not apply to such resolution applicant for a period of three years from the date of approval of such resolution plan by the Adjudicating Authority under this Code;]

(d) Xxx

(e) Is disqualified to act as a director under the Companies Act, 2013 (18 of 2013)

Provided that this clause shall not apply in relation to a connected person referred to in clause (iii) of Explanation I:

(j) has a connected person not eligible under clauses (a) to (i).

Explanation I.— For the purposes of this clause, the expression “connected person” means—

(i) any person who is the promoter or in the management or control of the resolution applicant; or

(ii) any person who shall be the promoter or in management or control of the business of the corporate debtor during the implementation of the resolution plan; or

(iii) the holding company, subsidiary company, associate company or related party of a person referred to in clauses (i) and (ii):

Provided that nothing in clause (iii) of Explanation I shall apply to a resolution applicant where such applicant is a financial entity and is not a related party of the corporate debtor.

Provided further that the expression “related party” shall not include a financial entity, regulated by a financial sector regulator, if it is a financial creditor of the corporate debtor and is a related party of the corporate debtor solely on account of conversion or substitution of debt into equity shares or instruments convertible into equity shares ⁴[or completion of such transactions as may be prescribed], prior to the insolvency commencement date;

16. The crux of the argument advanced by the learned senior counsel for the Respondent is Mr Anil Gupta is a *connected person* of appellant and hence is *deemed disqualified* as a director by operation of law solely on the basis of the ROC striking off three of his companies. This objection is taken by the Respondent in view of Section 29A(e) of the IBC read with Section 164 of the Companies Act.

17. Section 164(2)(a) of the of the Companies Act, 2013 read as under:-

164. Disqualifications for appointment of director.—(1) A person shall not be eligible for appointment as a director of a company, if —

(a) to (i) xxx.

(2) No person who is or has been a director of a company which—

(a) has not filed financial statements or annual returns for any continuous period of three financial years; or

(b) has failed to repay the deposits accepted by it or pay interest thereon or to redeem any debentures on the due date or pay interest due thereon or pay any dividend declared and such failure to pay or redeem continues for one year or more, shall be eligible to be re-appointed as a director of that company or appointed in other company for a period of five years from the date on which the said company fails to do so:

[Provided that where a person is appointed as a director of a company which is in default of clause (a) or clause (b), he shall not incur the disqualification for a period of six months from the date of his appointment.]

18. We have heard the arguments on this issue. The facts as narrated by the Respondent *probably* are not correct as the Companies aforesaid were struck off on applications by the director(s) of the said company under Section 248(2) of the Companies Act, 2013 seeking its striking off with payment of requisite fee. Such applications are part of the rejoinder of the appellant herein and are annexed at its Pages No. 13, 29 and 35 of the paper book. Thus it cannot be said the companies of the appellant were non-compliant of Section 29(A)(e) of the Code. Even otherwise Mr. Anil Gupta's DIN status is "ACTIVE" since 2006 and he is not a disqualified director of the ROC. No evidence is placed on record by the Respondent *qua* the status of Mr. Anil Gupta, *if* he is a disqualified director, as per ROC.

19. Moreso, M.K. Rajagopalan Vs Dr Periasamy Palani Gounder and another 2023 SCC OnLine SC 574, answers this preposition, wherein the Hon'ble Court held:-

Point C1- Effect of Section 164(2)(b) Companies Act

174. *A long length of argument has been advanced by the contesting parties as regards impact of Section 164(2)(b) of the Companies Act because of the alleged default of the company named International Aviation Academy Pvt. Ltd. of which, the resolution applicant is a Director. It has been argued that the said company collected share application money pending allotment and did not refund the same; and consequently, in terms of Section 164(2)(b) of the Companies Act, this default would disqualify the resolution applicant from acting as a Director and thereby, would render him ineligible to submit a resolution plan. We find it difficult to accept the submissions aforesaid and the propositions against the resolution applicant on this score.*

175. *Even if there had been any possibility of the resolution applicant incurring such a disqualification in terms of Section 164(2)(b) of the Companies Act, because of alleged default of another company, in which he is a Director, to refund the share application money, the same would essentially be a matter of consideration of the Registrar of Companies. Unless a categorical finding was recorded in the competent forum as regards any such default and unless specific order disqualifying the resolution applicant as Director because of such default came into existence, it could not have been taken by way of any process of assumption that the appellant-resolution applicant was disqualified to act as a Director and thereby, was ineligible to submit a resolution plan. It has rightly been pointed out that when DIN status of the appellant was "active compliant", he could not have been treated as ineligible.*

20. Further the learned counsel for the Respondent 1 argued the Ld. NCLT did not consider sub-section (c) of Section 29A to disqualify the appellant herein as at the time of submission of resolution plan, two of the companies of appellant were declared NPA by DBS Bank, Bank of Baroda as well as SBI.

21. Thus the Respondent No.1 attempted to make out a case of disqualification of the appellant under Section 29A (c), a ground which already

stood rejected by the Ld. NCLT in its impugned order and admittedly no appeal was even filed *qua* such finding in the impugned order. The impugned order *qua* Section 29A (c) held as under:-

32. There is also material available on record which clearly demonstrate the conduct of the present Applicant. The present Applicant in fact has been guilty of flouting orders of this Hon'ble Tribunal. The present Applicant has not complied with the directions passed by this Tribunal on multiple occasions. There were applications for non- cooperation filed against him. It is in these circumstances, this Tribunal at some stage also directed the present Applicant to remain present in person and also indicated that in the event of noncompliance, the proceedings for contempt will be initiated. This speaks volume of the conduct of the Applicant and his sincerity towards the CIRP process. He has not extended any cooperation at any stage and in fact now attempting to derail the process by raising these frivolous objections.

34. The requirement under Section 29-A(c) is that at the time of submission of resolution plan, there is an account which is NPA. There is no such account which is NPA as on the date of submission of resolution plan, in the present case.

40. This takes us to the issue of the Chhattisgarh entity of which the admission order is relied by the present Applicant. The Applicant was fully aware that SKS Power Generation (Chhattisgarh) Ltd., the Chhattisgarh entity, is a wholly owned subsidiary of Agritrade Resource Ltd., Hong Kong. It is sold by its lenders to another entity with new management. It was originally owned by SKS Ispat & Power Ltd. and others, but as early in 2018 in a share transfer transaction executed on 12th November 2018 with Agritrade Resource Ltd. and its affiliates, the company was transferred to another foreign entity which has no connection as on date with Respondent No.3 or its other related or connected parties. Respondent No.3 craves leave to place on record the share transfer documents as and when required to do so However, for the sake of convenience, the letter issued by SBI on 18th March 2019 clarifying that the entire transaction concluded is annexed and marked as Exhibit "B" to this Affidavit."

41. There is no case made out which would show or demonstrate in any manner that the Respondent No.3/the Resolution Applicant is barred under Section 29-A of IBC. The reliance placed on the Chhattisgarh entity is thoroughly misconceived as stated herein above. The records available

with this Tribunal where the proceedings of Chhattisgarh entity are ongoing will clearly demonstrate that the Resolution Applicant are not the owners and promoters. The company is managed, owned and controlled by a completely different entity/management. This company was transferred by lenders of the very same entity under a share transfer transaction. The Applicant of the present application is well aware about the same. The Applicant has deliberately not placed on record the shareholding of the Chhattisgarh entity which clearly shows that it is owned by one Entwickeln India Energy Pvt. Ltd. It is in these circumstances, that the application being thoroughly misconceived, deserves to be rejected with costs.

48.(c) "As per the stipulation delineated under Section 29-A(c), a prerequisite mandates the presence of an account classified as a Non-Performing Asset (NPA) at the time of submission of the resolution plan. Notably, it is observed that when the resolution plan is tendered Shree Krishna Structures Private Limited was not NPA. It significant to note that, as of the 11th of December 2015, DBS (name of entity) had duly issued a "No Dues Certificate" (NOC) to the entity identified as SKS Ispat& Power Ltd. It is unequivocally established that DBS, on the aforementioned 11th of December 2015, officially issued a "No Dues Certificate" (NOC) to the entity SKS Ispat& Power Ltd. Evidently, this NOC serves as irrefutable evidence attesting to the absence of any outstanding dues to be settled with DBS as early as 2015."

22. Admittedly before us the learned counsel for Respondent No.1 raised no dispute *qua* the finding of NPA vis-a-vis DBS Bank, as is noted in para 48(c) of the impugned order, as quoted above. However, the respondent No.1 is aggrieved of the fact the learned NCLT did not consider his arguments *qua* CIRP of SKS Power Generation Ltd, Chhatisgarh to be attributed to Mr. Anil Gupta.

23. Admittedly for invoking Section 29A(c) of IBC, it has to be proved **(i)** at time of submission of resolution plan, the SRA had an account classified as an NPA; and **(ii)** one year has lapsed from the date of such classification till the date of commencement of CIRP of CD.

24. Now coming to NPA classification of M/s SKS Power Generation (Chhattisgarh) Ltd., the Ld. NCLT has correctly returned a finding in Para 40 of the impugned order that M/s SKS Power Generation (Chhattisgarh) Ltd., has been sold to one M/s Agritrade Resource Ltd., as early as 12.11.2018. Now, SKS Power Generation (Chhattisgarh) Ltd., is not related to the Appellant at all. Admittedly the Resolution Plan was submitted by Appellant on 08.10.2022. No document has been placed on record to demonstrate M/s SKS Ispat & Power Ltd. or SKS Power Generation (Chhattisgarh) Ltd. were classified as an NPA as on date of submission of Resolution Plan, or that a period of one year has lapsed from the date of such classification till the commencement of CIRP of CD i.e. till 20.07.2021. Moreover, it was reiterated by the appellant that appellant had no relation with M/s SKS Power Generation (Chhattisgarh) Ltd. since 12.11.2018.

25. The learned counsel for R-1 also placed reliance on the Judgment of Hon'ble Allahabad High Court in Crl. M. WP No. 9949 of 2021 titled as Ms. Baba Beti v. State of UP & Ors. dated 19.03.2024 [Paras 5.4, 5.8, 5.11, 24] to state M/s Agritrade Resource Ltd. is also an entity owned by proxies of Mr. Anil Gupta. However, the said allegation can not be considered by this Tribunal, as the Allahabad High Court has itself in Paras 34 and 37 of its order clarified that:

“34. It is evident from the counter affidavit filed by the Enforcement Directorate, Department of Revenue, Government of India that the Zonal Office at Prayagraj has already registered an ECIR bearing No.ECIR/ALSZO/01/2022 dated 10.2.2022 with the approval of the competent authority. Consequently, we leave to the wisdom of Enforcement Directorate's officers, to trace the

proceeds of the crime and proceed further in accordance with the law, expeditiously

37. The observations made above are provisional and are intended solely to dispose of the instant petition. The same shall not be construed to influence the investigations being conducted by the Central Bureau of Investigation (CBI), the Enforcement Directorate (ED), and the Serious Fraud Investigation Office (SFIO). These investigative agencies are expected to conduct their investigations professionally, in accordance with the law and the standard operating procedures established over a period of time, in the best interests of the state and the institutions involved.”

27. Thus the above observations made by the High Court were never backed by evidence and were only prima facie observation..

28. Lastly we come to the finding of the Ld. NCLT on *connected person* viz sub-clause (j) of Section 29A.

29. On a bare perusal of Section 29A of the Code, more specifically, Clause (j) we find this clause debars only such *connected person* who are not eligible under Clauses (a) to (i) of Section 29A. However, this is not the case here. The argument of the respondent on Clauses (c) to (e) has failed, as discussed above. Hence the exercise of finding if clause (j) is attracted in the facts of this case, even otherwise, is now irrelevant.

30. Nevertheless to establish control and management of Mr. Anil Gupta over the Appellant, there ought to be more cogent material on record, like his presence at Board Meetings/ AGMs/ EOGM's, any kind of correspondence with the Appellant/ Citiwings or its directors/ employees. As submitted Mr. Anil Gupta is not a shareholder of the Appellant.

31. Mr. Anil Gupta is also neither a director nor a promoter of Citiwings Agencies Private Limited ("Citiwings"), which is a majority shareholder of the Appellant. It was argued M/s Citiwings is majorly owned by the Anil Gupta Family Trust where Mr. Anil Gupta is merely a Settlor, and the Trustee is Ms. Sangeeta Gupta in the Deed of Family Trust dated 08.03.2013.

32. On this issue we have also heard the learned counsel for the Resolution Professional. His argument is a mere reference to Mr. Anil Gupta's expertise in the *Conclusion* part of the resolution plan would not imply Mr. Anil Gupta shall be controlling the affairs of the appellant or that he would then fall within the ambit of Section 29A of the Code. The resolution plan rather clarifies the appellant shall be supported by Mr. Anil Gupta solely for his expertise, which clearly indicate an advisory role and not involving in management or controlling of the company.

33. We also note the conduct of Respondent No.1 as recorded in the Impugned Order at paragraphs 32, 33, 37, and 41. It clearly demonstrates Respondent No.1 has misled the Ld. Adjudicating Authority on multiple occasions. It has also come to light Respondent No.1 is presently in judicial custody in connection with allegations of financial fraud as brought to the fore by the Appellant. These facts cast serious doubt on his credibility and the bona fides of the objections raised by him.

34 In light of the above submissions, we find there is no *cogent* or *credible* evidence to establish the *disqualification* of the Appellant under Section 29A of the Code. Furthermore, the Ld. Adjudicating Authority has failed to

consider the Resolution Plan was duly approved by the CoC with 100% voting share. Therefore, we allow the present Appeal as we find the objections raised by Respondent No. 1 are devoid of merit. The impugned order is thus set aside and hence the Ld. NCLT may now proceed to hear CA No.2145/2023, *qua* approval of plan on merit. . Pending applications are disposed of.

(Justice Yogesh Khanna)
Member (Judicial)

(Mr. Ajai Das Mehrotra)
Member (Technical)

Dated:01-08-2025
Bm