

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 427 of 2022

(Arising out of Order dated 21.02.2022 passed by the Adjudicating Authority (National Company Law Tribunal), Principal Bench, New Delhi in C.A. No. 1233/2019 in C.P. (IB) 397(PB)/2018)

IN THE MATTER OF:

Athar Zia

R/o: 5593-94, 1st Floor,
Naya Bazar,
Delhi – 110006
Email: atharzia01@gmail.com

Also at:
1009, New Delhi House,
Barakhamba Road,
New Delhi - 01

...Appellant

Versus

Anup Sood

Liquidator of Basic India Limited
Flat No. 185, Block -H, 5th Floor,
SP Angle Condos, Old Ambala Road,
Ghazipur, Mohali
Sahibzada Ajit Singh Nagar,
Punjab – 140603.

...Respondent

Present:

**For Appellant: Mr. Rishi Kapoor and Mr. Akhil Shankwar,
Advocates.**

**For Respondents: Mr. Namit Suri, Ms. Surabhi Sinha and Ms. Sonal
Malik, Advocates for Liquidator.**

Cont'd.../

J U D G M E N T

ASHOK BHUSHAN, J.

This Appeal has been filed against the order dated 21.02.2022 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi, Principal Bench by which order C.A. No. 1233/2019 filed by the Resolution Professional for initiation of liquidation has been allowed. The Appellant – a Suspended Director of the Corporate Debtor aggrieved of the order has come up in this Appeal.

2. Learned counsel for the Appellant submits that the Appellant was eligible to submit the Expression of Interest and Resolution Plan for the Corporate Debtor which was duly submitted but without considering the Expression of Interest of the Appellant, the Application for liquidation has been allowed. It is submitted that the Appellant is not ineligible under Section 29A since the declaration of the Appellant as wilful defaulter vide communication dated 18.09.2018 issued by the Bank of India was set aside by the Hon'ble High Court of Delhi in Writ Petition (Civil) 3404 of 2019 by its order dated 08.07.2019. It is submitted that the Appellant was not given any opportunity by the Bank of India nor copy of Report of Identification Committee was supplied to the Appellant. It is submitted that Affidavit of Compliance as directed by the Adjudicating Authority on 20.01.2020 was never served on the Appellant by the Resolution Professional. The Adjudicating Authority without adjudicating the issue of eligibility of the Appellant to submit the Resolution Plan has allowed the

liquidation application. Appellant was also not given any opportunity in respect of liquidation application filed by the Resolution Professional.

3. Learned counsel for the Respondent refuting the submissions of the learned counsel for the Appellant submits that the Appellant was not eligible to submit the Resolution Plan under Section 29A of the Code he having been declared as wilful defaulter and which wilful default being still continuing, the Appellant could not have filed any Expression of Interest. Appellant did not submit any representation to the Bank of India as directed by the Delhi High Court. The Bank gave ample opportunity to the Appellant to participate in the proceeding of Identification of the Appellant as wilful defaulter where he did not participate. Bank of India has declared the Appellant wilful defaulter which was also approved by the Review Committee. Thus, no error has been committed in allowing the liquidation application. It is further submitted that the Compliance Affidavit dated 04.08.2020 by the Resolution Professional was filed before the Adjudicating Authority in compliance of order dated 27.02.2020 passed by the Adjudicating Authority. In the Compliance Affidavit, it was specifically pleaded that the Bank of India has identified the Appellant as a wilful defaulter in its meeting dated 27.01.2020 and he has also given opportunity to show cause. Copy of an Additional Affidavit filed by the Resolution Professional before the Adjudicating Authority dated 21.06.2021 has also been brought on record where the Appellant was informed by email dated 19.05.2021 that the Review Committed on

15.03.2021 has confirmed the order of Identification Committee declaring the Appellant as wilful defaulter.

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

5. The impugned order of liquidation passed by the Adjudicating Authority is sought to be challenged by the Appellant only on the ground that the Appellant was eligible to submit Expression of Interest and Resolution Plan and without considering the claim of the Appellant order of liquidation has been passed. The only question to be considered in this Appeal as to whether the Appellant in the facts of the present case was eligible within the meaning of Section 29A of the Code to submit a Resolution Plan or not.

6. The communication which was issued to the Appellant by the Bank of India dated 18.09.2018 declaring the Appellant a wilful defaulter was challenged by the Appellant before the Delhi High Court by means of Writ Petition (Civil) No. 3404/2019 – ‘Athar Zia vs. Bank of India & Ors.’. Delhi High Court by its judgment dated 08.07.2019 issued following directions:-

“If that be so, in view of the conclusion arrived at by the Supreme Court in the case referred above, wherein the Supreme Court has in Para 26 held as under and the fact that the order of the identification committee was not given to enable the petitioner no.1 make a representation, the impugned communication qua the petitioner no.1

Athar Zia is set aside. Liberty is with the respondent Bank to give a copy of the order passed by the identification committee to the petitioner no.1 within a week from today and seek his reply on the same within 15 days thereafter for the consideration of the same by the review committee for enabling the review committee pass a fresh order.”

7. The above order of the Delhi High Court cannot be read to mean that the Delhi High Court declared that the Appellant is not a wilful defaulter. The High Court set aside the communication sent to the Petitioner with liberty to the Bank to give a copy of the order of the Identification Committee to the Appellant with liberty to him to reply within 15 days thereafter for the consideration of the reply by the Review Committee for enabling the Review Committee to pass a fresh order. The High Court, thus, clearly permitted the Review Committee to pass fresh order on the question of Appellant being wilful defaulter or not.

8. In the CIRP against the Corporate Debtor initiated by order dated 12.10.2018 before the Adjudicating Authority, an I.A. No. 1155(PB)/2019 was filed by the Appellant under Section 60(5) challenging the observation of the Resolution Professional that Appellant is ineligible to submit a Resolution Plan. Prayer was made in the Application to direct the Resolution Professional to present the Resolution Plan to the CoC for voting. On said Application, the Adjudicating Authority after noticing the order of the Delhi High Court granted liberty to the Appellant to make

representation before the CoC to decide the status of the Appellant afresh in relation to the issue of being defaulter. Following observations have been made in the order dated 20.01.2020:-

“The sole member of the CoC is Bank of India who was respondent no. 1 in WP(C) No. 3404 of 2019 titled as Athar Zia . Bank of India & Ors., wherein the High Court has given directions. Therefore, liberty is granted to the applicant to make a representation before the CoC i.e. Bank of India and to decide the status of the applicant afresh in relation to the issue of being defaulter. The representation shall be made within three days by the applicant before the CoC thereafter the CoC shall dispose of the same within two weeks, under intimation the applicant in the light of the directions of the Hon’ble High Court given in the above noted case.

Accordingly, the application stands disposed of.”

9. After the order dated 20.01.2020, on 27.02.2020, the Adjudicating Authority directed the Resolution Professional to file Compliance Affidavit with respect to direction issued in the order dated 20.01.2020. The Resolution Professional filed the Compliance Affidavit dated 04.08.2020 where the relevant facts were pleaded. Resolution Professional in his affidavit stated that the Adjudicating Authority granted three days’ time to the Appellant to file the representation before the CoC by its order dated 20.04.2020 but instead of filing representation to the CoC Appellant by

email dated 23.01.2020 sent a letter with EOI for submitting the Resolution Plan. Resolution Professional has replied the email stating that the Adjudicating Authority has never directed to consider the Resolution Plan. Bank of India also noticed in the CoC meeting dated 01.02.2020 that no representation has been submitted by the Appellant. Bank of India on 03.02.2020 gave further opportunity to the Appellant to make payment of outstanding dues failing which Bank shall be constrained to initiate steps to declare the Appellant as wilful defaulter by following due process as prescribed by the RBI vide its circular dated 01.07.2015. No payments were made by the Appellant. The Appellant has claimed to have sent a letter dated 12.03.2020 to the Bank of India in reference to the letter dated 03.02.2020. Bank, however, subsequently again issued email dated 19.05.2021 to the Appellant where following has been stated:-

“Dear Sir,

We write with reference to the Promoter/Director Mr. Athar Zia of M/s Basic India Limited has been declared as wilful defaulter.

- 1. Review Committee dated 15.03.2021 confirmed the order of identification committee declaring the borrower as wilful defaulter.*
- 2. Letter of intimation dated 26.04.2021 sent to the borrower that he has been declared as wilful defaulter.”*

10. In the Additional Affidavit filed before the Adjudicating Authority another letter dated 26.04.2021 issued by the Bank to the Appellant was

brought on the record where it was mentioned that the Identification Committee has identified the Appellant as Wilful Defaulter vide its order dated 27.01.2020 and thereafter, Show Cause Notice was also issued giving 15 days' time for representation on 03.02.2020. It is useful to extract Para 2 and 3 of the letter:-

“2. The Identification Committee headed by Executive Director and comprising of two General Managers has examined and identified that the following person i.e. you being promoter director of M/s Basic India Ltd. has committed the Wilful Default in terms of RBI Circular No. DBR No. CID. BC.22/20.16.003/2015-16 dated 01-07-2015 vide its order dated 27.01.2020.

a) Athar Zia (Promoter Director & Guarantor)

Thereafter, show cause notice dated 30.02.2020 vide Ref No. HO/RD/MS/2019-20/ 298 giving 15 days time for representation was issued to you (Promoter Director & Guarantor) for representation or clarification if any. The Show Cause notices have been served and an opportunity of personal hearing was granted to you based on your representation dated 29.07.2020. However, you did not opt to attend the same.

On the basis of facts on record and submissions of Identification Committee you (Promoter Director & Guarantor) as Wilful Defaulters vide its Order dated 30.12.2020.

3. *The Review Committee, in its meeting dated 15.03.2021 has examined and reviewed the proceedings initiated, the findings and Order of the Identification Committee and found that findings are in order and confirmed that the promoter & director & guarantor as wilful defaulter. The findings are as under based on observations of the Forensic Audit Report dated 04.02.2019 by Audit Firm M/s B. M. Verma and Company (period 2016-17, 2017-18). The gist is as under:"*

11. From the materials on the record it is clear that the Bank has declared the Appellant wilful defaulter and he was clearly disqualified to submit Resolution Plan being ineligible under Section 29A(b). The mere fact that the Appellant is a Micro, small & Medium Enterprise (MSME) does not make it eligible to submit a Resolution Plan if it is wilful defaulter. The reliance of learned counsel for the Appellant on judgment of Delhi High Court dated 08.07.2019 that the High Court has declared the Appellant not a defaulter is misconceived. Delhi High Court only set aside the communication and directed the Bank to give a copy of the report of the Identification Committee to the Appellant and Appellant to submit its reply for consideration of the Review Committee. The Adjudicating Authority in its order dated 20.01.2020 has noted the above also granting liberty to the Appellant to make representation before the CoC to decide the status of the Appellant afresh. Opportunity was given to submit representation which was not submitted within the time allowed. Subsequently, the Bank after considering materials on record on 19.05.2021 again declared the

Appellant as Wilful Defaulter, which decision was also reiterated by the Review Committee. Thus, Appellant being a wilful defaulter he was ineligible to submit a Resolution Plan.

12. Learned counsel for the Appellant has relied on a subsequent order of Delhi High Court dated 09.09.2021 passed in Writ Petition (Civil) No. 9915 of 2021 to support his submission that High Court has granted interim order in a Writ Petition filed by the Appellant against the Bank. The communication dated 26.04.2021 has been impugned by the Appellant before the Delhi High Court. The submission of the Appellant that High Court has granted interim order the effect of which is that Appellant is no more a wilful defaulter, is not correct. Only interim order passed by the High Court in Para 10 is to the following effect:-

“10. In view of the specific contention of the petitioner that the order of the Identification Committee was not served upon him, which is contrary to the procedure laid down in the Master Circular, as interpreted by the Supreme Court in State Bank of India vs. Jah Developers (2019) 6 SCC 787 in paragraph 24, the petitioner has made out a prima facie case for grant of limited interim relief, to the effect that his name and particulars will not be published in the newspaper until the next date of hearing.”

From the above, it is clear that only interim order was passed that name and particulars of the Appellant will not be published in the

newspaper. Thus, the decision of the Bank declaring the Appellant as wilful defaulter still continues.

13. The contentions raised by learned counsel for the Appellant for challenging the impugned order are without any substance. The Appellant being ineligible had no right to submit the Resolution Plan nor there is any order of the Competent Authority (Adjudicating Authority) permitting the Appellant to submit a Resolution Plan. We, thus, do not find any error in the order of the Adjudicating Authority allowing the Application for liquidation. There is no merit in the Appeal. Appeal is dismissed.

**[Justice Ashok Bhushan]
Chairperson**

**[Dr. Alok Srivastava]
Member (Technical)**

NEW DELHI

19th May, 2022

Archana