

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 13 of 2022

(Arising out of Order dated 26.08.2021 passed by the Adjudicating Authority (National Company Law Tribunal), Principal Bench, New Delhi in I.A. No. 5087 of 2020 in C.P. (IB) No. 1825 (PB) of 2019)

IN THE MATTER OF:

Nikhil Tandon

F 15/11 DLF,
Gurgaon – 122002
Email: tandonsunil2@gmail.com

...Appellant

Versus

1. Sanjeev Bindal

Liquidator of
Radhey Sham Tandon Manufacturing Pvt. Ltd.
A-531, Shastri Nagar,
Delhi – 110 052
Email: rp@ecovisrkea.com

2. Committee of Creditors of

Radhey Sham Tandon Manufacturing Pvt. Ltd.
Through: Punjab National Bank
(Earlier Oriental Bank of Commerce)
Plot No.4, Section – 10,
Dwarka, New Delhi – 110075
Email: rrl_7670@obc.co.in

...Respondents

Present:

For Appellant: Mr. Pulkit Deora, Advocate.

**For Respondents: Mr. Sanjeev Bindal, Liquidator
Mr. Aakash Dahiya, Advocate.**

J U D G M E N T

ASHOK BHUSHAN, J.

This Appeal has been filed against the order dated 26.08.2021 passed by the Adjudicating Authority (National Company Law Tribunal),

Cont'd.../

Principal Bench, New Delhi allowing I.A. No. 5087 of 2020 filed by the Resolution Professional under Section 33(2) of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'I&B Code') directing for liquidation of the Corporate Debtor – 'M/s Radhey Sham Tandon Manufacturing Pvt. Ltd.'. The Suspended Director of the Corporate Debtor aggrieved by the order has come up in this Appeal. The brief facts of the case necessary to be noticed for deciding this Appeal are:

- (i) An Application under Section 7 filed by the Small Industries Development Bank of India against the Corporate Debtor was admitted vide order dated 10.10.2019 passed by the Adjudicating Authority. The Respondent No.1 was appointed as Resolution Professional in the second meeting of the Committee of Creditors (CoC).
- (ii) The 5th meeting of the Committee of Creditors was held on 24.02.2020. Item No. 4 in the meeting was to take note of provisions of liquidation of Corporate Debtor – 'M/s Radhey Sham Tandon Manufacturing Pvt. Ltd.', on which it was agreed by the members of the CoC that since the operation of Corporate Debtor is not being carried on for more than one year, the Corporate Debtor be liquidated. The Resolution Professional was authorised to do all such things as were required to liquidate the Corporate Debtor.

- (iii) In the 6th CoC meeting held on 23.07.2020 the present Appellant was present. In the 6th CoC meeting one of the Agenda Item No. 12 was to take approval of the CoC to file an application for liquidation of Corporate Debtor. The Resolution Professional in the said meeting informed the CoC that the Resolution Plan from Mr. Nikhil Tandon, Suspended Director has been received, which however, was not considered by the CoC because it was not in accordance with Section 30 of the Code. The Appellant pleaded before the CoC that the Corporate Debtor is an MSME and he has right to be heard. The CoC and the Resolution Professional advised the Appellant to submit a Resolution Plan by August 14, 2020.
- (iv) After the 6th CoC meeting, 7th meeting of CoC held on 27.08.2020 where earlier minutes of the CoC were approved. Agenda Item No. 6 was to discuss the Resolution Plan submitted by Mr. Nikhil Tandon, Suspended Director of the Corporate Debtor. In the said item plan submitted by the Appellant was discussed. The Appellant informed that requisite information memorandum be provided to enable him to submit the Resolution Plan as per law. With regard to registration of Corporate Debtor as MSME it was noticed that acknowledgment of application to the District Industries Centre has been filed but if the unit is closed for more than six months, the Entrepreneurs Memorandum shall be liable to be cancelled. One of the

Financial Creditors informed that the Resolution Plan will be discussed with the higher authority and then decision shall be given. Under Item No.7 discussion was held to appoint two Registered Valuers under Regulation 27.

- (v) 8th CoC meeting took place on 02.11.2020, where the plan submitted by the Appellant was discussed at Item No.10. The Resolution Professional placed before the CoC two aspects. Under the first aspect, the Resolution Professional formed opinion that the Appellant is not MSME and he has not filed an affidavit and further second aspect was that the total claim of Financial Creditor is much more from the plan amount. Ultimately, the CoC took decision that the Resolution Plan submitted by Mr. Nikhil Tandon cannot be deliberated since no Resolution Plan was invited. Further, the Appellant was not entitled to submit the Resolution Plan and the liquidation has already been approved in the CoC meeting dated 24.02.2020.
- (vi) The Resolution Professional filed an application for liquidation before the Adjudicating Authority and by the impugned order the Adjudicating Authority has allowed the application and directed for liquidation of the Corporate Debtor. Aggrieved by the order dated 26.08.2021, this Appeal has been filed by the Suspended Director of the Corporate Debtor.

2. Learned counsel for the Appellant challenging the impugned order submits that the Corporate Debtor being a Micro, Small and Medium Enterprise was fully entitled to submit the Resolution Plan, which was also done with the permission of the CoC. The Committee of Creditors did not consider the Resolution Plan submitted by the Appellant on the ground that no plans were ever invited which reason has no substance. The Resolution Professional had formed an erroneous opinion that the Corporate Debtor is not an MSME since no Registration Certificate was filed whereas the Entrepreneur Registration Number under the MSME Act duly containing due acknowledgement was filed which has been incorrectly disregarded. The Committee of Creditors in its 5th meeting decided to send the Corporate Debtor for liquidation without even obtaining any valuation report and before preparation of any Information Memorandum. It is submitted that the Corporate Debtor who was MSME is entitled to revive itself which is the object and purpose of the I&B Code. It is submitted that the decision of the Resolution Professional and the CoC that the Appellant is not registered as MSME is a material irregularity committed in the process which vitiates the entire process of CIRP. The Adjudicating Authority has also erred in not considering the case of the Corporate Debtor as MSME who was entitled to revive the Corporate Debtor.

3. Shri Sanjeev Bindal, Liquidator appeared in person and made his submission. The Liquidator submitted that no Registration Certificate of Corporate Debtor has been filed. Further, as per Notification dated

16.01.2009, Acknowledged Entrepreneurs Memorandum shall be liable to be cancelled since the unit is closed for more than six months. The commercial wisdom of the CoC to file an application for liquidation of the Corporate Debtor cannot be allowed to be challenged by the Appellant. An Appeal against order of liquidation passed under Section 33 can only be filed on the ground of material irregularities or fraud. There are no such ground in the present Appeal to interfere with the order passed by the Adjudicating Authority.

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

5. From the submission of learned counsel for the parties and materials on record following questions arise for consideration in this Appeal:

- I. Whether the Corporate Debtor on the strength of acknowledgement declaration filed in Part II before the District Industries Centre on 29.01.2007/30.01.2007 can be treated to be an MSME registered under Micro, Small and Medium Enterprises Development Act, 2006?
- II. In event it is found that the Corporate Debtor is an MSME, whether it was entitled to file Resolution Plan to revive Corporate Debtor as per Section 240A of the I&B Code.

- III. Whether the CoC which permitted the Corporate Debtor to file a Resolution Plan erred in not considering the Resolution Plan of the Appellant on the ground that no plan having been invited by the CoC, hence, the Resolution Plan of the Corporate Debtor cannot be considered?
- IV. Whether in the facts and circumstances of the present case, the decision of the CoC taken in the 5thCoC meeting to liquidate the Corporate Debtor is a sustainable decision?

Question I:

6. Under the Micro, Small and Medium Enterprises Development Act, 2006 (hereinafter referred to as 'Act, 2006') Section 8 deals with Memorandum of Micro, Small and Medium Enterprises. Section 8 Sub-section (1) entitles a person who intends to establish a micro, small or medium enterprise to file the memorandum of micro, small or, as the case may be, of medium enterprise with such authority as may be specified by the State Government under sub-section (4) or the Central Government under sub-section (3). Section 8 Sub-section (1) and (2) are as follows:-

“8. Memorandum of micro, small and medium enterprises.—(1) Any person who intends to establish,—

(a) a micro or small enterprise, may, at his discretion; or

- (b) *a medium enterprise engaged in providing or rendering of services may, at his discretion; or*
- (c) *a medium enterprise engaged in the manufacture or production of goods pertaining to any industry specified in the First Schedule to the Industries (Development and Regulation) Act, 1951 (65 of 1951),*

shall file the memorandum of micro, small or, as the case may be, of medium enterprise with such authority as may be specified by the State Government under sub-section (4) or the Central Government under sub-section (3):

Provided that any person who, before the commencement of this Act, established—

- (a) *a small scale industry and obtained a registration certificate, may, at his discretion; and*
- (b) *an industry engaged in the manufacture or production of goods pertaining to any industry specified in the First Schedule to the Industries (Development and Regulation) Act, 1951 (65 of 1951), having investment in plant and machinery of more than one crore rupees but not exceeding ten crore rupees and, in pursuance of the notification of the Government of India in the erstwhile Ministry of Industry (Department of Industrial Development) number S.O. 477(E), dated the 25th July,*

1991 filed an Industrial Entrepreneur's Memorandum,

shall within one hundred and eighty days from the commencement of this Act, file the memorandum, in accordance with the provisions of this Act.

(2) The form of the memorandum, the procedure of its filing and other matters incidental thereto shall be such as may be notified by the Central Government after obtaining the recommendations of the Advisory Committee in this behalf.”

7. Under Sub-section (2) of Section 8 of the Act, 2006, the Central Government provided for the form of the memorandum, the procedure of its filing by Notification dated 30.09.2006. Part II of the Notification was to be filled up and to be submitted to the District Industries Centre after commencement of production/activity. In the present case, the Appellant has filed Entrepreneur Memorandum in the prescribed performa before the District Industries Centre on 29.01.2007 and acknowledgment of which was issued allotting Entrepreneur Memorandum Number by the General Manager, District Industries Centre, Gurgaon dated 30.01.2007. The question to be considered is as to whether by mere filing of Entrepreneur Memorandum and allocation of Entrepreneur Memorandum Number, the Corporate Debtor is to be treated as a Registered Unit. Copy of Form Part II has been brought on record by the Appellant alongwith his additional affidavit which indicates that the form

was filled under the 'small' category of enterprise and the month of installation of plant and machinery has been mentioned in the Form as July, 2004. When Notification has been issued by the Central Government under Sub-section (2) of Section 8 providing for form of the memorandum, the procedure of its filing and Appellant in pursuance of the Notification dated 30.09.2006 has filed Entrepreneur Memorandum and Entrepreneur Memorandum Number was allotted, Appellant is required to be treated as Registered Small Industry.

8. The Liquidator in its reply has referred to the Notification dated 16.01.2009 issued under Sub-section (1) of Section 7 and has relied on Clause 13 as inserted in Schedule II by Notification dated 16.01.2009. Clause 13 is as follows:

“13. The Acknowledged Entrepreneurs’ Memorandum shall be liable to be cancelled in case the unit is found closed for more than 6 months or furnished wrong information in the Entrepreneurs’ Memorandum filed or did not follow the instructions at serial number 10 of this Schedule (to be initiated based on any complaint in writing followed by an enquiry under an official not below the authority notified for accepting the Entrepreneurs’ Memorandum under the provisions of sub-sections (3) and (4) of section 8 of the said Act.”

9. The Clause 13 which has been referred by the Liquidator empowers cancellation of Acknowledged Entrepreneurs’ Memorandum in case unit

is found to be closed for more than six months. The present is not a case where any proceedings for cancellation of Acknowledged Entrepreneurs' Memorandum has been undertaken nor there is any pleading or material that Acknowledged Entrepreneurs' Memorandum which was allotted to the Appellant was ever cancelled. The cancellation of the Acknowledged Entrepreneurs' Memorandum shall be only when the power is exercised for cancellation. Entry Serial No. 13 does not contemplate any auto-cancellation. Thus, the reliance of the Liquidator on notification dated 16.01.2009 to contend that Acknowledged Entrepreneurs' Memorandum shall be treated to have been cancelled, is erroneous.

10. From the materials on the record and the minutes of the CoC meeting, it is apparent that the Resolution Professional did not form any clear opinion that Appellant is a Registered MSME nor advised the CoC to treat the Appellant as Registered MSME. We, thus, are of the opinion that the Appellant is a Registered MSME within the meaning of Act, 2006 and the filing of Entrepreneurs' Memorandum in Part II which was acknowledged on 30.01.2007 is sufficient to treat the Appellant as a Registered MSME.

Question II, III & IV:

11. The I&B Code provide for special protection of MSME by inserting Section 240A w.e.f. 06.06.2018 where provision of clause (c) and (h) of Section 29A had been made not applicable to in respect of CIRP of any Micro, Small and Medium Enterprise.

12. It has been laid down by the Hon'ble Supreme Court that the liquidation is the last resort and all efforts should be made to revive the Corporate Debtor before resorting to liquidation. The Hon'ble Supreme Court in **"Swiss Ribbons (P) Ltd. Vs Union of India, (2019) 4 SCC 17"** in Para 28 has laid down:

"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."

13. In the present case, although in 5th CoC meeting, the CoC had taken a decision to liquidate the Corporate Debtor but subsequently in the 6th CoC meeting, the Appellant appeared before the CoC and claimed to file a plan to revive the Corporate Debtor. In the Agenda Item No. 12, in the 6th CoC meeting, the CoC and Resolution Professional advised the Appellant to file Resolution Plan by August 14, 2020. It is useful to extract the relevant part of the minutes of the meeting where CoC and Resolution Professional advised the Appellant to file a Resolution Plan:

"Mr. Sanjeev Bindal, RP, informed the COC that he had received a brief Resolution Plan from Mr. Nikhil Tandon, Suspended Director. However, RP had advised Mr. Tandon that the Resolution Plan could not be considered by the COC because

same was not in accordance with Section 30 of the IBC 2016. Mr. Nikhil Tandon, who was present in the Sixth meeting, intimated that he was not apprised of the fourth meeting nor he was given the minutes of that meeting despite of his repeated requests. He had a right to be heard as an MSME and make an application for the Resolution Plan. He promised to submit the Resolution Plan in accordance with the Law. Then, COC and RP advised him to submit the Resolution Plan by August 14, 2020 beyond which COC would not consider any Resolution Plan submitted by Mr. Nikhil Tandon, Suspended Director of CD.”

14. It is relevant to notice that the above permission was granted to the Appellant to file plan in 6th CoC meeting held on 23.07.2020 subsequent to the 5th CoC meeting held on 24.02.2020 when CoC had decided to liquidate. The above permission granted by the CoC itself indicate that the Appellant was treated to be eligible to file Resolution Plan to revive the Corporate Debtor.

15. We may at this stage also notice minutes of 8th CoC meeting held on 02.11.2020 where at Agenda Item No. 10 the Resolution Plan submitted by the Appellant came for consideration. Ultimately, conclusion of the CoC after the discussion was that the Resolution Plan of the Appellant cannot be deliberated since no Resolution Plan was invited. Following part of the minutes of the Item No. 10 are relevant:

“The Members of COC came to conclusion that:

- I. Resolution Plan submitted by Mr. Nikhil Tandon could not be deliberated upon as no Resolution Plan was invited;*
- II. Mr. Nikhil Tandon was not entitled to submit the plan as COC has not decided to call for Resolution Plan;*
- III. The liquidation of the Corporate Debtor was already approved in the Fifth Meeting of COC dated 24.02.2020; and*
- IV. Further, to liquidate the affairs of the Corporate Debtors, Resolution Professional was authorized to do the needful for the compliance of the laws, Rules and Regulations applicable to the Corporate Debtor and to file the necessary application for liquidation of Corporate Debtor.”*

16. We have noticed above that in the 6th COC meeting the Appellant pleaded for submission of Resolution Plan and the CoC permitted the Appellant to file Resolution Plan. In the 5th CoC meeting already a decision was taken by CoC to liquidate the Corporate Debtor. In subsequent CoC meeting when CoC permitted the Appellant to submit a plan by 14th August, 2020, the indication is clear that the CoC has reconsidered its earlier decision and proceeded to consider the plan submitted by the Appellant which was a MSME but ultimately plan was refused to be considered only on the ground that no Resolution Plan was not invited. When in the CoC meeting Appellant was permitted to file a Resolution Plan, it cannot be said that Appellant was not invited to

submit a Resolution Plan. It is another issue that CoC ought to have given opportunity to others to submit Resolution Plan by directing for issuance of Form G which was never done. As noted above, the Appellant was not considered as MSME during the proceedings of the CoC and the Liquidators view as reflected in the meeting of CoC and as submitted before us is clearly refuting the claim of the Appellant as Registered MSME. Non-acceptance of Corporate Debtor as a Registered MSME is a material irregularity which has been committed in the Insolvency Resolution Process.

17. The decision of the CoC taken in the 5th CoC meeting to liquidate the Corporate Debtor also cannot be approved due to more than one reason. Firstly, CoC when in the next CoC meeting permitted the Appellant to file Resolution Plan, the decision to liquidate the Corporate Debtor itself was not proceeded with any further. The minutes of the 6th, 7th and 8th meeting of CoC, where plan was permitted to be filed for discussion is clearly in derogation with the earlier decision of the CoC to liquidate the Corporate Debtor which indicate that CoC itself did not adhere to its earlier decision of liquidation. Hence, the decision taken in the 5th CoC meeting to liquidate the CoC cannot be held to be sacrosanct.

18. The Liquidator tried to support the decision of the CoC in the name of commercial wisdom of the CoC and has relied on judgments of Hon'ble Supreme Court in **"K. Shashidhar vs. Indian Overseas Bank & Ors., (2019) 12 SCC 150"**; **Committee of Creditors of Essar Steel India**

Ltd. vs. Satish Kumar Gupta & Ors., (2020) 8SC 53” and “Kalpraj Dharamshi & Anr. vs. Kotak Investment Advisors Ltd. & Anr., 2021 SCC Online SC 204”. All the above judgments cited by the Liquidator are decisions considering the commercial wisdom of the CoC in reference to approval of a Resolution Plan. In the present case, commercial wisdom of CoC regarding approval of Resolution Plan is not under consideration. CoC has refused to consider the Resolution Plan submitted by the Appellant for reasons as noted above. In the facts of the present case, decision to liquidate the Corporate Debtor was taken in the 5th CoC meeting held on 24.02.2020 by that time neither any Valuers were appointed nor there was any liquidation value. The Resolution Professional has not even prepared Information Memorandum. As noted above, the entire object and purpose of the I&B Code is to revive the Corporate Debtor and put it back on the track. The CoC had not taken any effort to issue any Form G to find out as to whether there can be resolution of the Corporate Debtor by any Resolution Applicant. Without even making one effort, CoC jumped on conclusion to liquidate. It is true that under the statute CoC is empowered to take a decision to liquidate the Corporate Debtor. Material irregularity has been committed in the process as already noticed above.

19. We are satisfied that sufficient ground exist within the meaning of Section 61(4) to assail the order directing for liquidation. The Adjudicating Authority in the impugned order only relying on the resolution of the CoC in 5th meeting has directed for liquidation without

even taking into consideration minutes of subsequent 6th, 7th and 8th meetings of CoC, the steps taken by CoC to invite plan from the Appellant, discussion of the plan and ultimately decision thereon.

20. When we look into the entire facts and circumstances of the present case and sequence of events, we are satisfied that decision of the CoC in the 5th meeting to liquidate the Corporate Debtor is unsustainable for the reasons as indicated above. In result, we allow the appeal, set aside the order of the Adjudicating Authority dated 26.08.2021 and reject the application filed by the Resolution Professional under Section 33(2).

21. In consequence to setting aside of order of liquidation further steps need to be taken in the CIRP. We are of the view that one opportunity has to be given to the CoC for finding out as to whether there can be any Resolution Plan to revive the Corporate Debtor. In result, while allowing the appeal we issue following directions:

- I. An extension of period of 90 days is granted to the Resolution Professional and the CoC to take steps to prepare Information Memorandum and issuance of Form G and consideration of Resolution Plan, if any, and take appropriate decision regarding resolution in the CIRP process.
- II. The Appellant may also in pursuance of issuance of Form G submit its Resolution Plan which also need to be considered by the CoC alongwith other plans, if any.

22. We make it clear that we are not expressing any opinion on merits of the Resolution Plan which was earlier submitted by the Appellant or which may be submitted consequent to this order. It is for the CoC to consider the Resolution Plan of the Appellant alongwith other Resolution Plans in accordance with law. The Resolution Professional and the CoC shall endeavour to complete the entire process, as directed above, within 90 days from today.

23. For any further steps in CIRP, it shall be open for the Resolution Professional and CoC to file appropriate application before the Adjudicating Authority, which may be considered in accordance with law.

24. Parties shall bear their own costs.

**[Justice Ashok Bhushan]
Chairperson**

**[Barun Mitra]
Member (Technical)**

NEW DELHI

1st September, 2022

Archana