

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL, PRINCIPAL BENCH,
NEW DELHI**

COMPANY APPEAL(AT)(INSOLVENCY) NO. 745 OF 2019

(Arising Out of Order dated 03.06.2019 passed by the Adjudicating Authority, National Company Law Tribunal Hyderabad in I.A. No. 691 of 2018 in C.P. (IB) No. 134/10/HDB/2017)

IN THE MATTER OF:

1. STATE OF TELANGANA, REP BY ITS PRINCIPAL SECRETARY,

Industries and Commerce (IE, SUGAR & IFR) Department,
Having its office at 2nd Floor, D-Block,
Telangana Secretariat, Hyderabad – 500 022.

2. DIRECTOR OF SUGAR AND CANE COMMISSIONER, HYDERABAD,

Having its office at 5-10-174, First Floor,
Shakar Bhavan, Fateh Maidan Road,
Khairatabad, Hyderabad - 500 004.

3. NIZAM SUGARS LIMITED

Having its office at 5-10-174, First Floor,
Shakar Bhavan, Fateh Maidan Road,
Khairatabad, Hyderabad - 500 004.

...APPELLANTS

VERSUS

1. NIZAM DECCAN SUGARS LIMITED,

Represented by its Liquidator,
Mr. R. Ramakrishna Gupta,
Having its office at. T-202, Techpolis,
H. No. 1-10-74/B, Above Ratnadeep Super Market,
Chikoti Gardens, Begumpet, Hyderabad 500 016.

2. MR. R. RAMAKRISHNA GUPTA,

Having its Office at T-202,
Techpolis, H. No. 1-10-74/B,
Above Ratnadeep Super Market,
Chikoti Gardens, Begumpet, Hyderabad 500 016.

3. DELTA PAPER MILLS LIMITED,

Having its Registered Office at:

Vendra Bhimavaram Taluk,
West Godavari, Andhra Pradesh.

4. MR. G. GANGA RAJU,

S/o. Sri G. Ranga Raju,
R/o 40-25-1978, Koganti Vari Street,
Patamata Lanka, (Urban),
Venkateswarapuram, Vijayawada – 520 010.

5. MR. G. RAMA RAJU,

S/o. G. Ganga Raju,
Ro. 40-15-14, Brindavan Colony,
Labbipet, Vijaywada – 520010.

6. MR. GVK RANGA RAJU,

S/o. G. Ranga Raju,
R/o. Plot No 552, 8-2-293/82/3/111/552,
Road No 92, Jubilee Hills,
Journalist Colony, Shaikpet, Hyderabad – 500 033.

7. MRS. G. VANI,

S/o. G. Ranga Raju,
R/o. Plot No 552, 8-2-293/82/3/111/552,
Road No 92, Jubilee Hills,
Journalist Colony, Shaikpet,
Hyderabad – 500 033.

8. ANDHRA BANK,

Sultan Bazar Branch,
Andhra Bank Buildings,
Koti, Hyderabad – 500 095.

9. SYNDICATE BANK,

Nizam Shahi Road, Opp. Karachi Bakery,
Hyderabad – 500 001.

10. UCO BANK,

Midcorporate Banjara Hills Branch,
8-2-418, Krishnamma House,
Road No. 4 and 7, Banjara Hills,
Hyderabad – 500 034.

11. INDIAN OVERSEAS BANK,

Andhra Loyola
College Campus,
Jayaprakash Nagar,
Vijayawada – 520 008.

...RESPONDENTS**With****COMPANY APPEAL(AT)(INSOLVENCY) NO. 818 OF 2019**

(Arising Out of Order dated 20.09.2017 passed by the Adjudicating Authority, National Company Law Tribunal Hyderabad in C.P. (IB)No.134/10/HDB/2017)

IN THE MATTER OF:**1. STATE OF TELANGANA, REP BY ITS PRINCIPAL SECRETARY,**

Industries and Commerce (IE, SUGAR & IFR) Department,
Having its office at 2nd Floor, D-Block,
Telangana Secretariat, Hyderabad – 500 022.

2. DIRECTOR OF SUGAR AND CANE COMMISSIONER, HYDERABAD,

Having its office at 5-10-174, First Floor,
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Having its office at 5-10-174, First Floor,
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3. DELTA PAPER MILLS LIMITED,

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8-2-418, Krishnamma House,
Road No. 4 and 7, Banjara Hills,
Hyderabad – 500 034.

11. INDIAN OVERSEAS BANK,

Andhra Loyola
College Campus,
Jayaprakash Nagar,
Vijayawada – 520 008.

...RESPONDENTS

Present:

For Appellants:

Mr. Ritin Rai, Sr. Advocate with Mr. Krishna Dev J and Mr. Harsha T.P.S., Advocate

For Respondents:-

Mr. Subrahmanyam Bkv, Advocate for Respondent Nos.1 & 2.

Mr. Hemant Chaudhri, and Mr. Piyush Arora, Advocates for Respondent Nos. 1 & 2 & 3-7

Mr. C S Ramakrishna Gupta, Advocate for Respondent No. 2 – Liquidator

Mr. PBA Srinivasan, Mr. Avinash Mohaptra, Ms. Ichchha Kalash, Mr. Parth Tandon Advocates for Respondent Nos. 8-11

J U D G M E N T

Jarat Kumar Jain: J.

The Adjudicating Authority (National Company Law Tribunal, Hyderabad) passed an order under Section 10 of IBC on 20.09.2017 for initiating Corporate Insolvency Resolution Process (CIRP) and passed an order of liquidation under Section 33 of IBC on 03.06.2019 against the M/s Nizam Deccan Sugars Ltd. (NDSL) (Corporate Debtor).The Company Appeal (AT) (Ins) No. 745 of 2019 is preferred against the order of liquidation

whereas Company Appeal (AT) (Ins) No. 818 of 2019 is preferred against the order of initiating CIRP against the Corporate Debtor NDSL.

2. Background of the Appeals are that the State of Telangana, and Director of Sugar & Cane Commissioner, Hyderabad have filed the Appeal against the order of liquidation against NDSL, Delta Paper Mills Ltd. (DPML) and Financial Creditors of the NDSL. When this Appeal came up for hearing on 24.07.2019 before this Appellate Tribunal, the Appellants requested to allow them to implead Nizam Sugars Ltd as Appellant No. 3 and also allow to challenge the order of initiating CIRP under Section 10 of the IBC. This Tribunal has allowed both the prayers however allowed 10 days' time to file the Appeal, then on 07.08.2019 the Appellants have filed CA (AT) (Ins) No. 818 of 2019.

3. Brief facts of the case are that M/s Nizam Sugars Ltd. (NSL) [98% shares owned by the erstwhile State of Andhra Pradesh] was incorporated and established for running the Nizam Sugars Factory in Nizamabad, Telangana. On 28.08.2002 the State Government entered into a Joint Venture Agreement (JV) with one Delta Paper Mills Ltd. (DPML), whereby the assets and business of the four units of NSL i.e. Metapalli Sugar Mill, Mombojipalli Sugar Mills, Sharkarnagar Sugar Mills and Shakarnagar Distillery were transferred to joint venture vehicle viz NDSL (Corporate Debtor). As part of arrangement the DPML held 51% shares and NSL held 49% shares of the Corporate Debtor (NDSL). Subsequently, the dispute arose between NSL and DPML over the running of NDSL (Corporate Debtor). The Corporate Debtor failed to run four units properly, therefore, the State

Government decided to take over the Corporate Debtor in the year of 2015 by divesting DPML of its shares in the Corporate Debtor.

4. The State Government of Telangana issued G.O. Ms No. 28 dated 29.04.2015 to constitute a Secretaries Committee to inter alia decide on to takeover of the Corporate Debtor and exploring ways to revive the Corporate Debtor's units expeditiously for the welfare of the farmers.

5. The private management (DPML) with an intention to profit from the liquidation of assets of the Corporate Debtor did not co-operate with the Secretaries Committee. Subsequently, the private management in gross violation of the rights of the NSL approached the Board for Industrial and Financial Reconstruction (BIFR) for declaring the Corporate Debtor as a sick Industry only with the intention of avoiding the state from taking over the Corporate Debtor as a going concern. During the pendency of such proceedings BIFR dissolved through the enactment of the IBC. The private management then proceeded to initiate CIRP against the Corporate Debtor, knowing well that the Financials of the Corporate Debtor are positive, as it wanted to liquidate the assets of the Corporate Debtor.

6. Subsequently, the private management of the Corporate Debtor which holds 51% shareholding of the Corporate Debtor with intention to defraud the Appellants (i) did not inform the NSL and the shareholders of the Corporate Debtor about the decision, initiate CIRP against the Corporate Debtor (ii) no affirmative vote of the nominee, director of the NSL was taken prior to/during the passing of the Board Resolution dated 30.03.2017. The shareholders of the Corporate Debtor were not informed prior to passing of

the aforesaid Board Resolution nor was any shareholder approval subsequently taken. Such Board Resolution is void ab initio as contrary to the Article of Association of the Corporate Debtor. On the basis of aforesaid Board Resolution VR Chary, the Chief Financial Officer of NDSL had filed the petition u/s 10 of the IBC to initiate CIRP. Ld. Adjudicating Authority vide impugned order dated 20.09.2017 admitted the Petition and initiated CIRP against the Corporate Debtor and Rama Krishna Gupta appointed as Interim Resolution Professional (IRP) and declared moratorium.

7. Thereafter the IRP made a public announcement on 23.09.2017 intimating the commencement of CIRP in the matter of NDSL, inviting the Creditors to submit their claims. In response, Financial Creditors Andhra Bank, Syndicate Bank and UCO Bank have filed their claims and CoC was constituted on 20.10.2017. The first CoC was held on the same day and IRP was appointed as RP. Total 11 CoC meetings were convened between 20.10.2017 to 06.09.2018. In response to issuance of EOI only two persons Phoenix ARC Pvt. Ltd., Mumbai and Hindustan Infrastructure Projects and Engineers Pvt. Ltd., Bangalore submitted their EOI. The CoC deliberated on the EOI received from the above two resolution applicants. The CoC noted that none of these two prospective resolution applicants met the criteria fixed by the CoC i.e. experience in manufacturing of sugar. Thereafter, invitation of resolution plans in Form-G was uploaded on IBBI website on 10.05.2018 and published on 16.05.2018 in newspapers. In response to the said invitation three prospective resolution applicants through email have asked RP to share the information memorandum. In reply the RP extended

confidentiality undertaking to such prospective resolution applicants. However, no response has been received from them. Due to absence of any resolution plan the CoC in their 7th CoC meeting dated 29.05.2018 decided to refer the Corporate Debtor for liquidation. Therefore, the CoC authorized the RP to take appropriate action as per the provisions of IBC. The RP had filed an Application I.A. No. 691 of 2018 under Section 33 of IBC inter alia praying to pass an order of liquidation against the Corporate Debtor. Ld. Adjudicating Authority considering the material on record vide impugned order dated 03.06.2019 passed the order of liquidation of Corporate Debtor (NDSL) and Mr. Ram Krishna Gupta appointed as liquidator. The Order of liquidation challenged on the ground that the RP committed material irregularity and fraud in obtaining the impugned order by publishing Expression of Interest (EOI) and request for resolution plan in newspapers with extremely limited circulation in gross violation of Regulation 36A of CIRP Regulations, not filed application for excluding the 81 days duration of adjudication of the application filed by the Appellant 'State of Telangana and RP approached the State which was interested in reviving the Corporate Debtor at an extremely late stage and RP by acting in concert with the private management of the Corporate Debtor to liquidate the assets of the Corporate Debtor.

8. As CA (AT) (Ins) No. 818 of 2019 is filed after prescribed period of limitation. Therefore, Appellants have filed I.A.No. 2477 of 2019 an Application for condonation of delay on the ground that the Appellants were not aware of the fraud and suppression of material facts perpetrated by the

Corporate Debtor in initiating the CIRP against the Corporate Debtor, which led to the impugned order having been passed. The Corporate Debtor played fraud upon the Appellants by not informing them about the necessity of obtaining a special resolution from the shareholders of the Corporate Debtor prior to passing the board resolution dated 30.03.2017, the necessity of obtaining the affirmative vote of the nominee director of the Nizam Sugars Ltd (NSL). The fraud discovered when an Appeal was preferred on 11.07.2019 against the order of liquidation dated 03.06.2019. Therefore, the period that elapsed from passing of the impugned order to be discovery of fraud be excluded for computing the period of limitation. It is stated that this Hon'ble Tribunal acceded to the request vide order dated 24.07.2019 allowed the Appellants to challenge the order of Admission within ten days. In the light of the aforesaid facts and circumstances the delay of 748 days in filing the Appeal may be condoned.

9. The Respondent No. 1 & 2 filed the Reply of the Application for condonation of delay and stated that since inception the Appellants were fully aware of the passing of the order dated 20.09.2017 and were also informed about it by the RP vide letter dated 25.09.2017 and the Appellants had also filed claim for Rs. 50.91 Crores before the RP. Hence, the Appellants cannot take the plea of ignorance that they were not aware of the initiation of proceedings against the Corporate Debtor. The plea of fraud was taken by the Appellants, without any basis. This Appellate Tribunal in the case of National Spot Exchange Ltd. Vs. Anil Kohli CA (AT) (Ins) No. 683 of 2019, Principal Director General of Income Tax Vs. Spartek Ceramics India

Ltd. CA (AT) (Ins) No. 160 and 258 of 2017, Central Transmission Utility Vs. Korba West Power Company Ltd. CA (AT) (Ins) No. 1334 of 2019 and V Nagarajan Vs. SKS Ispat & Power Ltd. CA (AT) (Ins) No. 561 of 2020 held that delay in filing of an Appeal beyond the period of 15 days, cannot be condoned as the same is not within the jurisdiction of the Appellate Tribunal. Hon'ble Supreme Court in the case of Canara Bank Vs. P Selathal & Ors. 2020 (2) ALT 68 held that clever drafting and vague and illusory allegations of fraud cannot bring the proceeding within the period of limitation. This Hon'ble Appellate Tribunal vide order dated 24.07.2019 allowed the Appellants to file Appeal against the order of Admission does not amount to grant permission to file Appeal beyond the period of limitation.

10. The Respondent No. 1 & 2 opposed the Appeal against the order of Admission on the ground that for filing application under Section 10 IBC prior approval of the shareholders of Corporate Debtor is required, such provision has been substituted by the amendment made on 06.06.2018. Whereas, in the present case the Company Petition was admitted earlier on 20.09.2017. The clause 107 of Article of Association (AoA) clearly permits the Board of Director to file voluntarily liquidation of the Company with an affirmative vote of at least one Director nominee of the Appellants. The Board meeting dated 30.03.2017 was attended by Mr. Bhadru Malloth as nominee Director of the Appellants and the resolution to file application under Section 10 IBC was duly approved by him. Subsequently, the minutes of Board meeting dated 30.03.2017 were approved by Mr. Bhadru Malloth in the Board meeting dated 29.06.2017 and filing of application under Section

10 IBC was also noted and approved. The matter pertaining to filing of application under Section 10 IBC was also placed before the shareholders in the AGM. In the present case order of admission made prior to substitution of amendment dated 06.06.2018, therefore, there is no requirement of special resolution of the shareholders of the Corporate Debtor, even without taking consent of the shareholders through a special resolution in an AGM/EGM application under Section 10 IBC can be filed for this proposition cited the decision of this Appellate Tribunal in the case of Umesh Aggarwal Vs. Ricoh India Pvt. Ltd. (2019) 214 Company Cases 490 and Amit Gupta Vs. Yogesh Gupta (2020) 158 SCL 301.

11. The Respondent No. 3 to 7 have also opposed the application for condonation of delay and the Appeal on the aforesaid grounds taken by the Respondent No. 1 & 2.

12. The Respondent No. 8 to 11 in their Reply opposed the Application and the Appeal on the same grounds which were taken by the Respondent No. 1 & 2.

13. The Respondents resisted the Appeal against the order of liquidation on the ground that the allegations raised in the Appeal are false and frivolous and does not constitute material irregularity as per Regulation 33 & 34 of CIRP Regulations the Applicant being the Corporate Debtor paid the CIRP costs to the IRP, hence, there is no material irregularity. Regulation 36-A was inserted w.e.f 04.07.2018. Therefore, the publication in newspapers made by the RP was statutorily not required. The RP immediately after his appointment approached the State of Telangana to

understand the thinking of Government of Telangana, however, no communication was received from the Appellants. Thus, RP has not committed any irregularity in conducting CIRP of Corporate Debtor.

14. The decision on the Application for condonation of delay was deferred. Therefore, we have heard the arguments on this application at the time of final hearing of these Appeals and we are deciding the issue of limitation along with other issues.

15. The following issues arose for our consideration:

(i) Whether the board resolution dated 30.03.2017 is void ab-initio as it was passed without securing affirmative vote of the nominee director of the Appellant No. 3?

(ii) Whether the appeal against the order of admission is barred by limitation.

(iii) Whether material irregularity committed by RP in conducting the CIRP of the Corporate Debtor.?

Issue No. (i)

Whether the Board resolution dated 30.03.2017 is void ab-initio as it was passed without securing affirmative vote of the nominee director of the NSL(Appellant No. 3)?

16. Ld. Counsel for the Appellant submitted that the Board resolution dated 30.03.2017 passed without securing affirmative vote of the nominee director of NSL (Appellant No. 3). For this purpose, he drew our attention towards clause 106 of the AoA of the Company, which defines the powers to be exercised by the Board only at meeting and clause 107 provides Board actions requiring qualifying majority. According to him, clause (u)

provides that resolution or voluntary liquidation of NDSL shall be taken only by the affirmative vote of three or more directors (Qualifying Majority) but there must be included in the qualified majority at least one director nominated by NSL. While passing the resolution dated 30.03.2017 no affirmative vote has been secured from the nominated director of NSL. Therefore, the resolution dated 30.03.2017 is void ab initio. For this purpose, he placed reliance on the Judgment of this Appellate Tribunal in the case of Gaja Trustee Company Pvt. Ltd. (Supra) and Vandana Industries Ltd. Vs. IL & FS Financial Services Ltd. & Anr. CA(AT) (Ins) No. 630 of 2018 decided on 01.02.2019.

17. On the other hand, Ld. Counsel for appearing on behalf of the Respondent No. 1 & 2 submitted that the Board resolution dated 30.03.2017 passed in the presence of Mr. Bhadru Malloth, nominee director of NSL. Therefore, it cannot be said that the resolution was passed without consent of the director nominated by NSL. It is submitted that in Section 10 of the IBC was amended w.e.f 06.06.2018 in which the provision was inserted that the special resolution passed by shareholders of the Corporate Debtor may approve filing of the Application under Section 10 of the IBC. Such amendment is subsequent to initiation of CIRP. Therefore, this amendment is not applicable to the present case. It is also submitted that after passing of the resolution the authorized person has filed the Application under section 10 of the IBC and the Appellants have not raised any objection before the Adjudicating Authority that the Application under Section 10 of the IBC is not maintainable, therefore, at a belated stage when

the liquidation is ordered by the Adjudicating Authority, such objection cannot be entertained.

18. Ld. Counsel for the Respondent No. 1 & 2 further submitted that reliance wrongly been placed by the Appellant on Gaja Trustee Company case. The decision of this Appellate Tribunal in the case of Umesh Agrawal Vs. Ricoh India Ltd. (2019) 214 Company Cases 490 clearly covers the present case. In this case, this Appellate Tribunal held that the IBC was amended w.e.f 06.06.2018 and therefore any order of admission made by the Adjudicating Authority prior to 06.06.2018 shall not require the consent of shareholders through a special resolution, if the AoA empowers the board of directors. The same view has been followed by this Appellate Tribunal in the case of Amit Gupta (Supra).

19. It is submitted that the Clause 107 of AoA of the NDSL (Respondent No. 1) clearly permits the board of directors to file voluntary liquidation of the Company with affirmative vote of at least one director nominee of the Appellants. The board meeting dated 30.03.2017 was attended by Mr. Bhadru Malloth nominee director of the Appellant and the resolution to file an application under Section 10 of the IBC was duly approved by him. The minutes of board meeting dated 30.03.2017 were duly approved by Mr. Bhadru Malloth in the board meeting dated 29.06.2017 and the filing of the Application under Section 10 of the IBC was also noted and approved. The matter pertaining to filing the Application under Section 10 of the IBC was also placed before the shareholders in the AGM dated 24.08.2017 by means of the directors report which was recorded as read in the minutes of the

AGM and was duly approved by all the directors. Ld. Counsel for the Respondent No. 3 to 7 who are DPML and their directors supports the arguments advanced by the Ld. Counsel for the Respondent No. 1 to 2.

20. Ld. Counsel appearing on behalf of the Respondent Nos. 8 to 11, i.e. the Financial Creditors of the Corporate Debtorsubmitted that the arguments advanced on behalf of the Appellants with respect to the consent of shareholders through a special resolution is frivolous as the IBC 2016 was amended w.e.f. 06.06.2018 and any order of admission made by the Adjudicating Authority prior to that shall not require consent of the shareholders through a special resolution. In the present case, the Company Petition was admitted on 20.09.2017 and the same is not applicable. It is also submitted that the claims made by the Financial Creditors involves public money and the Financial Creditors being a public financial institutions have a right to recover their legit dues. There is no dispute on the claim amount filed by the Financial Creditor and the same has been admitted by the RP of the Corporate Debtor.

21. Lastly, it is submitted that in the event of any fraud committed by the private management of the Corporate Debtor as alleged by the Appellants, the same is the internal matter of the Corporate Debtor and the private management, Financial Creditors have no role to play in any of it.

22. After hearing Ld. Counsel for the parties, we have gone through the record and the citations.

23. Firstly we would like to analyse the ratio of the Judgments cited by the Ld. Counsels for the parties. In the case of Gaja Trustee Company Pvt.

Ltd. (Supra), this Appellate Tribunal after elaborate discussion held that the decision of liquidation, dissolution or winding up of the Company should be taken strictly as per the provisions of AoA. If any resolution for liquidation or winding up of the company is passed ignoring the provisions of AoA then such resolution cannot be a basis of initiation of CIRP under Section 10 of the IBC.

24. Ld. Counsel for the Respondents have placed reliance on the Judgment of Umesh Aggarwal (Supra) and Amit Gupta (Supra) in both the Judgments. Gaja Trustees Judgment is considered. In the case of Umesh Aggarwal (Supra) the Application under Section 10 of the IBC was admitted on 14.05.2018 against this order the Appeal has been preferred by the shareholders on the ground that no Annual General Meeting (AGM) nor any Extraordinary General Meeting (EGM) was conducted for taking decision to file an Application under Section 10 of the IBC and the Appellant has cited the Judgment of Gaja Trustee (Supra). This Appellate Tribunal distinguishing the facts of this case held as under:-

“9. In the present case under Article 127(xii) the Board of Directors have been empowered to pass any order for winding up and/or presenting a petition for winding up of the company.

10. Like the case of Gaja Trustee Company Pvt. Ltd. (Supra) no specific provision has been made to obtain ‘affirmative vote’ in the AGM of the shareholders. Article 164 of Ricoh India Ltd. (Corporate Debtor) specifies when the liquidator requires sanction of a special resolution of the company at the time of winding up. Therefore, the said Article 164 is not applicable and cannot be relied upon to hold that the decision of the shareholders in the AGM is maintainable for moving the Application u/s 10 of the I&B Code.”

25. In Amit Gupta's Case, at the instance of Promoters/Corporate Debtor the Application under Section 10 of the IBC was filed and admitted by the Adjudicating Authority on 26.04.2018 and after initiation of CIRP, RP issued invitation of Expression of Interest (EOI) and submission of Resolution Plan with regard to Corporate Debtor till 18.08.2018. The Promoter has submitted its EOI on last date of submission of EOI. However, it was not found in conformity with the requirement asked for the applicable provisions of IBC. The Ld. Adjudicating Authority has declined to extend the date for submission of EOI then the Appellant (Amit Gupta) being a promoter/shareholder of the Corporate Debtor has filed the Appeal and in this Appeal, a new plea was raised that the Application under Section 10 of the IBC was filed without there being a resolution of General Body. The Ld. Counsel for the Appellant relied on the Judgment of Gaja Trustee (Supra). After considering this Judgment, it is held that in the case of Gaja Trustee (Supra) this Appellate Tribunal had referred to the Articles of Association of the Corporate Debtor in that matter and in that context considered the said Appeal and found that no decision had been taken by the shareholders in their Extraordinary General Body meeting and the Application under Section 10 of the IBC was filed by person authorized by the Board of Directors which was not maintainable. Whereas in the case of Amit Gupta (Supra) the Appellant Amit Gupta himself is a holder of 93.30 % of shareholding of the Corporate Debtor and the remaining shares with Shayam Lal Gupta and which is apparent from the proposed resolution plan. Therefore, it is

observed that, the Appellant holding 93.30% can hardly claim that decision of AGM/EGM is or was necessary. Thus, the Appeal was rejected.

26. With the aforesaid, we can say that the Judgments which are relied upon by the Ld. Counsel for the Respondents are not helpful to them and the ratio of the Judgment in Gaja Trustee (Supra) holds the field.

27. Now, we would like to refer the relevant paragraphs of the Judgment of Gaja Trustee (Supra) which are as under:-

“27. Article 9.1 which also relate to “Affirmative Vote Matters”, which reads as follows:

“9. Affirmative Vote Matters 9.1 No action or decision shall be taken and/or no resolution shall be adopted at a Board meeting or a Shareholder meeting any committee thereof, or any of the employees, officers or managers or the Target Companies, in respect of any Affirmative Vote Matter save and except with the prior written consent of the Investors. For this purpose, any connected contracts or transactions shall be combined to determine the applicability of the limits specified in the Affirmative Vote Matters.”

28. From the aforesaid provisions, it is clear that no action or decision can be taken and/or no resolution can be adopted at a Board meeting or a Shareholders meeting any committee thereof, or any of the employees, officers or managers or the Target Companies, in respect of any ‘Affirmative Vote Matter’ save and except with the prior written consent of the Investors.

29. Article 9.2 mandate that the ‘affirmative vote matters’ specified in Article 9.1 shall be taken by the Company only at a ‘general meeting’, as quoted below:

“9.2 In the event the provisions of Article 9.1 hereof are rendered unenforceable under law, all decision in relation to any of the Affirmative Vote Matters specified in Article 9.1 shall be taken by the Company only at a general meeting.”

30. From the aforesaid provision, it is clear that for the purpose of liquidation, dissolution or winding-up of the Company or any of its subsidiaries, ‘affirmative vote matters’ is required to be taken by the Company only at a general meeting.

31. *****

32. *****

33. In “John Tinson & Co. Pvt. Ltd. & Ors. V/s. Surjeet Malhan (Mrs) and Anr.-(1997) 9 SCC 651”, the Hon’ble Supreme Court held that “it is now a well-settled legal position that Articles of Association of a private company is a contract between the parties.”

34. In “Naresh Chandra Sanyal V/s. Calcutta Stock Exchange Association Ltd.-1971 (1) SCC 50”, the Hon’ble Supreme Court observed that subject to the provisions of the Companies Act, the Company and the members are bound by the provisions contained in the Articles of Association, as quoted below:

“14. Subject to the provisions of the Companies Act the Company and the members are bound by the provisions contained in the Articles of Association. The Articles regulate the internal management of the Company and define the powers of its officers. They also establish a contract between the Company and the members and between the members inter se. the contract governs the ordinary rights and obligations incidental to membership in the Company. In the absence of any provisions contained in the Indian Companies Act which prohibit a Company from forfeiting a share for failure on the part of the member to carry out an undertaking or an engagement the Articles of a Company which provide that in certain events membership rights of the shareholder including his right to the share will be forfeited are binding. The Articles of Association of the Exchange expressly provide that in the event of the member failing to carry out the engagement and in the conditions specified therein his share shall stand forfeited. Articles 22, 24, 26, 27 and 29 of the Exchange relating to forfeiture of shares in certain events are therefore valid.”

35. The Hon’ble Supreme Court in “Life Insurance Corporation of India V/s. Escorts Ltd. and Others. – (1986) 1 SCC 264” held:

“A Company is, in some respects, an institution like as State functioning under its 'basis Constitution' consisting of the Companies Act and the memorandum of Association. Carrying the analogy of constitutional law a little further, Gower describes "the members in general meeting" and the directorate as the two primary organs of a company and compares them with the legislative and the executive organs of a Parliamentary democracy

where legislative sovereignty rests with Parliament, while administration is left to the Executive Government, subject to a measure of control by Parliament through its power to force a change of Government. Like the Government, the Directors will be answerable to the 'Parliament' constituted by the general meeting. But in practice (again like the Government), they will exercise as much control over the Parliament as that exercises over them. Although it would be constitutionally possible for the company in general meeting to exercise all the powers of the company, it clearly would not be practicable (except in the case of one or two - man - companies) for day-to-day administration to be undertaken by such a cumbersome piece of machinery. So the modern practice is to confer on the Directors the right to exercise all the company's powers except such as general law expressly provides must be exercised in general meeting. Gower's Principles of Modern Company Law. Of course, powers which are strictly legislative are not affected by the conferment of powers on the Directors as section 31 of the Companies Act provides that an alteration of an article would require a special resolution of the company in general meeting. But a perusal of the provisions of the Companies Act itself makes it clear that in many ways the position of the directorate vis-a-vis the company is more powerful than that of the Government vis-a-vis the Parliament. The strict theory of Parliamentary sovereignty would not apply by analogy to a company since under the Companies Act, there are many powers exercisable by the Directors with which the members in general meeting cannot interfere. The most they can do is to dismiss the Directorate and appoint others in their place, or alter the articles so as to restrict the powers of the Directors for the future. Gower himself recognises that the analogy of the legislature and the executive in relation to the members in general meeting and the Directors of a Company is an over-simplification and states "to some extent a more exact analogy would be the division of powers between the Federal and the State Legislature under a Federal Constitution." As already noticed, the only effective way the members in general meeting can exercise their control over the Directorate in a democratic manner is to alter the articles so as to restrict the powers of the Directors for the future or to dismiss the Directorate and appoint others in their place. The holders of the majority of the stock of a corporation have the power to appoint, by election, Directors of their choice and the power to regulate them by a resolution for their removal. And, an injunction cannot be granted to restrain the holding of a general meeting to remove a director and appoint another."

36. In view of the aforesaid decision of the Hon'ble Supreme Court and other Hon'ble Courts, we hold that the Article 1.1.3; 9.1 and

9.2 are binding on all the 'shareholders' as also on the 'Board of Directors' as also on 'the Company'. We have already held that the 'Board of Directors' of a Company is not empowered to file an application under Section 10 for its own liquidation or dissolution or 'Corporate Insolvency Resolution Process'. For the said reason, the application under Section 10 filed by the Board of Directors was not maintainable. The argument that Section 59 of the 'I&B Code' is the only provision for liquidation, cannot be accepted as initiation of 'Corporate Insolvency Resolution Process' by the Company ('Corporate Debtor') against itself under Section 10 may result into its own liquidation. If the 'Resolution Process' starts and ultimately fails because of non-approval of the 'Resolution Plan', at that stage provisions of 'Articles of Association' cannot be given effect nor the approval of the shareholders can be taken.

37. An application under Section 7 of the 'I&B Code' or Section 9 cannot be equated with application under Section 10. On filing an application under Section 7 or Section 9, the Board of Directors may take steps for 'Corporate Insolvency Resolution Process' against other 'Corporate Debtor' but not against its own Company."

28. In the aforesaid preposition of law, we have examined the facts of the present case, in clause 106 of Article of Association specified the powers to be exercised by the Board of Directors at meeting which are as under:-

"The Board of Directors shall exercise the following powers on behalf of the Company and the said powers shall be exercised only by resolutions passed at the meeting of the Board:

- i. Power to make calls on shareholders in respect of moneys unpaid on their shares;*
- ii. Power to issue debentures;*
- iii. Power to borrow moneys otherwise than on debentures;*
- iv. Power to invest the funds of the Company;*
- v. Power to make loans.*

The Board of Directors may by a resolution delegate to any Committee of the Directors or to the Managing / Whole time Director the Powers specified in sub-Articles (iii), (iv) and (v) above."

29. Clause 107 of AoA is as under:-

107. Board actions requiring Qualifying Majority:

Action on the following matters shall be taken only by affirmative vote of 3 (Three) or more directors ("qualified majority") but there must be included in the qualified majority at least one director nominated by NSL.

"a.....

b.....

c.....

d.....

e. All transactions regarding building and land, including the lease, purchase, sale and mortgage of these assets;

f. Sale or disposal of any material assets of NDSL, in excess of such sum or value as may be determined by affirmative vote of 4 directors, other than sales or disposals already approved in the Annual Budget and business and investment plan;

g. ...

h....

i.....

j.....

k.....

l.....

m....

n. Doing of anything that would result in NDSL coming under the control of any other company or person;

o.

p.

q.

s.

t.

u. Dissolution or voluntary liquidation of NDSL.

30. It is apparent that Sale or disposal of any material assets of NDSL, in excess of such sum or value as may be determined by affirmative vote of 4 directors, other than sales or disposals already approved in the Annual Budget and business and investment plan, all transactions regarding building and land, including the lease, purchase, sale and mortgage of these assets, doing of anything that would result in NDSL coming under the control of any other company or person, dissolution or voluntary liquidation

NDSL and any material change in the business of NDSL, such matters shall be taken only by affirmative vote of three or more directors but there must be included in the qualified majority at least one director nominated by NSL.

31. Clause 108 of AoA provides how to resolve the deadlock exist on any matter between the Directors. Clause 108 of AoA is as under:-

108. Failure to achieve qualified majority:

If after two meetings of the Board have been called, it is not possible to achieve a qualified majority for a proposal, due to failure to obtain a quorum or the support of a Director nominated by NSL, but for which proposal at least three Directors have indicated their support in writing to the Secretary, then the chairman may certify that, Deadlock exist and refer the matter to the shareholders who shall use their best efforts to resolve the deadlock.

32. Now, we have examined whether the Resolution dated 30.03.2017 was passed as per the requirements of AoA i.e. by affirmative vote of the nominee director of NSL. Relevant extract of minutes of the meeting of the 67th meeting of board of directors are as under: -

“MINUTES OF THE MEETING OF THE 67TH MEETING OF THE BOARD DIRECTORS OF M/S NIZAM DECCAN SUGARS LIMITED HELD ON THURSDAY THE 30TH DAY OF MARCH 2017. AT 4:00 PM. AT THE CHAMBERS OF MANAGING DIRECTOR, NIZAM SUGARSLIMITED 5-10-174, SHAKAR BHAVAN, FATEH MAIDAN ROAD, P.B.NO. 1, KHAIRATABAD, HYDERABAD - 500 004.

DIRECTORS PRESENT:

- | | |
|-----------------------------|---------------------------|
| 1. Dr. G. Ganga Raju | Chairman |
| 2. Sri Bhadrhu Malloth, ITS | Director (Nominee of NSL) |
| 3. Sri G.V.K. Ranga Raju | Director |
| 4. Smt. Vani Gokaraju | Director |

INVITEES:

1. Sri V.R. Chary

Chief Financial Officer, NDSL

The Chairman occupied the Chair and welcomed the Members to the meeting and after ascertaining the requisite quorum, the proceedings of the meeting were commenced at 4-00 P.M.

“8. To take note of repealing the Board for Industrial and Financial Reconstruction (BIFR) w.e.f. 01.12.2016 and to approve to file an application before National Company Law Tribunal (NCLT).

With reference to the repealing of the Board of Industrial and Financial Reconstruction (BIFR) w.e.f 1/12/2016, the Management of the company put forwards the Board the provisions relating to the Insolvency and Bankruptcy Code of India (IBC) and the process involved therein to apply before the National Company Law Tribunal (NCLT) for Insolvency Resolution.

The Insolvency and Bankruptcy Code, 2016 (IBC) is a new Act recently enacted by the Government to consolidate various other laws and provisions for dealing with insolvency.

In view of the above, it is advisable for the board to take immediate action and file application with NCLT before the expiry of 180 days.

In accordance with the above stated provisions, the boards of directors of the company is requested to take note of the same and pass the following resolution to make an application to the NCLT.

After due deliberations, the board of directors have passed the following resolutions.

Resolved That pursuant to the provisions of the Insolvency and Bankruptcy Code of India (IBC), 2016 and other applicable provisions, if any and subject to the approval of such other authorities as may be required, the board has taken note of the repealing of board for industrial and financial reconstruction (BIFR) w.e.f 1st December, 2016 and thereby the consent of board of directors of the company be and is hereby accorded to

file an application before the NCLT for the purpose of seeking the Insolvency Resolution Process.”

33. The Hon’ble Supreme Court in the case of “*John Tinson & Co. Pvt. Ltd. & Ors. V/s. Surjeet Malhan (Mrs) & Anr.*”– (1997) 9 SCC 651 held that it is now a well settled position that AoA of a pvt. Company is a contract between the parties. Hon’ble Supreme Court in the case of Naresh Chandra Sanyal V/s. Calcutta Stock Exchange Association Ltd. (1971) (1) SCC 50 held that subject to the provisions of the Companies Act, the Company and the members are bound by the provisions contained in the AoA. Thus, it is settled law that the members are bound by the provisions contained in the AoA.

34. Learned Senior Counsel for the Appellants also pointed out that as per second proviso of Section 179(1) of Companies Act, 2013, the Board shall not exercise any power or to do any act or thing which is directed or required under the Act or by the memorandum or Articles of the Company or otherwise to be exercised or done by the Company in general meeting. However, resolution dated 30.03.2017 is passed in contravention of clause 107 of AoA. Therefore, such Board resolution is void ab initio. We are in agreement with this argument.

35. Admittedly, the Resolution dated 30.03.2017 was passed in the presence of Mr. Bhadru Malloth nominee director of NSL. It was argued on behalf of the Respondents that the presence of the nominee director and his consent to the Board resolution dated 30.03.2017 satisfies the affirmative vote requirement. There is a specific distinction between an affirmative vote and mere consent. Affirmative vote matters provided in AoA generally to

protect the rights of minority shareholders. Mere consent or presence of nominee director of NSL cannot equated with the affirmative vote as provided in clause 107 of AoA.

36. In the Corporate debtor NDSL Pvt. management i.e. DPML holds 51% shares whereas NSL holds 49% shares. The clause 107 incorporated in the AoA to protect the right of minority shareholders i.e. NSL.

37. With the aforesaid we hold that on 30.03.2017 without affirmative vote of nominee director of NSL Board resolution was passed for filing the application under Section 10 of IBC. Such application is not maintainable for want of affirmative vote of nominee director of NSL. For the said reason the application under Section 10 filed by the VR Chary the Chief Financial Officer of NDSL was not maintainable. We also hold that the Board resolution dated 30.03.2017 is void ab initio as it was passed without securing affirmative vote of the nominee director of NSL.

Issue No. (ii)

Whether the Appeal against the order of admission is barred by limitation?

38. Admittedly the order of admission was passed on 20.09.2017 and subsequently the order of liquidation was passed on 03.06.2019. when the Appeal against the order of liquidation came up for hearing on 24.07.2019, before this Appellate Tribunal the Appellants requested to allow them to challenge the order of admission. This Tribunal allowed the Appellants to file the Appeal within 10 days then on 07.08.2019 the Appellants have filed CA (AT) (Ins) No. 818 of 2019 against the order of admission. Apparently, the Appeal has been filed with a delay of 748 days.

39. For condonation of delay the Appellants have taken two grounds

(i) The Appellants were not aware of the fraud and suppression of the material facts perpetrated by the Corporate Debtor in filing the application under Section 10 of IBC. Therefore, when the fraud discovered the Appeal was preferred. Hence, the period that lapsed from passing of the impugned order to discovery of the fraud we excluded for computing the period of limitation.

(ii) This Hon'ble Tribunal vide order dated 24.07.2019 allowed the Appellants to challenge the order of admission within ten days. Pursuant to the order the Appeal has been filed. Thus, the appeal is within limitation.

40. Learned Counsel for the Respondents pointed that the Appellants were fully aware of passing of the admission order dated 20.09.2017 and were also informed about it by the RP vide letter dated 25.09.2017& the Appellants had filed claim of Rs. 50.91 Crores before the RP. Therefore, the Appellants cannot take plea of ignorance. The plea of fraud was taken by the Appellant, without any basis. It is also submitted that this Tribunal vide order dated 24.07.2019 allowed the Appellants to file Appeal against order of admission does not amount to grant permission to file appeal beyond the period of limitation.

41. We have considered arguments advance by the Ld. Counsel for the parties. The RP vide letter dated 25.09.2017 informed the Appellants in regard to the admission order dated 20.09.2017. Therefore, we are unable to convince with the arguments of Ld. Counsel for the Appellants that they were unaware and the Respondents have suppressed the admission order

dated 20.09.2017. The Appellant have not placed on record any material to draw the inference that the Respondents have committed fraud with the Appellants in regard to admission order dated 20.09.2017.

42. It is true that on 24.07.2019 this Appellate Tribunal allowed the Appellants to challenge the order of admission within ten days such order does not amount to grant permission to file Appeal beyond the period of limitation.

43. Ld. Counsel for the Appellant have argued that the application under Section 10 of IBC was not maintainable. Therefore, the admission order dated 20.09.2017 is void ab initio. Hence, it can be challenged at any time.

44. We find substance in this argument. The order of admission dated 20.09.2017 had no legal existence. Therefore, such order can be challenged at any time even beyond the prescribed period of limitation. For this proposition of law we would like to refer the Judgment of Hon'ble Supreme Court in the case of State of M.P. V/s Syed Qamarali (Civil Appeal No. 248 of 1960 decided on 08.03.1961). Para 20 is as under:

“20. We therefore hold that the order of dismissal having been made in breach of a mandatory provision of the rules subject to which only the power of punishment under Section 7 could be exercised, is totally invalid. The order of dismissal had therefore no legal existence and it was not necessary for the Respondent to have the order set aside by a court. The defence of limitation which was based only on the contention that the order had to be set aside by a court before it became invalid must therefore be rejected.”

45. Thus, the Appeal is time barred such defence is not maintainable.

Issue No. (iii)

Whether material irregularity committed by RP in conducting the CIRP of the Corporate Debtor.?

46. Learned Senior Counsel for the Appellants submitted that the private management of Corporate Debtor interested to sale the assets of the Corporate Debtor, to achieve this object the RP and the private management of the Corporate Debtor are hand in glove in managing the CIRP of the Corporate Debtor. The RP decided to publish EOI in newspapers with the minimal subscription base and circulation. Such publication is in direct contravention of regulation 36-A of CIRP regulations which mandates that the publication must be in newspapers having a wide circulation. In such manner only limited prospective resolution applicants could participate in the process of resolution. The Adjudicating Authority initiated the CIRP on 20.09.2017 shortly, therefore, on 23.01.2018 the private management of the Corporate Debtor made a representation to the COC for permission to sell 161 acres of land of the Corporate Debtor. Pursuant to the permission granted by the COC, the RP filed an application on 21.02.2018 before the Adjudicating Authority praying for sale of the land to an extent of Acres 29.29 Guntas belonging to Corporate Debtor. However, the Adjudicating Authority was pleased to dismiss the said application on the ground that the Corporate Debtor was undergoing CIRP as opposed to liquidation proceedings apart from being contrary to regulation 29 of IBBI (Insolvency Resolution Process of Corporate Person) Regulations 2016.

47. Learned Senior Counsel for the Appellant further submitted that the RP after failing to obtain permission from the Adjudicating Authority to liquidate the asset of the Corporate Debtor, has not made any attempt for resolution of Corporate Debtor and actively sought for liquidation of the Corporate Debtor. When the extended date of expiry of CIRP period was come to an end on 16.06.2018, at the very last minute, the RP had formally addressed the letter on 01.06.2018 requesting the State Government to take necessary steps to fulfil G.O. MS No. 28 dated 28.04.2015. Thus, the State Government was approached as a last resort at a belated stage, to make efforts to revive the Corporate Debtor. Immediately, the State Government constituted the five Member Committee on 11.06.2018 for revival of the units of the Corporate Debtor. The same was done under the bonafide belief that the RP would file an application before the Adjudicating Authority for extension of CIRP period beyond 15.06.2018 through exclusion of time. However, the RP mischievously file an application seeking for an extension of CIRP beyond 270 days knowing well that extension of CIRP beyond 270 days was statutorily impermissible. The State of Telangana also filed an application to ensure that the RP does not derail the resolution of the Corporate Debtor. Ld. Adjudicating Authority noticing the intention of State of Telangana extended the duration of CIRP by excluding 78 days being the time spent in adjudication of the application for granting permission for sale of land and further gave liberty to the State of Telangana to file a resolution plan. However, the State of Telangana could not take any further steps to achieve resolution of the Corporate debtor as the time granted by the

Adjudicating Authority expired on 02.09.2018. If the RP had sought for exclusion of the duration of adjudication of the Application filed by the Appellant State of Telangana and an additional period of 81 days is provided for completion of CIRP. The State of Telangana could have revived the Corporate Debtor by finding or through submitting a resolution plan.

48. Learned Senior Counsel for the Appellant further submitted that the RP conducted CIRP against the interest of the Corporate Debtor. The CIRP cost have been consistently paid by the private management of the Corporate debtor. Such cost should have been paid by the financial creditors as per the regulation no. 3 & 5 of the 1st Schedule of code of conduct for Insolvency Professionals to the IBBI (Insolvency Professional Regulations) 2016. It is also pointed out that as per the valuers appointed by the RP, even the distress sale value of the Corporate debtor is more than the dues owed by the Corporate debtor to all its creditors. The liquidation of the Corporate debtor would benefit nobody except the private management of the Corporate debtor and would be detrimental to thousands of farmers relying on the Corporate debtor for their livelihood. In light of the aforesaid submission, it is prayed that the liquidation order ought to be set aside.

49. Per Contra, Ld. Counsel for the Respondents No.1 & 2 submitted that the allegation raised in the Appeal does not constitute material irregularity and the same is made without any basis. So far as the CIRP cost is concerned regulation 2A defines that Applicant means the person filing an Application under Section 7, 9 or 10 of the IBC as the case may be. In the instant case, the Application under Section 10 of the IBC was instituted by

the Corporate Debtor and Regulation 33 provides that the Applicant shall fix the expenses to be incurred by the IRP and the Applicant shall bear the expenses which shall be reimbursed by CoC. In the instant case the Applicant being the Corporate Debtor paid the CIRP cost to the IRP. Hence, there is no material irregularity. Regulation 34 prescribes that the committee shall fix the expenses to be incurred on or by the RP and the expenses constitute Insolvency Resolution Process Cost. There is also an explanation to Regulation 34 that the expenses include the fees to be paid to the RP and also other expenses incurred by the RP.

50. Ld. Counsel for the Respondent No. 1 & 2 submitted that the Corporate Debtor stopped the operation since 2015 and there were no cash flows being generated since then. Whereas the monthly fixed expenses of the Corporate Debtor are close to Rs. 21 Lacs to meet fixed expenses of the Corporate Debtor, in the second CoC Meeting dated 21.11.2017 took decision to raise interim finance, the Appellants did not raise any objection in the CoC meetings or before the Adjudicating Authority alleging material irregularity. On the other hand, in the 10th CoC meetings dated 31.07.2017 the Appellant No. 2 Mr. Bhadru Malloth assured that the matter pertaining ongoing CIRP cost will be taken up with the Government of Telangana to arrange funds. However, they never turned up. The Secured Financial Creditors of the Corporate Debtor pooled resources for two months in September, 2018 and October, 2018 summing up to Rs. 26,84,722/-. Thereafter, the Financial Creditor had expressed their inability to raise interim finance/CIRP cost of the Corporate Debtor. Thus, as a last resort the

interim finance was funded by the private management, further, RP placed an agenda item for discussion at every meeting of CoC for ratifying the expenditure incurred and that every notice alongwith agenda of every CoC meeting had been shared with the Appellants for inviting them to attend the meeting. The Appellants during the CoC meetings or before the Adjudicating Authority never raised any objection in this regard.

51. Ld. Counsel for the Respondent No. 1 & 2 further submitted that the Regulation 36-A which provides that the publication of Form-G in one English and one in regional language newspaper with wide circulation such amendment was inserted with effect from 04.07.2018. Whereas, in the present case the publication in the newspapers was made on 16.05.2018. Regulation 36-A did not mandate the publication of invitation of Resolution Plan either in Form-G or otherwise in newspapers. It is only the amended Regulation 36A which came into effect from 04.07.2018 that requires the publication of Form-G in the newspapers. Therefore, the publication in the newspaper made by the RP in the case on hand on 16.05.2018 was statutorily not required and hence, the Appellants cannot take advantage of the amendment that came later, to attack advertisement.

52. Ld. Counsel for the Respondent No. 1 & 2 also submitted that the Appellants made false allegations without any basis that the RP by acting in concert with the private management to liquidate the assets of the Corporate Debtor. The minutes of the 3rd CoC meeting dated 24.01.2018 is categorically clear and the same are self-explanatory that RP already clarified that the sale of unencumbered asset cannot be done in the instant

case. It is the CoC decision to file an Application before the Adjudicating Authority to liquidate the assets.

53. Ld. Counsel for the Respondent No. 1 & 2 submitted that the allegation, the RP approached the State of Telangana at a belated stage is without any basis. The Appellants filed a claim of Rs. 50.91 Crores at the time of invitation of claims by the IRP. The RP immediately after his appointment approached the State of Telangana and sought appointment to meet in person to understand the thinking of Government of Telangana in reviving the Company as per the Government Order dated 29.04.2015. Thereafter, sent emails dated 04.11.2017, 6.11.2017 and 14.11.2017, however, no communication was received from the Appellants. The Appellants vide letter dated 01.11.2017 and 13.11.2017 notified the RP to inform the Adjudicating Authority that the proposal to sell the surplus vacant land acquired by the Corporate Debtor, is still under process and in reply to the said letter the RP vide letter dated 18.11.2017, informed the Appellants that CIRP is a time bound process to be completed within 180 days and if no resolution plan is forthcoming within such period, the Corporate Debtor company will step into liquidation. The RP conducted 12CoC meetings, notices and minutes of all meeting were circulated from time to time to the Appellants through emails. The Appellants right from the commencement of the CIRP have knowledge that resolution plan is required in order to revive the Corporate Debtor within 270 days. The Appellants are aware of the entire process since BIFR and also that of CIRP. Hence, they cannot plead ignorance.

54. Ld. Counsel for the Respondent No. 1 & 2 lastly submitted that allegation that the RP has not filed an Application for exclusion of time lost during CIRP is not correct. After passing of the order dated 03.09.2018 the Appellants did not ask the RP to seek exclusion to time consumed under I.A. No. 213 of 2018 to enable filing of resolution plan. It is also pointed out that no resolution plan was received to the RP within/after expiry of CIRP period. Consequently, when there is no receipt of resolution plan Section 33 of the IBC is inevitable. Since, there is no resolution plan, the members of CoC unanimously passed the resolution to liquidate the Corporate Debtor and authorized RP to file an Application for liquidation. Thereafter, the RP received letter from Director of Sugar & Cane Commissioner, Hyderabad vide G.O. MS No. 28 dated 06.09.2018 the State Government is not authorized to file the resolution plan to revive Corporate Debtor due to dissolution of first Legislative Assembly. In such circumstances, the RP filed the Application before the Adjudicating Authority for liquidation of Corporate Debtor Company.

55. Thus, all the false and frivolous allegation raised in this Appeal does not constitute material irregularity and the same is made without any basis. The Appeal is not maintainable and liable to be dismissed.

56. Ld. Counsel appearing on behalf of the Respondent No. 3 to 7 supports the arguments advanced by the Ld. Counsel for the Respondent No. 1 & 2.

57. After hearing Ld. Counsels for the parties, we have carefully examined the record.

58. Firstly we have considered whether the RP deliberately published EOI in newspapers with the minimal subscription base and circulation, in contravention of regulation 36-A of CIRP Regulations? Admittedly, EOI was published in two newspapers i.e. The New Indian Express (English Language) and 2nd Andhra Prabha (Regional Language) inviting the prospective resolution applicants to submit their EOI for the submission of resolution plan on 26.01.2018 with a corrigendum on 30.01.2018. Regulation 36A before amendment provides that the RP shall publish brief particulars of invitation in Form-G of the schedule (a) on the website of the Corporate Debtor (b) on the website designated by the board for the purpose. The Regulation 36-A amended with effect from 04.07.2018 which provides that the RP shall publish Form-G in one English and one regional language newspaper with wide circulation at the location of registered office and principal office of the Corporate Debtor and any other location where in the opinion of the RP the Corporate Debtor conducts material business operations. Thus, it is apparent that before amendment of Regulation 36-A, it was not required for the RP to publish the Form-G in any newspaper. Therefore, the objection of the Appellants that the Form-G was not published in any newspaper with wide circulation is of no consequence.

59. Now, we have considered the other objection that whether the RP has not made any attempt for resolution of Corporate Debtor and actively sought for liquidation of the Corporate Debtor? It is also one of the allegation that the RP had formally addressed the letter requesting the State Government to take necessary steps at the very last minute. In this regard, the

Respondents have filed the notices and minutes of CoC meeting circulated from time to time to the Appellants through various emails. The copies of emails are part of the Reply of R1 available at Pg. 960 to 1033 Volume IV. There is nothing on record to show that these communications were not received by the Appellants.

60. The Appellants filed claim of Rs. 50.91 Crores on 05.10.2017 at the time of invitation of claims by IRP (Annexure R-18 at Pg. 835 to 867 Reply of R1 Volume IV). The RP immediately after his appointment approached the State of Telangana and sought appointment to meet in person to understand the thinking of Government of Telangana in reviving the Company as per the Government G.O. MS No. 28 dated 29.04.2015 through email dated 04.11.2017, 06.11.2017 and 14.11.2017. The Respondents have placed on record the letter of RP dated 18.11.2017 which is reply of the Appellants letter dated 01.11.2017 and 13.11.2017. In the aforesaid letter the RP informed the Appellants that the CIRP is a time bound process to be completed within 180 days and if no resolution plan is forthcoming within such period the Corporate Debtor Company will step into liquidation (Letter is at Pg. 530 to 532 Reply of R1 Volume III).

61. With the aforesaid, it cannot be said that the Appellants were unaware with the CIRP and the RP approached the Appellants at a belated stage for revival of Corporate Debtor.

62. The Appellants have not placed on record any communication to show that they have directed the RP to seek exclusion to time consumed under I.A. No. 213 of 2018 to enable filing of resolution plan. Admittedly, no

resolution plan was submitted by the Appellants to the RP within/after expiry of CIRP period.

63. With the aforesaid discussion, we are unable to convince with the arguments of Ld. Counsel for the Appellants that the RP committed material irregularity while conducting the CIRP of the Corporate Debtor and the RP has not made any attempt for resolution of the Corporate Debtor and actively sought for liquidation of the Corporate Debtor. As per Section 61(4) of the IBC the order of liquidation can be set aside only on the ground of material irregularity or fraud committed in relation to such a liquidation order.

64. With the aforesaid we hold that the application under Section 10 filed by VR Chary authorised by the Board of directors, was not maintainable. Resultantly, the impugned order dated 20.09.2017 passed by the Adjudicating Authority is set aside and in effect order(s) passed by Adjudicating Authority appointing IRP declaring moratorium and subsequently passing order liquidation dated 03.06.2019, all such orders and actions are declared illegal and are set aside. The application preferred under Section 10 of IBC is dismissed. Ld. Adjudicating Authority will now close the proceedings. The Corporate Debtor is released from all the rigour of law and is allowed to function independently through its Board of director from the immediate effect.

65. We make it clear that we have allowed the Appeal against the order of initiation of CIRP on merit. We are not allowing the Appeal against the order of liquidation on the ground of material irregularity but as the order of

initiation of CIRP is void ab-initio. Therefore, the subsequent order of liquidation is also set aside.

66. The Adjudicating Authority will fix the fee of Resolution Professional/Liquidator and the Corporate Debtor will pay the fees of the RP/Liquidator and also pay CIRP cost. The Appeals are allowed with the aforesaid observations. No order as to costs.

[Justice Jarat Kumar Jain]
Member (Judicial)

[Kanthi Narahari]
Member(Technical)

New Delhi
29th October, 2021
SC/SR