

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 43-43A of 2021

IN THE MATTER OF:

Digambar Anandrao Pingle

Shareholder/Director/Promoter
M/s Pingle Builders Pvt. Ltd.
S/o Sh. Anandrao Pingle
F-1/5, Jilla Parishad Complex,
M. G. Road, Nashik – 1,
Maharashtra.

...Appellant

Versus

Shrikant Madanlal Zawar

Erstwhile Resolution Professional
M/s Pingle Builders Pvt. Ltd.
D-26/404, Yogi Ashram, B Wing,
Yogi Nagar, Borivali (West),
Mumbai City, Maharashtra – 400 091.

Also at

Shrikant Madanlal Zawar

Erstwhile Resolution Professional
M/s Pingle Builders Pvt. Ltd.
252, The Summit, Business Bay,
Near Western Express Metro Station,
Andheri (E), Mumbai,
Maharashtra – 400 093.

...Respondent No. 1

Vandana Garg

Liquidator
M/s Pingle Builders Pvt. Ltd.
Unit No. 307, 3rd Floor,
Exgellencia Lodha Supremus 2,
Wagle Estate, Panchpakhadi,
Thane, Maharashtra – 400 604.

...Respondent No. 2

State Bank of India

Stressed Asset Recovery Branch
Kerom Building, First Floor,
Plot No. A – 112,
Next to Wagale Industrial Estate,
Thane (W) – 400 604.

...Respondent No. 3

Vijaya Bank

M. G. Road Branch,
Nashik – 422 001.

...Respondent No. 4

M/s Soorajmull Baijnath Pvt. Ltd.

(Operational Creditor/ Original Applicant)
304, Jasmine Tower,
31, Shakespere Sarani, Kolkata,
West Bengal – 700 017.

...Respondent No. 5

For Appellant: Mr. Gautam Singhal, Advocate.

For Respondents: Mr. Ranjan Agarwal, Advocate for R-1.

Ms. Ranjana Roy Gawai, Mr. Pervinder and Mr. Vineet Kumar, Advocates for R-2.

Mr. Kartik Malhotra and Ms. Abhilasha Shrawat, Advocates for R-3.

Mr. Brijesh Kr. Tamber, Advocate for R-4.

Ms. Garima Sharma, Mr. Girish B. Kedia, Mr. Mohit Chaudhary and Ms. Shivangi Girish Kedia, Advocates for R-5.

ORDER
(Virtual Mode)

09.07.2021: The present Appeal has been filed by the Appellant as Ex-Director/ Promoter of the Corporate Debtor –‘M/s Pingle Builders Pvt. Ltd.’. The Appeal has been filed against impugned order dated 11th December, 2020 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, Court – III at Mumbai in I.A. No.1506/2019 which was filed by the Resolution Professional and M.A. No.2261/2019 and I.A. No. 1156/2020 which were filed by the Appellant in C.P. (IB) No. 215/2018 in the matter of ‘M/s Soorajmull Baijnath Pvt. Ltd. vs. M/s Pingle Builders Pvt. Ltd.’.

2. The appeal is basically against passing of orders on the application of the Resolution Professional directing liquidation and not accepting the plan of the Appellant which he had submitted as the Resolution Applicant. The Appellant claimed that the Corporate Debtor was an MSME and that he could file a Resolution Plan.

3. The appeal sets out in various details so as to how CIRP was initiated on 19th July, 2018 and how earlier in meeting dated 5th January, 2019 CoC resolved to go for liquidation but as to how on request of the Appellant the CoC reconsidered and recalled its earlier decision in meeting dated 10th January, 2019. The appeal shows that the Appellant made efforts to settle under Section 12(A) of Insolvency and Bankruptcy Code, 2016 ('IBC' for short) with the Operational Creditor and with OTS for Respondent No. 3. Appeal shows that on 24th June, 2019, the CoC had again resolved that the Company is required to go into liquidation. As per the Appeal, the CoC in its meeting held on 24th June, 2019 discussed the proposal of the Appellant and certain revisions were suggested.

4. The Resolution Professional filed I.A. No. 1506/2019 under Section 33 of IBC for liquidation of the Corporate Debtor. The Appeal claims that the Appellant filed MA No. 2261/2019 requesting withholding of order of liquidation and directions to CoC to consider resolution/ settlement plan of the Appellant. Appeal mentions as to how Adjudicating Authority in order dated 19th July, 2019 directed Resolution Professional to hold a meeting in 5 days so that the CoC could consider revised proposal of the Appellant. According to the Appeal, in the 10th Meeting of CoC held

on 22nd July, 2019, the Appellant had offered settlement which was accepted by Respondent No. 5 on the condition that the Appellant would make payment of Rs.30,00,000/- before 5th August, 2019. Appeal claims that the Operational Creditor subsequently backed out of this proposal. Appeal claims that the Appellant made further efforts for settlement and also gave resolution plan and the Resolution Professional had objected to the Resolution Plan in meeting held on 23rd August, 2019 and then, the Appellant tendered Resolution Plan before the Adjudicating Authority and then the Adjudicating Authority directed the Resolution Professional to place it before the CoC. Appeal claims that in the 12th Meeting of CoC held on 7th October, 2019, resolution plan of the Appellant was unanimously approved by the CoC 'subject to certain fulfilments' which were time bound as recorded in the minutes (Annexure A-14 – Page 174). The Appeal highlights various efforts made by the Appellant for settlement/ resolution. Appeal claims that I.A. 1156/2020 was filed to direct the Resolution Professional to hold CoC Meeting for final approval of Revised Resolution Plan given by the Appellant which was given in compliance of the conditional approval of the resolution plan given by the CoC in 12th meeting held on 7th October, 2019. Instead of this, impugned order came to be passed and I.A. No. 1506/2019 filed by the Resolution Professional for initiation of liquidation proceedings was accepted and M.A. No. 2261/2019 of the Appellant to withhold liquidation was dismissed and I.A. No. 1156/2020 of the Appellant to call CoC meeting for final approval of the Revised Resolution Plan was also dismissed.

5. Now when this Appeal has come up before us for hearing, the Learned Counsel for Appellant has not referred to any of the above grounds raised by the Appellant which are referred in the Appeal and has limited his arguments to request that the Corporate Debtor is now in liquidation and in the liquidation proceedings the Appellant has given a bid to take over the Corporate Debtor as going concern but the obstruction in the way of the Appellant are observations of the Adjudicating Authority in Para 4 of the impugned order holding that the Appellant was hit by Section 29A of the IBC. The Learned Counsel submitted that all the other grounds raised by the Appellant in the Appeal are not being pressed by the Appellant and the Appeal is now limited to the observations made by the Adjudicating Authority in Para 4 of the impugned order.

6. Learned Counsel for Respondent No. 1 appearing for Ex-Interim Resolution Professional (IRP) submits that the Appellant has in the Appeal made various allegations which are incorrect like making allegations that the IRP connived with Responded No. 5 the Operational Creditor and other competitors of the Corporate Debtor so as to ensure that the Corporate Debtor goes into liquidation. Reference is made to Para 7(ix) of the Appeal in this regard.

7. Learned Counsel for the Liquidator (Respondent No. 2) submitted that in the liquidation proceedings bids have been called, in which the Appellant has given a bid and there are other bids also. The Liquidator is considering the eligibility of the Appellant in the context of observations in Para 4 of the impugned order and other relevant factors with regard to the Appellant.

8. Learned Counsel for Respondent No. 5 is submitting that the Corporate Debtor was not an MSME and during the pendency of the CIRP, Appellant procured the MSME Certificate without authority, copy of which has been filed in the Appeal. The Learned Counsel for Respondent No. 5 is also making various other allegations against the Appellant to state that the Appellant has acted fraudulently.

9. The Adjudicating Authority in the impugned order in Para 4 observed as under:

“4. Again, there are several allegations against the ex-promoter who is also the resolution applicant herein regarding the fraudulent transactions etc. Also, on earlier occasions, he has promised to pay and later failed to pay the amount and thus this attempt by him appears merely to stall the proceeding and buy time. Also, the applicant in these two M.A.s is the ex-promoter of the Corporate Debtor against whom an application for preferential transactions was filed by the RP. Here, it is to be noted that the applicant gets hit by Section 29A of the Code and is therefore, restrained from filing the resolution plan. For ready reference, we would like to reproduce Section 29A hereunder:”

10. Thereafter, the Adjudicating Authority reproduced Section 29A of IBC. Then, in Para 5, the Adjudicating Authority made the following observations:

“5. Keeping the above facts and circumstances in mind and relying upon this settled position of law, we believe that the matter is unnecessarily being dragged by the ex-promoters and is merely an attempt to stall the proceeding. This Tribunal has therefore allowed the application filed by the Resolution Professional for

liquidation of the Corporate Debtor. As an order has been passed by this Bench in M.A. No. 1506 of 2019 today itself allowing liquidation of the corporate debtor company, these two Interlocutory Applications bearing numbers I.A.1156 of 2020 and M.A. 2261 of 2019 wherein prayers have been sought by the ex-directors for directing the CoC to consider the resolution plan submitted by them, are hereby disposed of as dismissed.”

11. The Learned Counsel for the Appellant is submitting that if Clause (g) of Section 29A of IBC is seen, the party gets debarred if an order has been made by the Adjudicating Authority in that regard. It is stated that M.A. No. 3020 of 2019 filed under Section 43, 66 and 65 of IBC is still pending before the Adjudicating Authority and order in that regard has not been passed. Thus, according to Learned Counsel, the Appellant should be permitted to participate in the liquidation proceedings so as to bid for taking over the Corporate Debtor as a going concern. The Learned Counsel for the Liquidator accepts that the M.A. is still pending.

12. Having gone through the matter, although the Appellant heavily banked upon his efforts made to settle with the Operational Creditor and also with other creditors so as to bring about the withdrawal under Section 12(A) of IBC and also relied heavily on his efforts to show that the Appellant was trying to bring through a resolution plan filed by him and his resolution plan was required to be accepted, fact remains that the record does not show that Resolution Plan, as such of the Appellant, was approved by CoC by any given majority. Section 9 application was admitted on 19th July, 2018 and Liquidation order passed by the Adjudicating

Authority on 11th December, 2020. This is more than two years of time. Clearly, if in the time prescribed under Section 12 of IBC resolution was not reached in the given time, liquidation is the only consequence which had to follow and which has been ordered though belatedly.

13. Now coming to Para 4 of the impugned order, the argument of Learned Counsel for the Appellant is attractive that there must be an order required under Clause (g) of Section 29A, which reads as under:

“29A. A person shall not be eligible to submit a resolution plan, if such person, or any other person acting jointly or in concert with such person –

--x---x---x--

(g) has been a promoter or in the management or control of a corporate debtor in which a preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction has taken place and in respect of which an order has been made by the Adjudicating Authority under this Code;”

14. There is yet another factor which is relevant and we find that the Appellant has obtained Annexure-A-3 – an MSME Certificate for which application had been made on 5th March, 2019. Clearly, CIRP with regard to the Corporate Debtor started on 19th July, 2018 and on 5th March, 2019 the Corporate Debtor was under the management of IRP/RP. The Appellant has not shown that the application for MSME was made through the IRP/RP. The Learned Counsel for Respondent No. 5 is claiming that there was no consent of the IRP/RP. When the Corporate Debtor

was not under the management of the Appellant, such unauthorized application could not have been made and the claim of the Appellant that the Corporate Debtor is MSME would require to be ignored. Appellant cannot take advantage of his wrongful act. Keeping in view Judgment in the matter of '*Arun Kumar Jagatramka vs Jindal Steel and Power Ltd.*' – 2021 SCC Online SC 220, back door entries cannot be allowed. After CIRP was initiated former Promoter/ Director cannot suppress from IRP/RP and apply for MSME Certificate and tide over ineligibility under Section 29A of the IBC.

15. Admittedly, M.A. No. 3020/2019 regarding Section 43, 66, 65 of IBC is still pending and is not decided one way or the other. The observation in context of Section 29A appears to have been made to demonstrate how sufficient chance was given to the Appellant though he appeared to be undeserving, and was now dragging proceedings.

16. (A) For the above reasons, we would ignore the observations made in Para 4 of the impugned order. It would be appropriate for the Adjudicating Authority to formally decide M.A. No. 3020/2019 which is stated to be still pending, at the earliest. We request the Adjudicating Authority to do so.

(B) Averments made by the Appellant against the Resolution Professional referred to by the Learned Counsel for Respondent No. 1 are required to be ignored as there is no foundation for the averments, and they appear to be based on surmises.

(C) We decline to give any direction to Liquidator, as requested by Advocate for Appellant, as we decline to accept claim made in Appeal that the Corporate Debtor is MSME. We dispose of the Appeal without setting aside the impugned order explaining context of observations in Para 4 of the impugned order.

(D) The Appeal is disposed of as above. No orders as to costs.

[Justice A.I.S. Cheema]
The Officiating Chairperson

[Dr. Alok Srivastava]
Member (Technical)

Archana/gc.