

**IN THE NATIONAL COMPANY LAW TRIBUNAL, AHMEDABAD**

**Division Bench**

**Court - 1**

ITEM No.136  
CP(IB) 395 of 2020

**Order under Section 33 & 34 IBC**

**IN THE MATTER OF:**

Shri Pramod Kumar Pathak  
V/s  
Arfat Petrochemicals Pvt Ltd

.....Applicant

.....Respondent

**Order delivered on ..22/12/2021**

**Coram:**

Madan B. Gosavi, Hon'ble Member(J)  
Ajai Das Mehrotra, Hon'ble Member(T)

**PRESENT:**

For the Applicant :  
For the Respondent :

**ORDER**

The case is fixed for pronouncement of order.

The order is pronounced in the open court, vide separate sheet.

  
**AJAI DAS MEHROTRA  
MEMBER (TECHNICAL)**

  
**MADAN B GOSAVI  
MEMBER (JUDICIAL)**

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
AHMEDABAD BENCH  
COURT-I**

**CP(IB) No. 395 of 2020**

In the matter of:

[An application filed under Section 33 r.w. 34 of the Insolvency and Bankruptcy Code, 2016 along with Rule 11 of NCLT Rules, 2016].

In the matter between:

**SHRI PRAMOD KUMAR PATHAK**

Aadhar No. 848356954125

Having the address at:

Flat No. SQC-7, J.K. Nagar,  
Kota, Rajasthan (324003)

**Versus**

**M/S. ARFAT PETROCHEMICALS PVT. LTD.**

CIN: U23209GJ2001PTC102724

Having its registered office at:

B-59, Zainab Park Society, Gorat  
Road, Rander, Surat, Gujarat-395005

Order Reserved on 08/12/2021

Order Delivered on 22/12/2021

**CORAM: MADAN B. GOSAVI, MEMBER (JUDICIAL)**

**AJAI DAS MEHROTRA, MEMBER (TECHNICAL)**

**Appearance:**

For the Applicant : Ld. Adv. Mr. Pankaj Jain a.w. Ld. Adv. Aman  
Shankar

For the Respondent : Ld. Sr. Adv. Mr. Navin Pahwa a.w. Ld. Adv.  
Nipun Singhvi



## ORDER

**[Per: MADAN B. GOSAVI, MEMBER (JUDICIAL)]**

1. This application under Section 33 and 34 read with Section 31(1) of the Insolvency and Bankruptcy Code, 2016 (in short "**IBC, 2016**") along with Rule 11 of NCLT Rules, 2016 filed by one Mr. Pramod Kumar Pathak claiming to be Operational Creditor of the Respondent - M/s. Arfat Petrochemicals Pvt. Ltd. requesting herein to pass order of the Liquidation of the Respondent on the ground that the Respondent committed a breach of the terms of sanctioned rehabilitation scheme dated 07.01.2005 duly approved by Appellate Authority for Industrial and Financial Reconstruction (in short "**AAIFR**").
  
2. There is no much dispute to the fact that the M/s. J. K. Synthetics Pvt. Ltd. was declared as a sick industrial unit by the Board of Industrial and Financial Reconstruction (in short "**BIFR**") vide order dated 02.04.1998. The Respondent herein entered into Memorandum of Understanding (in short "**MoU**") agreement with M/s. J. K. Synthetics Pvt. Ltd. and thereby taking over the liabilities of Sick Industry. On the basis of that MoU, the AAIFR vide order dated 07.01.2005 approved and sanctioned the implementation of the rehabilitation scheme. It is

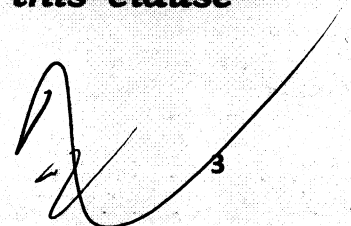
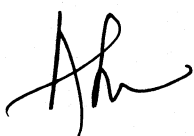




also not in dispute that the order of AAIFR sanctioning the rehabilitation scheme stands undisturbed.

3. The Petitioner claiming to be the representative of the worker union of Sick Industry M/s. J. K. Synthetics Pvt. Ltd. filed this application to pass the order of Liquidation of the Respondent on the ground that the Respondent committed the breach of implementation of the scheme which is deemed to be approved Resolution Plan as per the Schedule-VIII of the Insolvency and Bankruptcy Code, 2016 whereby the amendment to the Sick Industrial Companies (Special Provisions) Repeal Act, 2003 was carried on in view of Section 242 of the IBC, 2016. The amended provisions of Section 4(b) of Sick Industrial Companies (Special Provisions) Repeal Act, 2003 states that "**...(b) On such date as may be notified by the Central Government in this behalf, any appeal preferred to the Appellate Authority or any reference made or inquiry pending to or before the Board or any proceeding of whatever nature pending before the Appellate Authority or the Board under the Sick Industrial Companies (Special Provisions) Act, 1985 shall stand abated:**

**Provided that a company in respect of which such appeal or reference or inquiry stands abated under this clause**

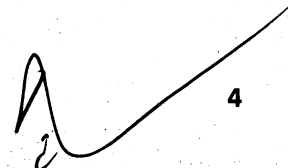


**may make reference to the National Company Law Tribunal under the Insolvency and Bankruptcy Code, 2016 within one hundred and eighty days from the commencement of the Insolvency and Bankruptcy Code, 2016 in accordance with the provisions of the Insolvency and Bankruptcy Code, 2016:**

**Provided further that no fees shall be payable for making such reference under Insolvency and Bankruptcy Code, 2016 by a company whose appeal or reference or inquiry stands abated under this clause."**

**<sup>1</sup>[(Provided also that any scheme sanctioned under sub-section (4) or any scheme under implementation under sub-section (12) of section 18 of the Sick Industrial Companies (Special Provisions) Act, 1985 shall be deemed to be an approved resolution plan under sub-section (1) of section 31 of the Insolvency and Bankruptcy Code, 2016 and the same shall be dealt with, in accordance with the provisions of Part II of the said Code:**

**Provided also that in case, the statutory period within which an appeal was allowed under the Sick Industrial Companies (Special Provisions) Act, 1985 against an order of the Board had not expired as on the date of the**



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**notification of this Act, an appeal against any such deemed approved resolution plan may be preferred by any person before National Company Law Appellate Tribunal within ninety days from the date of publication of this order.]”**

4. Learned Counsel Mr. Pankaj Jain appearing for the Petitioner submitted that as per the above provision, the sanctioned scheme by AAIFR is the Resolution Plan. He submitted that since there is a breach of implementation of the Resolution Plan, the Applicant has filed this application under Section 33 and 34 of the IBC, 2016 for passing order of the Liquidation of the Respondent because the Respondent committed the breach of implementation of the sanctioned scheme (deemed Resolution Plan). Upon our query, as to how this application which is not filed by the Resolution Professional and being filed by purported Operational Creditor of the Respondent is maintainable without undertaking the Corporate Insolvency Resolution Process of the Respondent as per the Scheme of IBC, 2016? The Learned Counsel submitted that this Adjudicating Authority itself in its order dated 05.04.2021 passed in I.A. No. 115 of 2020 in the case of Surendra Singh Hada & 125 other employees vs. M/s. Arfat Petrochemicals Pvt. Ltd. Anr. has held that “...5. (iii)

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***Having decided so, we give liberty to the Operational Creditor to file application under Section 33(3) of Insolvency and Bankruptcy Code, 2016 subject to compliance of relevant provisions of law. In view of our decision, we do not consider it necessary to deal with other contentions made by both the sides."***

5. Learned Counsel further submitted that since this Adjudicating Authority has already held that the sanctioned scheme under Sick Industrial Companies Act, 1985 (in short "**SICA, 1985**") is the Resolution Plan within the meaning of IBC, 2016 and upon breach of the implementation of the Resolution Plan, the aggrieved party can approach this Adjudicating Authority under Section 33(4) of IBC, 2016 for passing the order of Liquidation of the Respondent, hence, this application is maintainable.
6. As against this, the Learned Senior Counsel Mr. Navin Pahwa for the Respondent submitted that Hon'ble NCLAT in the case of Pr. Director General of Income-tax (Admn. & TPS) vs. Spartek Ceramics India Ltd. & Anr. in Company Appeal (AT) (Insolvency) Nos. 160 of 2017 has held that the Notification dated 24.05.2017 is not valid, and hence, the amendment carried pursuant to that notification declaring the sanctioned scheme under SICA, 1985 as to be the Resolution Plan does not stand in

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the Statute Book. Learned Senior Counsel further submitted that the above order of the Hon'ble NCLAT was challenged before the Hon'ble Supreme Court in Civil Appeal Nos. 7291-7292 of 2018 and the Hon'ble Supreme Court approved the findings of the Hon'ble NCLAT that the scheme cannot be the Resolution Plan within the IBC, 2016.

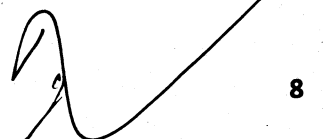
7. Learned Senior Counsel further submitted that since the notification dated 24.05.2017 declared to be void and, hence, the amendment in Section 4 of the SICA, 1985 goes away from the Statute Book, and hence, the scheme under Section 4(b) of Sick Industrial Companies (Special Provisions) Repeal Act, 2003 cannot be called as an approved Resolution Plan. This application filed under Section 33(4) of the IBC, 2016 for passing order of the Liquidation of the Respondent on the ground that the Respondent has committed the breach of terms of the Plan is not maintainable at all. Learned Senior Counsel further submitted that as per the Scheme of IBC, 2016, there has to be an attempt of Resolution of Insolvency of any Company and upon failure of such efforts, the Adjudicating Authority can pass the order of Liquidation of that Company. According to the Learned Senior Counsel, this application filed by one of the purported Operational Creditors under Section 33(4) of IBC,

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2016 is not maintainable at all. Hence, he prayed for its rejection.

8. In the rejoinder, the Learned Counsel for the Petitioner pointed out that the Hon'ble NCLAT in its order, has itself held in Para-56 that **"....the NCLAT has no jurisdiction to declare Central Government Notification to be illegal.** On the other hand, the Hon'ble Delhi High Court in the case of Ashapura Minechem Ltd. vs. Union of India [in W.P. (C) No. 9674 of 2017 dated 01.11.2017] has held that Notification No. S.O. 1683 (E) dated 24.05.2017 to be valid and legal whereby it has been declared that sanctioned rehabilitation scheme is the Resolution Plan within the meaning of the IBC, 2016. Learned Counsel would further submit that in this case sanctioned rehabilitation scheme that has been approved by the AAIFR has to be treated as the Resolution Plan in view of the amended provision of Section 4(b) of Sick Industrial Companies (Special Provisions) Repeal Act, 2003. The Petitioner has proved that the Respondent herein has committed a breach of implementation of the sanctioned scheme which is deemed to be Resolution Plan and, hence, this application under Section 33(4) of the IBC, 2016 is maintainable. This Adjudicating Authority may pass the order of Liquidation of the Respondent.



9. Upon going through the pleadings of the parties and having heard the arguments of learned counsels, the following points arise for our determination. We record our findings with the reasons stated below:

I. Whether the sanctioned scheme of rehabilitation dated 07.01.2005 is the Resolution Plan within the meaning of Section 5(26) of the IBC, 2016 in view of the Notification No. S-O-1683 (E) dated 24.05.2017?

Finding -No.

II. Whether it can be held that the Respondent has committed the breach of the sanctioned rehabilitation scheme and, hence, liable for order of liquidation under Section 33(4) of the IBC, 2016?

Findings-No.

**Reasons:**

**Point No. 1**

10. On 07.01.2005, the AAIFR approved and sanctioned the implementation of DRS dated 08.12.2003. The Respondent did not controvert this fact in clear terms. However, we do not wish to go into any such controversy whether the sanctioned scheme was put for implementation and whether there is a breach of implementation of the scheme? We have only to consider

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whether the sanctioned scheme can be treated as the Resolution Plan within the meaning of Section 5(26) of the IBC, 2016.

Section 5(26) of the IBC, 2016 defines the Resolution Plan as:


(26) "resolution plan" means a plan proposed by <sup>2</sup>[resolution applicant] for insolvency resolution of the corporate debtor as a going concern in accordance with Part II;

<sup>3</sup>[Explanation.- For removal of doubts, it is hereby clarified that a resolution plan may include provisions for the restructuring of the corporate debtor, including by way of merger, amalgamation and demerger;]

Above definition of the Resolution Plan in the IBC, 2016 does not cover the sanctioned rehabilitation scheme approved under Section 18(4) of the Sick Industrial Companies (Special Provisions) Act, 1985 but in order to remove the difficulty in reading the law, the Central Government by invoking its power under Section 252 of the IBC, 2016, amended Section 4 of Sick Industrial Companies (Special Provisions) Repeal Act, 2003 vide Notification No. S-O-1683 (E) dated 24.05.2017.

Amended provisions of Section 4 read as follows:

**"...(b) On such date as may be notified by the Central Government in this behalf, any appeal preferred to the Appellate Authority or any reference made or inquiry pending to or before the Board or any proceeding of whatever nature pending before the Appellate Authority or the Board under the**



**Sick Industrial Companies (Special Provisions) Act, 1985 shall stand abated:**

**Provided that a company in respect of which such appeal or reference or inquiry stands abated under this clause may make reference to the National Company Law Tribunal under the Insolvency and Bankruptcy Code, 2016 within one hundred and eighty days from the commencement of the Insolvency and Bankruptcy Code, 2016 in accordance with the provisions of the Insolvency and Bankruptcy Code, 2016:**

**Provided further that no fees shall be payable for making such reference under Insolvency and Bankruptcy Code, 2016 by a company whose appeal or reference or inquiry stands abated under this clause."**

**<sup>1</sup>[(Provided also that any scheme sanctioned under sub-section (4) or any scheme under implementation under sub-section (12) of section 18 of the Sick Industrial Companies (Special Provisions) Act, 1985 shall be deemed to be an approved resolution plan under sub-section (1) of section 31 of the Insolvency and Bankruptcy Code, 2016 and the same shall be dealt with, in accordance with the provisions of Part II of the said Code:**


**Provided also that in case, the statutory period within which an appeal was allowed under the Sick Industrial Companies (Special Provisions) Act, 1985 against an order of the Board had not expired as on the date of the notification of this Act, an appeal against any such deemed approved resolution plan may be preferred by any person before National Company Law Appellate Tribunal within ninety days from the date of publication of this order.]"**

11. The Hon'ble NCLAT had occasion to consider the aspect of whether the Central Government invoking its power under Section 242 of the IBC, 2016 can amend Section 4 of the Sick Industrial Companies (Special Provisions) Repeal Act, 2003 by issuing notification dated 24.05.2017?

The Hon'ble NCLAT has held that **"....37. in absence of any ground shown for removing any difficulty in giving effect to the provisions of the 'I&B Code' and as the Central Government cannot exercise powers conferred under Section 242 of the 'I&B Code' for removing the difficulties arisen due to 'SICA Repeal Act, 2003' or omission of provisions of the 'Companies Act, 2013,' this Appellate Tribunal cannot act pursuant to impugned Notification S.O. 1683 (E) dated 24<sup>th</sup> may, 2017 to entertain the appeal.**

The Hon'ble NCLAT further held that **"....45. in view of the aforesaid discussion, we find that the grounds shown by the Central Government in Notification S.O. 1683 (E) dated 24<sup>th</sup> May, 2017 for exercising powers conferred under Section 242 are in conflict with the amended sub-clause (b) of Section 4 of the 'SICA Repeal Act, 2003'."**

12. The Hon'ble NCLAT has recorded the above findings after considering the judgment of Hon'ble Delhi High Court in the



case of Ashapura Minechem Ltd. vs. Union of India [W.P. (C) No. 9674 of 2017 dated 01.11.2017]. The NCLAT noted in Para- 28 of the judgment that **"...the question arises for consideration in this appeal is whether Notification S.O. 1683 (E) dated 24<sup>th</sup> May, 2017 issued by the Central Government in the exercise of the powers conferred under section 242 relates to giving effect to the provisions of the 'I&B Code' or for removing any difficulty in giving effect to the provision of the 'I&B Code'? In other words, whether Notification No. S.O. 1683 (E) dated 24<sup>th</sup> May, 2017 is consistent with Section 242 of the 'I&B Code'?"**

In short, the Ruling of the Hon'ble Delhi High Court relied on by the Petitioner was considered by the NCLAT and ultimately the Hon'ble Appellate Tribunal held **"...45. in view of the aforesaid discussion, we find that the grounds shown by the Central Government in Notification S. O. 1683 (E) dated 24<sup>th</sup> May, 2017 for exercising powers conferred under Section 242 are in conflict with the amended sub-clause (b) of the 'SICA Repeal Act, 2003'."**

13. No doubt in Para-56 of its judgment, the Hon'ble NCLAT has noted that it has no jurisdiction to declare the Central Government's Notification as illegal but at the same time the

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order of the Hon'ble NCLAT was challenged before the Hon'ble Apex Court and the Hon'ble Apex Court ultimately approved the NCLAT's finding in Para-45 (noted above) in its order dated 25.10.2018 in the case of M/s. Spartek Ceramics India Ltd. vs. Union of India & Ors in Civil Appeal No. 7291-7292 of 2018. The Hon'ble Apex Court held that **"2....having gone thorough the judgment dated 28.05.2018 passed by National Company Law Appellate Tribunal (NCLAT), we are of the view that the judgment of the NCLAT holding that the appeal filed by the Central Government in that case not maintainable in view of the fact that the Notification dated 24.05.2017 travels beyond the scope of the removal of difficulties provision is correct."**

14. Since the Hon'ble Apex Court held that notification dated 24.05.2017 travels beyond the scope of the removal of the difficulties provision is correct, it has to be held that the said notification declared to be void and amendment carried in Section 4 of Sick Industrial Companies (Special Provisions) Repeal Act, 2003 goes from the Statute Book.

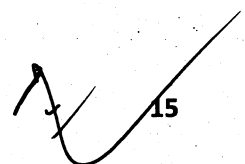
15. Learned Counsel for the Petitioner submitted that this Adjudicating Authority in its order dated 05.04.2021 in IA No. 115 of 2020 has already held that the Scheme is the Resolution

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Plan and granted liberty to the Applicant in that proceeding to initiate action under Section 33(4) of the IBC, 2016 against the Respondent herein. However, it is difficult for us to accept the submissions of Learned Counsel for the Petitioner. This Adjudicating Authority had never considered the point whether the notification dated 24.05.2017 is valid or not. The judgment of the Hon'ble NCLAT in the case of Pr. Director General of ~~Income Tax (Admn. & TPS) Vs. M/s. Spartek Ceramics India Ltd. & Anr.~~ in Company Appeal (AT) (Insolvency) No. 160 of 2017 and further the judgment of the Hon'ble Supreme Court in the case of M/s. Spartek Ceramics India Ltd. Vs. Union of India in Civil Appeal Nos. 7291-7292 of 2018 were never placed before this Adjudicating Authority for consideration. This Adjudicating Authority had given the above advisory without considering the law laid down by the Hon'ble Supreme Court as it was not brought to the notice of the Adjudicating Authority. So, this order of the Adjudicating Authority cannot be relied on.

16. Learned Counsel for the applicant further relied on the order of NCLT, Mumbai Bench in the case of Ashapura Miechem Limited in CP. (IB)-4508/MB/2018 & MA 303/2019. However, as noted above, the order of NCLT, Mumbai had been set aside by Hon'ble NCLAT and the Hon'ble Supreme Court approved the judgment



15

of the Hon'ble NCLAT. Resultantly, we held that the sanctioned scheme of rehabilitation dated 07.01.2005 cannot be termed as the Resolution Plan within the meaning of Section 5(26) of the IBC, 2016. We answer in point no. 1 in negative.

**Point No. 2**

17. As we have held that the sanctioned scheme of rehabilitation is not the Resolution Plan within the meaning of Section 5(26) of the IBC, 2016. We further held that there is no question of the Respondent committing the breach of implementing any of such plan, hence, this application under Section 33(4) of the IBC, 2016 is not maintainable.

18. Even otherwise, the sanctioned scheme under Sick Industrial Companies (Special Provisions) Repeal Act, 2003 cannot be considered as Resolution Plan because the said scheme had not been approved by the Committee of Creditors in terms of sub-section (4) of Section 30 of IBC, 2016 which is the mandate of law. We have been supported with this view by order of Hon'ble NCLAT in Company Appeal (AT) (Insolvency) No. 160 of 2017. It has been held in Para-63 that ***"....As the impugned Scheme dated 20<sup>th</sup> October 2016 has not been approved by the 'Committee of Creditors' in terms of sub-section (4) of***

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**Section 30 of the 'I&B Code', it cannot be treated to be approved 'Resolution Plan' under sub-section (1) of Section 31. If the 'Resolution Plan' does not conform to the requirements of sub-section (2) of Section 30, it is to be rejected."**

19. Since the approved Scheme dated 07.01.2005 cannot be treated as the Resolution Plan within the meaning of Section 5(26) of the IBC, 2016, we hold that there is no question of breach of its implementation as alleged by the Applicant herein. We answered Point No. II in negative.
20. Accordingly, CP(IB) 395 of 2020 stands rejected.
21. The Registry is directed to upload this order on the official website within a maximum of two working days from the date of this order. The authenticated copy of this order also be sent by the registry to the concerned parties by Speed-post within one week from the date of this order.
22. Signed on this, the <sup>22<sup>nd</sup></sup> day of December 2021.



**(AJAI DAS MEHROTRA)  
MEMBER (TECHNICAL)**



**(MADAN B. GOSAVI)  
MEMBER (JUDICIAL)**

Rajeev Kr. Sen/Stenographer