NATIONAL COMPANY LAW APPELLATE TRIBUNAL

AT CHENNAI

(APPELLATE JURISDICTION)

COMPANY APPEAL (AT) (CH) (INS.) NO. 346/2021
(Filed under Section 61 of the Insolvency and Bankruptcy Code, 2016)

Arising out of the Impugned Order dated 13/08/2021 in IA No. 1094/2020 in CP(IB)/153/07/HDB/2019, passed by the 'Adjudicating Authority' (National Company Law Tribunal, Hyderabad Bench – I)

In the matter of:

The Assistant Commissioner of Central Tax
CGST Division,
1/343, 2nd Floor, City Plaza Commercial Centre,
Opp. District Court, Kadapa – 516001 …Appellant

Versus

1. Mr. Sreenivasa Rao Ravinuthala
Resolution Professional
At: M/s Samyu Glass Private Limited,
Regd. Office:
Plot No. 6, 1st Floor, Kavuri Hills,
Phase -1, Jubilee Hills,
Hyderabad -500 033.
Factory Address:
Plot No. 11, APIIC Industrial Development Park,
Pulivendula -516390,
Kadapa District-AP …Respondent No. 1

2. M/s Renganayaki Agencies
Resolution Applicant
Samyu Glass Private Limited
No. 25, Aachi Nagar, P.K. Salai,
Kovilpathu, Karaikal,
Puducherry -609 602. …Respondent No. 2

Present :

For Appellant : Mr. Raj Kumar Jhabakh, Advocate

For Respondent : Mr. T.K. Bhaskar, Sr. Advocate
For Mr. Shabeer Ahmed &
Ms. Varuni Mohan, Advocates, For R1

J U D G M E N T

(Physical Mode)

[Per: ShreeshaMerla, Member (Technical)]

1. Challenge in this Appeal is to the Impugned Order dated 13/08/2020 passed in IA 1094/2020 in CP(IB)153/07/HDB/2019 by National Company Law Appellate Tribunal, Hyderabad Bench, allowing the Application 1094/2020 preferred by the Resolution Professional of the Corporate Debtor Company, seeking approval of the Resolution Plan of 'M/s Renganayaki Agencies'.

2. The Appellant challenges the approval of the Resolution Plan on the ground that the Corporate Debtor owes Rs. 22,60,32,948/- towards default in payment of Central Excise Duty, interest and penalty as per Central Excise Returns filed with the Appellant Department. As per the Resolution Plan, only 0.13% has been earmarked towards Government dues, and the Financial Creditor is getting 44.5% of the Claim amounts and the other Operational Creditors are getting 0.51% of their Claim amounts, which is stated to be unfair.

3. It is vehemently argued by the Learned Counsel for the Appellant that in view of the attachment on the Property of the Corporate Debtor, the Appellant

could fall within the definition of 'Secured Creditor'. The Plan also notes that the total sum for the purpose of Resolution Plan is Rs. 4,73,42,602/- and that in the event the Application of the Appellant is rejected under SABHKA VISWA SCHEME, the total Claim would be Rs. 22,60,32,948/- . It is contended that the Corporate Debtor had filed under the said Scheme and had agreed to pay an amount of Rs. 4,73,42,602/- during the CIRP Period and on account of non-payment, the total sum due to the Appellant, today is Rs. 22,60,32,948/-. The Learned Counsel for the Appellant placed reliance on the letter issued by the Successful Resolution Applicant on 13/09/2021 that out of the total amount, Government dues would be Rs. 1,38,00,000/- and that the Claim may go up, subject to the rejection of the Application filed under SABHKA VISWAS SCHEME. The Demand Draft totaling of Rs. 2,93,843/- was enclosed with the said letter. It is submitted by the Learned Counsel for the Appellant that the said amount was accepted *'under protest'.*

4. The Learned Senior Counsel for the Respondent submitted that the Appellant is challenging the approval of the Plan dated 13/08/2021 which was already implemented on 08/02/2022 and that an amount of Rs. 68,98,00,000/- was spent by the Successful Resolution Applicant, pursuant to the approval of the Plan. It is the case of the Respondent that there was no objection made by the Appellant when the Claim amount was intimated.

5. It is an admitted fact that the Plan submitted by 'M/s Renganayaki Agencies' was approved by the CoC with 100% majority votes, on 16/09/2020,

which was also approved by the 'Adjudicating Authority', vide the Impugned Order dated 13/08/2021, observing in Para 18 as follows:

> *"The Applicant/Resolution Professional has submitted that the Resolution Applicant has sought certain waivers and reliefs. We are, however, not inclined to grant such concession or waivers. The Resolution Applicant needs to approach the authorities concerned for permits, if required, and the same will be considered by the authorities concerned in accordance with law. The instant Resolution Plan meets the requirements of Section 30(2) of the Code and Regulations 37, 38, 38 (1A) and 39(4) of the Regulations. The Resolution Plan is not in contravention of any of the provisions of Section 29A of the Code and is in accordance with law."*
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> *(Emphasis Supplied)*

6. It is recorded by the Adjudicating Authority that the Plan is in compliance of Section 30(2) of the Code and Regulations 37, 38, 38(1A) and 39(4) of the CIRP Regulations, 2016.

7. As regarding the contention of the Learned Counsel for the Appellant that the decision of the Hon'ble Supreme Court in the matter on ***'State Tax Officer Vs. Rainbow Papers Limited',*** reported in ***[(2022) SCC Online SC 1162],*** is applicable to the facts of this case, this Tribunal is of the considered view that the ratio laid down by the Hon'ble Apex Court in the matter on ***'State Tax Officer Vs. Rainbow Papers Limited'***, (Supra) is with respect to whether the provisions of the IBC, in particular, Section 53 thereof, overrides Section 48 of the GVAT Act, 2003 and it was held by the Hon'ble Apex Court that Section 48 of the

'Gujarat Value Added Tax Act, 2003' (GVAT Act, 2003) is not contrary or inconsistent with Section 53 or any other provisions of IBC. It was observed that under Section 53 (1) (b) (ii), the debts owed to a Secured Creditor, which would include the State, under the 'GVAT Act, 2003', are to rank equally with other specified debts including debts on account of workman's dues for a period of 24 months preceding the Liquidation Commencement date and hence it was held in that case that the State, is a Secured Creditor under 'GVAT Act, 2003'. In this instant case, the Demand orders were issued to the Corporate Debtor under the 'Central Excise Act, 1944'. Section 11E of the 'Central Excise Act, 1944' is distinct from the provisions of 'GVAT Act, 2003'. For better understanding of the case, the said Section 11E of the Central Excise Act, 1944 is reproduced as hereunder:

> *"11E Liability under Act to be first charge— Notwithstanding anything to the Contrary contained in any Central Act or State Act, any amount of duty, penalty, interest, or any other sum payable by an assessee or any other person under this Act or the rules made thereunder shall, save as otherwise provided in Section 529A of the Companies Act, 1956, the Recovery of Debts Due to Banks and the Financial Institutions Act, 1993, the Securitisation and Reconstruction of Financial Assets and the Enforcement of Security Interest Act, 2002 and the Insolvency and Bankruptcy Code, 2016, be the first charge on the property of the assessee or the person, as the case may be.*

8. From the usage of the words 'save as provided in' in Section 11E is in the nature of an exception intended to exclude the class of cases, mentioned in Companies Act, 1956, 'The Recovery of Debts due to Banks and the Financial Institutions Act, 1993', 'SARFAESI Act, 2002' and 'I & B Code, 2016'. The 'Secured Interest' as defined under the Code excludes charges created by Operation of law. Section 11E of the Central Excise Act, 1944 is distinct from the provisions of the 'Gujarat VAT Act, 2003' and therefore, the decision in the matter of **'State Tax Officer Vs. Rainbow Papers Limited'**, (Supra) cannot be made applicable to the facts of this case. It is also pertinent to mention that the Master Circular No.1053/02/2017-CX, issued by the Ministry of Finance, Department of Revenue, Central Board of Excise and Customs specifies that dues under 'Central Excise Act, 1944' would have first charge only after the dues under the Provisions of the Code are recovered. Once again, for better understanding of the case, Clause 20 of the Regulation is reproduced as hereunder:

> *"20. Recovery from the assets under liquidation: Section 53 of the Insolvency and Bankruptcy Code, 2016 provides for order of priority for distribution of proceeds from the sale of the liquidation assets. Pari-materia changes have been made in Section 11E of the Central Excise Act, 1944. In effect, the Central Excise dues shall have first charge, after the dues, if any, under the provisions of Companies Act, Recovery of Debt due to Bank and Financial Institution Act, 1993 and Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and the*

Insolvency and Bankruptcy Code, 2016, have been recovered."

9. Keeping in view, the aforenoted Section of the 'Central Excise Act, 1944' is quite different from the 'GVAT Act, 2003' and Clause 20 of the aforenoted Circulation, this 'Tribunal' is of the considered view that the Appellant herein, cannot be treated as a 'Secured Creditor'.

10. The Hon'ble Supreme Court in a Catena of Judgments in the matter of ***'Kalparaj Dharamshi & Anr. v. Kotak Investment Advisors Ltd. & Anr.'*** reported in ***2021 (10 SCC 401)*** has observed that the Commercial Wisdom of the CoC is non-justiciable, unless it is not in accordance with Section 30(2) of the Code. The relevant Paras in the matter of ***'Kalparaj Dharamshi & Anr. v. Kotak Investment Advisors Ltd. & Anr.'*** (Supra) are detailed as hereunder:

> ***"164.*** *It will be further relevant to refer to the following observations of this Court in K. Sashidhar [K. Sashidhar v. Indian Overseas Bank, (2019) 12 SCC 150 : (2019) 4 SCC (Civ) 222] : (SCC pp. 186-87, para 57)*
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> > *57. ... Indubitably, the remedy of appeal including the width of jurisdiction of the appellate authority and the grounds of appeal, is a creature of statute. The provisions investing jurisdiction and authority in NCLT or Nclat as noticed earlier, have not made the commercial decision exercised by CoC of not approving the resolution plan or rejecting the same, justiciable. This position is reinforced from the limited grounds specified for instituting an appeal that too against an order "approving a resolution plan" under Section 31. First, that the approved resolution plan is in contravention of the provisions of any law for the time being in*

force. Second, there has been material irregularity in exercise of powers "by the resolution professional" during the corporate insolvency resolution period. Third, the debts owed to operational creditors have not been provided for in the resolution plan in the prescribed manner. Fourth, the insolvency resolution plan costs have not been provided for repayment in priority to all other debts. Fifth, the resolution plan does not comply with any other criteria specified by the Board. Significantly, the matters or grounds—be it under Section 30(2) or under Section 61(3) of the I&B Code —are regarding testing the validity of the "approved" resolution plan by CoC; and not for approving the resolution plan which has been disapproved or deemed to have been rejected by CoC in exercise of its business decision."

165. *It will therefore be clear, that this Court, in unequivocal terms, held, that the appeal is a creature of statute and that the statute has not invested jurisdiction and authority either with NCLT or NCLAT, to review the commercial decision exercised by CoC of approving the resolution plan or rejecting the same.*

166. *The position is clarified by the following observations in para 59 of the judgment in K. Sashidhar [K. Sashidhar v. Indian Overseas Bank, (2019) 12 SCC 150 : (2019) 4 SCC (Civ) 222] , which reads thus : (SCC p. 187)*

"59. In our view, neither the adjudicating authority (NCLT) nor the appellate authority (Nclat) has been endowed with the jurisdiction to reverse the commercial wisdom of the dissenting financial creditors and that too on the specious ground that it is only an opinion of the minority financial creditors."

167. *This Court in Essar Steel India Ltd. Committee of Creditors [Essar Steel India Ltd. Committee of Creditors v. Satish Kumar Gupta, (2020) 8 SCC 531 : (2021) 2 SCC (Civ) 443] after reproducing certain paragraphs in K. Sashidhar [K. Sashidhar v. Indian Overseas Bank, (2019) 12 SCC 150 : (2019) 4 SCC (Civ) 222] observed thus : (Essar Steel India case [Essar Steel India Ltd. Committee of Creditors v. Satish Kumar Gupta, (2020) 8 SCC 531 : (2021) 2 SCC (Civ) 443] , SCC p. 589, para 67)*

> *"67. … Thus, it is clear that the limited judicial review available, which can in no circumstance trespass upon a business decision of the majority of the Committee of Creditors, has to be within the four corners of Section 30(2) of the Code, insofar as the adjudicating authority is concerned, and Section 32 read with Section 61(3) of the Code, insofar as the Appellate Tribunal is concerned, the parameters of such review having been clearly laid down in K. Sashidhar [K. Sashidhar v. Indian Overseas Bank, (2019) 12 SCC 150 : (2019) 4 SCC (Civ) 222] ."*

168. *It can thus be seen, that this Court has clarified, that the limited judicial review, which is available, can in no circumstance trespass upon a business decision arrived at by the majority of CoC.*

169. *In Maharashtra Seamless Ltd. [Maharashtra Seamless Ltd. v. Padmanabhan Venkatesh, (2020) 11 SCC 467 : (2021) 1 SCC (Civ) 799] , NCLT had approved [V. Venkatachalam v. Indian Bank, 2019 SCC OnLine NCLT 713] the plan of the appellant therein with regard to CIRP of United Seamless Tubulaar (P) Ltd. In appeal, Nclat directed [Padmanabhan Venkatesh v. V. Venkatachalam, 2019 SCC OnLine NCLAT 285] , that the appellant therein should increase upfront payment to Rs 597.54 crore to the "financial creditors",*

"operational creditors" and other creditors by paying an additional amount of Rs 120.54 crores. Nclat further directed, that in the event the "resolution applicant" failed to undertake the payment of additional amount of Rs 120.54 crores in addition to Rs 477 crores and deposit the said amount in escrow account within 30 days, the order of approval of the "resolution plan" was to be treated to be set aside. While allowing the appeal and setting aside the directions of Nclat, this Court observed thus : (Maharashtra Seamless case [Maharashtra Seamless Ltd. v. Padmanabhan Venkatesh, (2020) 11 SCC 467 : (2021) 1 SCC (Civ) 799] , SCC p. 487, para 30)

> *"30. The appellate authority has, in our opinion, proceeded on equitable perception rather than commercial wisdom. On the face of it, release of assets at a value 20% below its liquidation value arrived at by the valuers seems inequitable. Here, we feel the Court ought to cede ground to the commercial wisdom of the creditors rather than assess the resolution plan on the basis of quantitative analysis. Such is the scheme of the Code. Section 31(1) of the Code lays down in clear terms that for final approval of a resolution plan, the adjudicating authority has to be satisfied that the requirement of sub-section (2) of Section 30 of the Code has been complied with. The proviso to Section 31(1) of the Code stipulates the other point on which an adjudicating authority has to be satisfied. That factor is that the resolution plan has provisions for its implementation. The scope of interference by the adjudicating authority in limited judicial review has been laid down in Essar Steel [Essar Steel India Ltd. Committee of Creditors v. Satish Kumar Gupta, (2020) 8 SCC 531 : (2021) 2 SCC (Civ) 443] , the relevant passage (para 54) of which we have reproduced in earlier part of this judgment. The case of MSL in their appeal is that*

they want to run the company and infuse more funds. In such circumstances, we do not think the appellate authority ought to have interfered with the order of the adjudicating authority in directing the successful resolution applicant to enhance their fund inflow upfront."

170. *This Court observed, that the Court ought to cede ground to the commercial wisdom of the creditors rather than assess the resolution plan on the basis of quantitative analysis. This Court clearly held, that the appellate authority ought not to have interfered with the order of the adjudicating authority by directing the successful resolution applicant to enhance their fund inflow upfront.*

171. *It would thus be clear, that the legislative scheme, as interpreted by various decisions of this Court, is unambiguous. The commercial wisdom of CoC is not to be interfered with, excepting the limited scope as provided under Sections 30 and 31 of the I&B Code.*

(Emphasis Supplied)

11. In the instant case, this Tribunal do not find any such irregularity in the Provisions of the Resolution Plan, as specified under Section 30 (2) of the Code. Additionally, this 'Tribunal' is quite alive and conscious of the fact that the Resolution Plan was fully implemented and the Successful Resolution Applicant had made payments amounting to Rs. 35,25,00,000/- to all the Creditors and almost 2 years has passed since the approval of the Resolution Plan and this 'Tribunal' does not find any tangible and substantial reasons to set the clock back at this point of time.

12. For all the aforegoing reasons this Company Appeal (AT) (CH) (Ins) No. 346/2021 is 'dismissed' accordingly. No Costs. The connected pending Interlocutory Applications, if any, are 'closed'.

[Justice M. Venugopal]
Member (Judicial)

[Shreesha Merla]
Member (Technical)

02/08/2023
SPR/NG