

NATIONAL COMPANY LAW APPELLATE TRIBUNAL

PRINCIPAL BENCH, NEW DELHI

Comp. App. (AT) (Ins.) No. 678 of 2022

IN THE MATTER OF:

1. Kushal Ltd.

A company incorporate under the Companies Act, 1956
Having its registered office at
Plot No. 43, Beside Navneet Prakashan,
Sukhramnagar, Gomtipur,
Ahmedabad – 380023.

Appellant No.1

2. Sandeep Tulsiram Agarwal
Residing at 36, Royal Enclave,
Near Asopalav Bungalows,
Thaltej, Ahmedabad – 380059.

Appellant No.2

Vs.

1. Kartik Baldwa

A-7, 234, Royal Enclave,
Near Jalsa Party Plot,
Off S.G. Highway, Thaltej,
Ahmedabad-380059.

....Respondent No. 1

2. Nitin Patil
Flat 303, Silver Nest Apartment,
Behind CIIGMA Hospital,
Aurangabad-431001

....Respondent No. 2

3. Runel Rathi
E 14, Galaxy Apartment,
S.G. Highway, Bodakdev,
Ahmedabad-380054.

....Respondent No. 3

4. Bhavin Shah
E 106, Haridham Society,
Near Parshwanath Township, Naroda,
Ahmedabad-382354.

....Respondent No. 4

5. Dinesh Pal
C-201, Shivashrya Residency,
Near KIRC College,
Kalol- 382721

....Respondent No. 5

6. Anil Patel
26, Suryay Bungalow,
Opp. Saidham Temple, Sola,
Ahmedabad- 380060.Respondent No. 6
7. Sanjeev Kumar Sharma
Rajmoti-1, B3-204,
Near Hariya Hospital, Vapi-396191.Respondent No. 7
8. Sunil Shah
E 203, Shukan Platinum,
Vandemataram Cross Road,
Gota, AhmedabadRespondent No. 8
9. Bijendra Sharma
Samarpan Residency, Block F,
Near Shindbad Hotel,
Kalol- 383721Respondent No. 9
10. Pankaj Sidhu
F-308, Umiya Tirth Ville,
Kalol,
GandhinagarRespondent No. 10
11. Hemant Vyas
C-13, Madhava Apartment,
Maniyasa Society,
Maninagar, Ahmedabad – 380008Respondent No. 11
- 12.Sanket Mukul
F-4, Mukul Park,
Bhairavnath Road,
Maninagar,
Ahmedabad – 380028Respondent No. 12
13. Urmila Guglani
A-507, Suryavanshi Tower,
Nehru Park, Vastrapur,
Ahmedabad- 380015Respondent No. 13
14. Tapan Biswas
Vil. DharsaChoudhary Para,
PO GIP Colony, Howrah,
West Bengal - 711112Respondent No. 14
15. Arup Kumar
401, Riddhi Siddhi 2,
Ravapar Residency,Respondent No. 15

Morbi - 363641

16. Rajesh Nayak
3, Ranna Park Society,
Kadi - 382715

....Respondent No. 16

17. Ajay Shah
9, Gitanjali Society,
Radhaswami Road, Ranip,
Ahmedabad - 382480

....Respondent No. 17

18. Ujjal Chandra Giri
B-43, Sundivine-1,
R.C. Technical Road, Gota,
Ahmedabad - 382481

....Respondent No. 18

19. Rajendra Thakor
5, Ranna Park Society,
KadiKarannagar Road,
Kadi

....Respondent No. 19

20. Prabir Das
HP 4, Indraprastha Tower,
Drive In Road, Memnagar,
Ahmedabad - 380052

....Respondent No. 20

21. Jaybhagwan Suhag
B/36, Sangath-3,
Near Motera Stadium, Sabarmati,
Ahmedabad - 380005

....Respondent No. 21

22. Haresh Patel
J/102, Samarpan Residency,
Mehsana Ahmedabad Highway,
Kalol

....Respondent No. 22

23. Harshad Oza
Bungalow 15, Shreeji Park Society,
Dargha Char Rasta, Adalaj,
Gandhinagar - 382721

....Respondent No. 23

24. Ramesh Trivedi
E13, Sthapatya Apartment,
Near Sterling Hospital, Memnagar,
Ahmedabad - 380052

....
.Respondent No. 24

25. Kirti Patel
G- 308, Sudarshan Arcade,

....Respondent No. 25

Panchvati Area,
Kalol - 382721

26. Tapas Kapasi
B-402, Akash IV,
Ankur Road, Naranpura,
Ahmedabad - 380013
....Respondent No. 26

27. Sudhir Kumar Nilendu
Maruti Nandan,
Room No. 15,
Talagra District - 392130
....Respondent No. 27

28. Dharmendra Sharma
25, Hariomnagar Part 2,
Sabarmati,
Ahmedabad - 380019
....Respondent No. 28

29. Dhirendra Thanki
Q 702, 7th Floor,
Sardar Patel Housing Society,
Ahmedabad - 380013
....Respondent No. 29

30. Yogesh Shah
C- 38, Bapukrupa Society,
Gurukul Road, Memnagar,
Ahmedabad - 380052
....Respondent No. 30

31. Anand Jayarama krishnan
C- 52, Venus Apartment,
Near Sandesh Press, Bodakdev,
Ahmedabad - 380054
....Respondent No. 31

32. Jyothy Menon
E-32, Shivdhara Apartment,
Near Hind Super Market, Thaltej,
Ahmedabad - 380059
....Respondent No. 32

33. Shailendra Singh
D/22, Narayan Kunj Society,
Bharuch - 392001
....Respondent No. 33

34. Shrimali Prakash
5, Shiv Shakti Society,
IOC Road, Chandkheda,
Ahmedabad - 382424
....Respondent No. 34

35. Pargesh Contractor
A-10, New Madhavi Apartment,
Bhudarpura Road, Ambawadi,
Ahmedabad
....Respondent No. 35
36. Biharilal Jangir
H- 302, Kanchan Bhoomi Apartment,
Near Seema Hall,
Ahmedabad - 380015
....Respondent No. 36
37. Dayashankar Sharma
Galaxy Flat G1,
204, Borisana Road,
Chhatral,
Gandhinagar
....Respondent No. 37
38. Mukesh Patel
67, Rajdeep Park Society,
Odhav Road,
Ahmedabad - 382415
....Respondent No. 38
39. Vinod Trivedi
N- 14, Savita Park,
Opp. Lotus Schil, Isanpur,
Ahmedabad - 382443
....Respondent No. 39
40. Dinesh Chhatrala
Mota Goraiya,
Near Ramdevpir Temple,
Taluka Viramgam - 382150
....Respondent No. 40
41. Jignesh Dave
Dave Vaas, Post- Adalaj,
Gandhinagar - 382421
....Respondent No. 41
42. Gaurang Parmar
Vraj Galaxy Flat No. 606,
NarodaDehgam Road,
Ahmedabad - 382330
....Respondent No. 42
43. Rahul Shastri
89, Radheshyam Nagar Society,
Serisa Road,
Kalol - 382721
....Respondent No. 43
44. Jitendra Nayak
J- 106, SatyamdevChhavni- 5,
Behind Balaji Agro Mall,
....Respondent No.44

Sugad - 382424

45. Nitesh Prajapati
Opp. Reliance Hall, Kalol,
Gandhinagar - 382721Respondent No. 45

46. Kamlesh Tiwari
B/5, New Laxminagar Society,
Village Borisana,
GandhinagarRespondent No. 46

47. Prem Jha
1, Amrut Complex,
Opp. Snehkunj Society, Highway Road,
Kalol- 382721Respondent No. 47

48. Pravinkumar Patel
7, Green City Society,
Vibhag 1,
KalolRespondent No. 48

49. Pramod Rajput
405, Anjani Avenue,
Near Ganesh Party Plot,
Kalol - 382721Respondent No. 49

50. Hasmukh Dholariya
147, Radheshyam Nagar Society,
Near Borisana Village,
Gandhinagar - 382721Respondent No. 50

51. Popatbhai Prajapati
Vamaj, Taluka Kadi,
Mehsana - 382715Respondent No. 51

52. Bharatkumar Solanki
13, Gayatri Row House,
Near Water Tank Railway,
East KalolRespondent No. 52

53. Pankaj Patel
7, Green City Society,
Vibhag 1, KalolRespondent No. 53

54. Mangal Parmar
Bechraji Taluka,
MehsanaRespondent No. 54

55. Harshad Jadhav
KothivaliChaul, Opp. BOB, Kalol,
Gandhinagar - 382721Respondent No. 55
56. Chandrakant Prajapati
Prajapati Vas, Near Water Tank,
Kalol,
Gandhinagar -382735Respondent No. 56
57. Hitesh Prajapati
Prajapati Vas, Near Water Tank,
Kalol,
Gandhinagar - 382735Respondent No. 57
58. M. Gadhavi
19, Ramvadi Township,
Panchvati Area, Kalol,
Gandhinagar - 382721Respondent No. 58
59. Brijmohan Dwivedi
243, Gali No. 3, Vinod Vihar Colony,
Khadi Road, Rishikesh,
Uttrakhand - 249204Respondent No. 59
60. Bharat Shah
19, Krishnapark Society,
Opp. Gaganvihar, Khanpur,
Ahmedabad - 380001Respondent No. 60
61. Arvind Thakur
Srinagar Society, Nandini Apartment,
Kalol- 382721Respondent No. 61
62. Utkarsh Gadhavi
21, Simraj Status Bungalow,
Near Kisan Petrol Pump, Kudasan,
Gandhinagar - 382421Respondent No. 62
63. Pramod Singh
Rajsaphhire Society Co. Op. Hsg. Society,
Koparli Road,
Valsad- 396195Respondent No. 63
64. Dharmendra Nirala
House No. B 150,
Kota, RajasthanRespondent No. 64

With

Comp. App. (AT) (Ins.) No. 680 of 2022

IN THE MATTER OF:

1. Kushal Ltd.

A company incorporate under the Companies Act, 1956
Having its registered office at
Plot No. 43, Beside Navneet Prakashan,
Sukhramnagar, Gomtipur,
Ahmedabad- 380023.

.... Appellant No.1

2. Sandeep Tulsiram Agarwal
Residing at 36, Royal Enclave,
Near Asopalav Bungalows,
Thaltej, Ahmedabad – 380059.

.... Appellant No.2

3. Manoj Agrawal
Residing at 3, Royal Crescent,
Thaltej, Ahmedabad

.... Appellant No.3

4. Kushal Agrawal,
Residing at 3, Royal Crescent,
Thaltej, Ahmedabad

.... Appellant No.4

Vs.

Indian Overseas Bank

Being the Lead Bank of
The Lenders of M/s. Rainbow Papers Ltd.
(Corporate Debtor in CIRP)
Having its office at
Ashram Road Branch,
Chinubhai Tower,
Ashram Road, Ahmedabad

....Respondent

With

Comp. App. (AT) (Ins.) No. 681 of 2022

IN THE MATTER OF:

1. Kushal Ltd.

A company incorporate under the Companies Act, 1956
Having its registered office at
Plot No. 43, Beside Navneet Prakashan,
Sukhramnagar, Gomtipur,
Ahmedabad – 380023.

....Appellant No. 1

2. Sandeep Tulsiram Agarwal
Residing at 36, Royal Enclave,
Near Asopalav Bungalows,
Thaltej, Ahmedabad – 380059.

....Appellant No. 2

Vs.

1. Committee of Creditors of Rainbow Papers Ltd.

(Corporate Debtor in CIRP)
Represented through lead bank
Indian Overseas Bank,
Large Corporate Branch, 1st Floor,
Chinubhai Tower, Ashram Road,
Ahmedabad - 380009

....Respondent No. 1

2. Ramchandra Dallaram Choudhary,
Resolution Professional of the
Corporate Debtor Rainbow Papers Ltd.
9-B, Vardan Complex, Near Vimal House,
Lakhudi Circle, Navrangpura,
Ahmedabad – 380014.

....Respondent No. 2

Present:

**For Appellants: Mr. Salil Thakore, Ms. Stuti Sharma and
Mr. Prabhat Chaurasia, Advocates.**

For Respondent:

J U D G M E N T

[21st July, 2022]

(Per Hon'ble Mr. Justice M. Satyanarayana Murthy)

All the three appeals have been filed aggrieved by the common order dated 24.03.2021 passed by Hon'ble National Company Law Tribunal, Ahmedabad Bench at Ahmedabad in Interlocutory Application Nos. 229, 230 and 231 of 2020.

I.A. No. 230 of 2022

The Insolvency Resolution Applicants filed I.A.No. 230 of 2020 requesting the Adjudicating Authority to recall the order dated 27.02.2019 passed by the Tribunal in I.A. No. 224 of 2018 in CP (IB) No. 88/NCLT/AHM/2017 and to issue a direction for return of Rs. 30.5 crores paid by the Applicant pursuant to the resolution plan approved by the order dated 27.02.2019 passed in I.A.No.224 of 2018 in CP (IB) No. 88/NCLT/AHM/2017 and other consequences. I.A. No. 230 of 2020 was dismissed by the Adjudicating Authority having found no misrepresentation or fraudulent misrepresentation in issuing Information Memorandum calling for the expression of interest for submitting insolvency resolution plan.

I.A. No. 229 of 2022

I.A. No. 229 of 2020 was filed under Section 60 (5) of Insolvency and Bankruptcy Code, 2016 (for short 'IB Code') read with Rule 11 of National Company Law Tribunal, Rules 2016 ('NCLT Rules') and Regulation No. 39 (9) of Corporate Insolvency Resolution Process ('CIRP') regulations for issue of appropriate direction against the Respondent to implement the resolution plan including the direction for deposit of balance amount, allotment of debentures, giving of guarantees by Respondent Nos. 2 to 4 etc. as approved by the Adjudicating Authority vide order dated 27.02.2019 made by the Adjudicating Authority in I.A. No. 224 of 2018 and as confirmed by the Hon'ble NCLAT New Delhi by its order dated 19.12.2019 passed in Comp. App. (Ins.) No. 354 of 2019 and allied appeals. The Petitioner also sought an alternative relief to recommence the period of CIRP, for such period as may be deemed appropriate by the Adjudicating Authority and permit the Applicant to engage the services of Resolution Professional for the purposes of bringing about resolution of the Corporate Debtor and to achieve the object of going concern and for other consequential reliefs.

The Tribunal granted relief as claimed by the Petitioner directing implementation of resolution plan dated 27.02.2019.

I.A. No. 231 of 2020

I.A. No. 231 of 2020 was filed by employees of Corporate Debtor claiming the following reliefs:

- (a) Order and direct the Respondent to make payments due to the applicants forthwith and evolve mechanism to ensure that future payments are made and when they fall due and/or;
- (b) Initiate action against the Respondent under Section 74 of the Code for willful contravention of the resolution plan approved on 27.02.2019.

I.A. No. 231 of 2020 was resisted by the Respondents therein on various grounds, but the Adjudicating Authority allowed the application directing the Corporate Resolution Applicant for implementation of resolution plan dated 27.02.2019.

Aggrieved by the orders in all three Interlocutory Applications, the Appellants herein i.e the Insolvency Resolution Applicants preferred these company Appeals Comp. App (AT) (Ins.) No. 678 of 2022, Comp. App (AT) (Ins.) No. 680 of 2022 and Comp. App (AT) (Ins.) No. 681 of 2022 on various grounds.

Comp. App. (AT) (Ins.) No. 681 of 2022

In view of the allegations made, in the grounds raised, as the result in the other appeals depends upon the decision in the appeal, we find it appropriate to take up Comp. App. (AT) (Ins.) No. 681 of

2022 as a leading case for adjudication since the result of other appeals is a consequence of decision in the Comp. App. (AT) (Ins.) No. 681 of 2022.

The factual matrix in nutshell is that, the Adjudicating Authority admitted CP (IB) No. 88/NCLT/AHM/2017 by order dated 12.09.2017 filed by Operational Creditor against the Corporate Debtor i.e. Rainbow Papers Ltd. On appointment of Insolvency Resolution Professional, the Resolution Professional after exercising due diligence to complete the corporate insolvency resolution process, issued Information Memorandum calling for expression of interest, after its approval. In pursuance of invitation, the appellants herein submitted the resolution plan and the same was placed before the Committee of Creditors for voting on 6.6.2018 and 7.6.2018, the same was approved by the Committee of Creditors.

The Resolution Applicants/ Appellants herein filed I.A. 224 of 2018 in CP (IB) No. 88/NCLT/AHM/2017 to approve the resolution plan under Section 30 of I&B Code, 2016 before the Adjudicating Authority.

The application was allowed by the Tribunal i.e. Adjudicating Authority upon hearing both the parties to the petitions, including objections, by order dated 27.02.2019. Thus, the Corporate Debtor was merged into applicant No. 1 company i.e. the first Appellant

herein. As per the approved plan submitted by the Applicants/Appellants, the applicant is required to make payment as per plan in the specified manner at different intervals as agreed by Committee of Creditors, but the Appellants paid an amount of Rs. 30.50 crores as on the date of disposing the applications.

The contention of the appellants is that, they have also spent Rs. 3.67 crores as CIRP cost. It is further alleged that, despite complying with its obligation, applicant has not been given possession of the office premises and the same is continued to be in possession of Rainbow Papers Ltd. No data, books of accounts and other records of Rainbow Papers Ltd. were handed over till today.

The Resolution Professional as well as Committee of Creditors have also not shared the forensic audit report which would disclose the performance of Corporate Debtor.

It is also contended that Information Memorandum in Annexure-B of the application contains column for disclosure of the list of ongoing cases, but CIRP did not disclose the ongoing assessment proceedings under the Income Tax Act 1961 for the assessment year 2016-17, though they were pending at the time of issuance of Information Memorandum, calling for expression of interest. It resulted in an income tax liability of Rs. 5.22 crores, as

evident from the order dated 4.2.2020 passed by Dy. Commissioner, Central Circle 2 (4).

The applicant got report made by GITCO with an object to find out the condition of plant and machinery etc. The team of GITCO consisting of technical experts inspected the premises and thereafter submitted a report on conducting detailed expert examination.

The main grievance of this petitioner is that, as per Information Memorandum, the production capacity of Corporate Debtor is 3,59,100 metric tonnes per annum (which is equivalent to 1088 tonnes per day). However, as per the report of GITCO it is only 1,99,650 metric tonnes per annum (equivalent to 605 metric tonnes per day). The daily rate has been calculated by taking 330 working days in year.

The applicants submitted the resolution plan based on production, turnover and profitability projections and believing bonafide the details furnished in Information Memorandum i.e. production capacity as 3,59,100 metric tonnes per annum, but it was only 1,99,650 metric tonnes per annum as per the report, therefore, on account of misstatement or misrepresentation made by the Resolution professional, the appellants were made to part with huge amount.

On account of the misrepresentation which is made intentionally by the CIRP, the appellants are not under obligation to proceed further to comply the plan and thus the resolution professional fraudulently misrepresented the production capacity of the industry i.e. Corporate Debtor and on the basis of such fraudulent misrepresentation, the appellants were made to submit the resolution application along with plan, got approved from the Adjudicating Authority as per the orders in I.A. No. 224 of 2018 by order dated 27.02.2019, thus, the order was obtained by fraudulent misrepresentation which is avoidable or it can be avoided by the Appellants herein since the fraud or misrepresentation vitiates the entire proceedings and requested to recall the order passed in I.A. No. 224 of 2018 dated 27.02.2019 relying on the judgment in ***Kundan Care Products Ltd. vs. Amit Gupta***¹.

The respondents opposed the appeals on various grounds. The Resolution Professional contended that the joint lenders meeting of Rainbow Paper Ltd. was held on 01.08.2017 accepted, the liability of Corporate Debtor as estimated by the applicant and that Information Memorandum was issued after exercising of due diligence by visiting the plant of Rainbow Papers Ltd. and only after visiting, after compliance of statutory procedure, the Information Memorandum was issued. On the basis of Information Memorandum, the appellants submitted the resolution plan and approved by the

¹ Comp. App. (AT) (Ins.) No. 653 of 2020 dated 30.09.2020

Committee of Creditors, later accepted by the Adjudicating Authority by order dated 27.02.2019 in I.A. No. 224 of 2018.

After hearing the arguments of both the counsel, the Adjudicating Authority having come to the conclusion that the Appellants herein GITCO appointed by the Appellants did not calculate the capacity as per the formula for calculation of production capacity, calculated the capacity based on the report of GITCO and came to a conclusion that the capacity is equivalent to the production capacity as stated in Information Memorandum. As such the Resolution Professional did not make any misrepresentation, much less, fraudulent misrepresentation in Information Memorandum to invite expression of interest from the public, thereby no illegality is committed by CIRP.

Finally, the adjudicating authority concluded that NCLT has no power to recall its own orders and none of rules and regulations under IBC or Rules of NCLT, 2016 permit to exercise such power. Rule 11 of NCLT, 2016 and Section 420 (2) of Companies Act, 2013 do not permit, recall of any order passed by the Adjudicating Authority, dismissed the petition.

Aggrieved by the order passed by the Adjudicating Authority, the present appeals are filed raising several contentions more particularly about the misrepresentation and fraudulent misrepresentation allegedly made by the Resolution Professional,

while issuing Information Memorandum calling for expression of interest. In response to the invitation, the Appellants/Resolution Applicants submitted a resolution plan and addendum which was accepted by Committee of Creditors and approved by Adjudicating Authority by order dated 23.02.2019 in I.A. No. 224 of 2018.

It is specifically contended by the Appellants that dismissal of an application to recall the order passed by the Adjudicating Authority in I.A. No. 224 of 2018 on the ground that the Tribunal/ Adjudicating Authority cannot exercise power to recall its own order, as none of the provisions much less Rule 11 of IBC Rules, 2016 and Section 420 (2) of Companies Act, 2013 is erroneous *ex-facie*, in view of the law declared by the Hon'ble Apex Court. In support of their contentions, the appellants relied on the judgments of Hon'ble Supreme Court in ***United India Insurance Co. Ltd. vs. Rajendra Singh²***; ***Roshan Deen vs. Preeti Lal³***; ***Indian National Congress vs. Institute of Social Welfare⁴***; ***Indian Bank vs. Satyam Fibres (India) Pvt. Ltd⁵***; ***Deepa Gourang Murdeshwar Katre vs. Principal, V.A.V. College of Arts⁶***; ***Revandas Ranchhodhbhai***

² (2000) 3 SCC 581

³ (2002) 1 SCC 100

⁴ (2002) 5 SCC 685

⁵ (1996) 5 SCC 550

⁶ (2007) 14 SCC 108

**Rathod vs. Jyotiben Wd/o Rameshbhai Madhusudan Thakar⁷;
Bindeshwari Pd. Chaudhary V. Debendra Pd. Singh⁸.**

The Adjudicating Authority on erroneous appreciation of law arrived at such conclusion, on the ground that the Adjudicating Authority is not vested with power to recall its own orders.

It is further contended that the question of merger does not arise as the Appellants did not prefer any appeal before the Appellate Authority on the ground of misrepresentation or fraudulent misrepresentation made by Resolution Professional but filed appeal on different ground and the other aggrieved parties also preferred appeals before the Appellate Tribunal and Hon'ble Supreme Court, but the order was confirmed with certain modifications. Such order is not deemed to have been merged with the order and thereby, dismissal of the application of these Appellants on the ground of merger of the judgment of the Appellate Court into the judgment of Adjudicating Authority is erroneous and thereby, the approach of the Adjudicating Authority is illegal and placed reliance on the judgments of the Hon'ble Supreme Court in **State of Madras vs. Madurai Mills Co. Ltd⁹; Kunhayammed vs. State of Kerala¹⁰** and

⁷ 2011 SCC online GUJ 2552

⁸ AIR 1958 Patna 618

⁹ AIR 1967 SC 681

¹⁰ (2000) 6 SCC 359

Khoday Distilleries Ltd. Vs. Shri Mahadeswara Sahakara Sakkare Karkhane Ltd¹¹

Yet, another contention of the appellants is that, on account of fraudulent misrepresentation, entire transaction is vitiated since the Resolution Professional did not exercise due diligence in issuing Information Memorandum which amounts to misrepresentation, thereby the submission of resolution plan which was approved by the Adjudicating Authority in I.A. No. 224/2018 is vitiated by fraudulent misrepresentation thereby the order is liable to be recalled, exercising inherent power by the Tribunal, but instead of exercising such power, dismissed the application erroneously and requested to allow the appeal, setting aside the order passed by the Adjudicating Authority.

During hearing, learned Counsel for the appellants requested for remanding the case to the Adjudicating Authority (National Company Law Tribunal, Ahmedabad Bench) with the direction to dispose of the applications, considering the law laid down by the Hon'ble Apex Court in various judgments referred above.

Learned counsel for the Respondents supported the impugned order totally and would contend that the order does not warrant any interference of this Court while exercising jurisdiction under Section

¹¹ (2019) 4 SCC 376

61 of IB Code, as the jurisdiction of the Tribunal under the IB code is summary in nature, since the adjudicating Authority exercised due diligence while issuing Information Memorandum based on the previous reports of Indian Agro & Recycled Paper Mills Association (IARPMA) and MITCON, and requested to dismiss the appeals.

Considering rival contentions, perusing the material available on record, the point that arises for consideration in Comp. App. (AT) (Ins.) No.681 of 2022 is:-

“Whether the Resolution Professional made any misrepresentation or fraudulent misrepresentation, while issuing Information Memorandum, inviting expression of interest to submit resolution plan? If not, whether the order passed by the Adjudicating Authority refusing to recall the order passed in I.A. No. 224 of 2018 dated 27.02.2019 be sustained?”

P O I N T:

Indisputably, Rainbow Papers Limited filed an application to undergo process of the insolvency resolution and in that process Resolution Professional was appointed for completion of the insolvency resolution process. Later, he issued Information Memorandum inviting expression of interest from the public. In response to the Information Memorandum calling for expression of

interest, the resolution applicants/appellants herein submitted their plan for resolution.

The Resolution Professional undisputedly issued the Information Memorandum calling for expression of interest dated 21.2.2018, disclosing the profile of Corporate Debtor in Annexure I, the same is extracted hereunder:

“A Company Profile document provided by the company is shown as Annexure - 1. As per the total installed capacity of India of 22.15 Million MTs of Paper, the installed capacity of the Corporate Debtor (herein after also termed as Company) is 0.359 Million MTs equivalent to 1.6% of the Country's production capacity. Important information related to the Corporate Debtor are provided herein below:”

Though Annexure -1 is referred it was not filed. After 18 months from the date of approval of resolution plan by the Adjudicating Authority and after disposal of appeals filed by both Appellate Tribunal and the Hon'ble Supreme Court, the Appellant herein resorted to second round of litigation, filed petition on the ground that the CIRP made a false representation as to production capacity of the Corporate Debtor and on the basis of report of GITCO, the appellants herein filed the petition making serious allegation of fraudulent misrepresentation against the Resolution premises and thereafter submitted a report on conducting Professional.

The applicant got report made by GITCO with an object to find out the condition of plant and machinery etc. The team of GITCO

consisting of technical experts inspected the detailed expert examination, the conclusions of GITCO are as follows:

The Rainbow Papers Ltd. is having adequate land and factory building. The infrastructure in the form of building and sheds is sufficient to support the projected production.

- The report is aimed at assessing the condition of the plant and machinery through inspection and optical observations, possibility of restarting the manufacturing operations as the plant is closed for more than 18 months, technical up gradation required and to estimate the cost crude form and timeline required for the same.
- Rainbow is having adequate land and factory building. The infrastructure in the form of building and sheds is sufficient to support the projected production.
- Power arrangement through captive power plan of 35 MW and water management from the bore wells within the premises is available which is sufficient for projected production.
- Provisions of machineries, unities and miscellaneous assets equipment as envisaged in the report are adequate.
- After proposed CAPEX/overhauling/ Up gradation of ETP, plant will be fully operational and produce good quality products where the yield will be reasonably good. And in turn will help Rainbow to earn EBITDA margin matching to industry standards and even better than industry standards with the operational efficiency.
- Based on the date provided and observations during the site visit, the project is considered to be technically feasible subject to completion of ETP up gradation/CAPEX/ overhauling

- Total installed capacity of plant no. 7, 8 around 360 MTs per day
- Plant has been closed since July, 2016, however, the machineries in reasonable good condition of the plant
- The machineries and its part are in place

According to the report and as per Column No. III of the Information Memorandum, it is mentioned that the company profile document provided by the company show the installing capacity of the Corporate Debtor is 0.359 MTs is equivalent to 1.6% of Country Production Capacity.

Based on this Information Memorandum issued by the Resolution Professional, the Resolution applicants/appellants herein submitted their resolution plan and approved by COC and adjudicating authority, however, they got appointed GITCO for the purposes mentioned in the earlier paragraphs. The inspection was done unilaterally without the presence of CIRP or his representatives. However, the adjudicating authority calculated the production capacity based on GITCO report as follows:

We found that the production capacity of the industry is minimum, the same is shown as under: -

Paper Machine	Machine Deckle (in Mtr.)	GSM Range	Design Speed	Operating Speed	Respective Page Number of GITCO Report on which the capacity is shown	Daily Capacity as shown in GITCO Report	Assumption 2- Calculation of daily production capacity by factoring in to the production calculation formula the gsm, speed, machine hours, Machine deckle as per the basis shown in the GITCO study report of every individual machines					Assumption 3 - Calculation of daily production capacity by factoring in to the production calculation formula the gsm, speed, machine hours, Machine deckle as per the basis shown in the GITCO study report of every individual machines					
							GSM	Speed	Hours	Deckle	Production	GSM	Speed	Hours	Deckle	Production	
2	2.15	60-180	250	220	Page no. 23	50	100	195	22.5	2.15	57	100	250	24	2.15	73	
3	2.13	180-550	120	110	Page no. 27	60	220	105	22.5	2.13	66	220	120	24	2.13	76	
4	2.13	230-550	150	130	Page no. 30	80	260	105	22.5	2.13	79	260	150	24	2.13	112	
5	1.75	230-700	150	110	Page no. 34	80	290	115	22.5	1.75	79	290	150	24	1.75	103	
6	1.60	20-130	120	100	Page no. 57	4					4					4	
7	4.46	40-100	850	750	Page no. 37	180	48	650	22.5	4.46	188	48	850	24	4.46	246	
8	4.46	45-100	1100	800	Page no. 42	225	80	700	22.5	4.66	35.2	80	1100	24	4.46	530	
9	4.46	40-120			Page no. 59	250					250					250	
Master Cote	Air Knife Coater (1.6 m Deckle), ALR, Knife Coater (1.5 Deckle) air knife coater (1.5 m Deckle) Cast coater 1 & 2					Page 62	37					37					37
	Total						966					1111					1430
Annual Capacity (Assuming 365 days in a year)							352590					405685					521911

Formula for calculation of production capacity

*** Daily Operating Production**

(GSM × Machine Deckles in Meters × Operating Speed × Daily Operating hours)/ (1000 × 1000)

**** Installed capacity**

(GSM × Machine Deckles in Meters × design speed × 24 hours)/ (1000 × 1000)
 Installed capacity means the design production capacity to run the machine at highest efficiency i.e. 24 hours × 365 days

As per the details mentioned above, the capacity was calculated by the Adjudicating Authority and found that the installing capacity as 5,21,911 MTs as shown in last column of the table.

Thus, the Tribunal on accessing the installing capacity i.e. the production capacity, the capacity of the industry of the Corporate Debtor, as mentioned in the Information Memorandum is equivalent to the capacity noted by GITCO after due inspection. Therefore, there is no misrepresentation, much less fraudulent misrepresentation.

The production capacity of Corporate Debtor as calculated by the adjudicating authority in the order under challenge was not questioned in the appeals by the Appellants in the present case. However, this Court while deciding this appeal under Section 61 of the IB Code need not undertake the process of calculating the production capacity of the Corporate Debtor.

Learned counsel for the Appellants in the written submission contended that the Appellants submitted resolution plan based on the information furnished by CIRP, submitted a resolution plan and addendum, at Clause (G), wherein, it is specifically stated that the resolution applicant submitted his resolution plan. However, I find no such clause in the addendum, but at Page No. 206 a specific mention is made as under:

“total amount of outstanding dues to secure financial creditors of Rainbow Papers Ltd. as per Information Memorandum being Rs. 1437.11 crores (claimed received and admitted Rs. 1437.11 crores) as per the table”.

The above extracted paragraph it is not relating to production capacity of the industry.

From the above, it is clear that, based on the Information Memorandum, the amount due to the financial creditors is arrived at, therefore, the contention of the Appellants that they submitted resolution plan based on the details as to production capacity of the industry is without any substance.

Another contention of the Appellants is that, pending tax proceedings are not disclosed in the Information Memorandum by CIRP, in fact, the CIRP disclosed the tax liability and the appellants at Point No. 51 of the resolution plan agreed as follows:

“51. “Taxes” or “Tax” shall means any and all present and future, direct or indirect, claims for tax, levy, impost, duty, cess, statutory dues or other charge of a similar nature (including any penalty or Interest payable in connection with any failure to pay or any delay in paying any of the same) including on gross receipts, sales, turnover, value addition, use, consumption,, property, service, franchise, capital, occupation, license, excise, documents (such as stamp duties) and customs and other taxes, duties, assessments, or fees, however imposed, withheld, levied, or assessed by any Governmental Authority.”

As the appellants themselves agreed to pay the future liability of taxes, non-disclosure of any pending cases as to assessment is not a ground. On the other hand, CIRP is under obligation to disclose pending cases but not the assessments. Hence, non-disclosure is not a ground to conclude that the CIRP made any misrepresentation.

In view of specific findings recorded by the Adjudicating Authority regarding the production capacity based on Information Memorandum and GITCO report, so also Point No.51 of resolution plan, it is difficult to accede to the request of the learned counsel for the Appellants.

‘Misrepresentation’ and ‘fraud’ are not defined in IBC. The word ‘Fraud’ is defined under Section 17 and ‘Misrepresentation’ is defined under Section 18 of the Indian Contract Act, 1872.

“Section 17. ‘Fraud’ defined.— ‘Fraud’ means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with

intent to deceive another party thereto or his agent, or to induce him to enter into the contract:

(1) the suggestion, as a fact, of that which is not true, by one who does not believe it to be true;

(2) the active concealment of a fact by one having knowledge or belief of the fact; (3) a promise made without any intention of performing it;

(4) any other act fitted to deceive;

(5) any such act or omission as the law specially declares to be fraudulent. Explanation.—Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence, is, in itself, equivalent to speech.”

Section 18. “Misrepresentation” defined-
‘Misrepresentation’ means and includes-

(1) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;

(2) any breach of duty which, without an intent to deceive, gains an advantage to the person committing it, or any one claiming under him, by misleading another to his prejudice or to the prejudice of anyone claiming under him;

(3) causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement.”

In the instant case, representation was made by the Resolution Professional in Information Memorandum inviting expression of interest. To constitute fraudulent misrepresentation, there must be material on record that CIRP has not exercised due diligence as a reasonable man and intentionally made such misrepresentation. But, no such material is place that misrepresentation was made

intentionally, consequently failed to establish none of the ingredients to constitute misrepresentation or fraudulent misrepresentation.

To constitute a fraudulent misrepresentation, the appellant has to plead and prove that CIRP made such representation with an intent to deceive the Appellants herein and the petitioner would have suffered any damage.

In the present facts of the case, there is absolutely no allegation that the Resolution Professional made any representation with fraudulent intention or with an intent to deceive the resolution applicants i.e. appellants herein. In the absence of such allegation and proof of it, by producing *prima facie* material, it is difficult for this Court to accept the contention of the Appellants, that the appellants have submitted the resolution plan based on such fraudulent misrepresentation made by Resolution Professional.

At this stage it is relevant refer to the provisions of IBC, as referred by the appellants in the grounds of the appeal.

Section 18 (1) (a) of IBC deals with duties of interim resolution professional. The IRP has to:

- (a) *collect all information relating to the assets, finances and operations of the Corporate Debtor for determining the financial position of the Corporate Debtor, including information relating to; business operations for the previous two years;*
- (b) *financial and operational payments for the previous two years; list of assets and liabilities as on the initiation date; and such other matters as may be specified. But this provision is*

irrelevant since the appellants did not submit any resolution plan based on the IM issued by IRP.

Section 25 (2) (G) of IBC obligates the Resolution Professional to prepare the Information Memorandum in accordance with section 29, whereas Section 29 deals with preparation of information memorandum and the contents of information memorandum. The contents are as follows:

*“(a) The Resolution Professional shall prepare an information memorandum in such form and manner containing such **relevant information** as may be specified by the board for formulating a resolution plan, the Resolution Professional shall provide to the resolution applicant access to all the relevant information in physical and electronic form provide such a resolution applicant undertakes to comply with previous provisions of law for the time being enforce relating to confidentiality.*

(b) to protect any intellectual property of Corporate Debtor it may have access to (c) not to share relevant information with 3rd party unless (a) & (b) of the section.”

In the explanation annexed to Section 29, the word ‘relevant information’ is explained. It means the information required by the resolution applicant to make the resolution plan for the Corporate Debtor which shall include financial position of the Corporate Debtor. All information relating to dispute against the Corporate Debtor on any other matter pertaining to the Corporate Debtor as may be specified. Therefore, the word ‘**relevant information**’ referred in Section 29 (1) of IBC is only an information required by the resolution applicant i.e. appellants herein to make resolution plan for the Corporate Debtor. Here, the Resolution Professional disclosed

the information based on the report of MITCON available and he is not an expert to make an assessment of the production capacity of the industry, therefore, he only disclosed those details regarding production capacity based on earlier report submitted by MITCON, such information is relevant for the purpose of making a resolution plan for the Corporate Debtor by the Resolution Applicant.

Thus, the Resolution Professional disclosed relevant information enabling the resolution applicants/ appellants to make appropriate application by submitting resolution plan for the Corporate Debtor. Such act would not amount to fraudulent misrepresentation.

Learned counsel for the Appellants also drawn the attention of this Court to Regulation Nos. 32, 36 (2) (a) which states about contents of Information Memorandum i.e. assets and liabilities with such description as on insolvency commencement date. The word 'description' includes the details such as cost of acquisition information useful like identification numbers, depreciation of charge etc., as per the explanation under Regulation 36 (2) (a). The contention of the Appellant is that the report was submitted for obtaining loans and it is confidential. Based on such report, disclosure of production capacity is impermissible. But this contention is not acceptable, for the reason that the report was submitted by MITCON to Corporate Debtor within reasonable time

before commencement of insolvency resolution process. Thus, the CIRP made every endeavor to disclose the relevant information as required under law. The appellants themselves obtained a certificate from stock exchange and placed on record. Even according to the certificate, the production capacity of corporate debtor is same as mentioned in Information Memorandum, as such, the information disclosed by CIRP is based on material. Hence the finding of Tribunal cannot be interfered by this Appellate Tribunal.

Viewed from any angle, the Resolution Professional *prima facie* did make no misrepresentation or false representation, much less, fraudulent misrepresentation as alleged by the Appellants.

The Adjudicating Authority dismissed the application on the ground that the Adjudicating Authority has no power to recall its own order, which is *prima facie* erroneous, in view of the law laid down by the Apex Court in various judgments. At this stage, it is relevant to refer judgment of Apex Court in ***United India Insurance Co. Ltd. vs. Rajendra Singh***¹² where the Apex Court held that:

“Fraud and justice never dwell together” (Frans et jus nunquam cohabitant) is a pristine maxim which has never lost its temper over all these centuries. Lord Denning observed in a language without equivocation that “no judgment of a Court, no order of a Minister can be allowed to stand if it has been obtained by fraud, for, fraud unravels everything.”

¹² 2000 ACJ 1032

“Therefore, we have no doubt that the remedy to move for recalling the order on the basis of the newly discovered facts amounting to fraud of high degree, cannot be foreclosed in such a situation. No court or tribunal can be regarded as powerless to recall its own order if it is convinced that the order was wangled through fraud or misrepresentation of such a dimension as would affect the very basis of the claim.”

The same principle is reiterated in ***United India Insurance Co. Ltd. vs. Rajendra Singh; Roshan Deen vs. Preeti Lal; Indian National Congress vs. Institute of Social Welfare; Indian Bank vs. Satyam Fibres (India) Pvt. Ltd; Deepa Gourang Murdeshwar Katre vs. Principal, V.A.V. College of Arts; Revandas Ranchhodhbhai Rathod vs. Jyotiben Wd/o Rameshbhai Madhusudan Thakar¹³; Bindeshwari Pd. Chaudhary V. Debendra Pd. Singh*** (referred supra).

We are not disputing the power of the Tribunal to recall its own order. The Tribunal held that it is not vested with the power to recall its own order on any ground but it is erroneous and therefore dismissal of the I.A. No. 230 of 2020 filed by these Appellants, on the ground that no such power is vested with the Tribunal is hereby set aside, while holding that Tribunal is competent to recall its own orders in view of the perspective pronouncements referred above.

The Adjudicating Authority also concluded that the order of primary Tribunal merged with the order of Supreme Court and NCLT.

¹³ 2011 SCC online GUJ 2552

No doubt, normally the order of the Appellate Tribunal will be merged with the order passed by the Tribunal etc. The fraud allegedly detected in year 2020 appointing GITCO for assessing the production capacity of Corporate Debtor company and by the time the appeals were filed by the Appellants, so no such fraud was detected and no findings were recorded by the Appellate Tribunal or the Supreme Court in the appeals filed by the other creditors.

‘Doctrine Of Merger’ was laid down by the Hon’ble Apex Court in ***State of Madras V. Madurai Mills Company Ltd***¹⁴, wherein the Supreme Court held as follows:

*“But the doctrine of merger is not a doctrine of rigid and universal application and it cannot be said that wherever there are two orders, one by the inferior Tribunal and the other by a superior Tribunal, passed in an appeal or revision, there is a fusion or merger of two orders **irrespective of the subject matter** of the appellate or revisional order and the scope of the appeal or revision contemplated by the particular statute. In our opinion, the application of the doctrine depends on the nature of the appellate or revisional order in each case and the scope of the statutory provisions conferring the appellate or revisional jurisdiction. For example in *Amritlal Bhogilal & Co*’s. (1) case it was observed by this Court that the order of registration made by the Income-tax officer did not merge in the appellate order of the Appellate Commissioner, because the order of registration was not the subject-matter of appeal before the appellate authority. It should be noticed that the order of assessment made by the Income-Tax Officer in that case was a composite order viz., an, order granting registration of the firm and making an assessment on the basis of the registration. The appeal was taken by the assessee to the Appellate Commissioner against the composite order of the Income-tax- Officer. It was held by the High Court that the order of the Income-tax- Officer granting registration to the respondent must be deemed to be merged in the appellate order and that the revisional power of the Commissioner of Income-tax cannot, therefore, be exercised in respect of it. The view taken by the High Court was overruled by this Court for the reason that the order of the Income-tax officer granting registration cannot be deemed to have merged in the order of the Appellate Commissioner in an appeal taken against the composite order of assessment. Similarly, in *The State of Uttar**

¹⁴ AIR 1967 SC 681

Pradesh V. Mohammed Nooh (2), it was held by this Court that the principle of merger cannot apply in the case of an order of dismissal of a public servant which was made by the departmental Tribunal on the 20th April, 1948 and against which the appeal was dismissed by the Appellate Authority on the 7th May, 1949, and the revisional application was rejected on the 22nd April, 1950. In the circumstances of the present case, it cannot be said that there was a merger of the order of assessment made by the Deputy Commercial Tax Officer dated the 28th November, 1952 with the order of the Deputy Commissioner of Commercial Taxes dated the 21st August, 1954 because the question of exemption on the value of yarn purchased from outside the State of Madras was not the subject-matter of revision before the Deputy Commissioner of Commercial Taxes. The only point that was urged before the Dy. Commissioner was that the sum of Rs. 6,57,971-4-9 collected by the respondent by way of tax should not be included in the taxable turnover. This was the only point raised before the Dy. Commissioner and was rejected by him in the revision proceedings. On the contrary, the question before the Board of Revenue was whether the Dy. Commercial Tax Officer, Madurai was right in excluding from the net taxable turnover of the respondent the sum of Rs. 7,74,62,706-1-6 which was the value of cotton purchased by the respondent from outside the State of Madras. We are, therefore, of opinion that the doctrine of merger cannot be invoked in the circumstances of the present case."

The above principle is reiterated in ***Kunhayammed vs. State of Kerala***¹⁵; ***Khoday Distilleries Ltd. vs. Shri Mahadeswara Sahakara Sakkare Karkhane Ltd***¹⁶; ***A.V. Papayya Sastry vs. Govt. of AP***¹⁷; ***Vijay Shekhar vs. Union of India***¹⁸; ***Venture Global Engineering LLC vs. Tech Mahindra Ltd***¹⁹; ***Ganpatbhai Mahijibhai Solanki vs. State of Gujarat***²⁰; ***Vijay Shekhar vs. Union of India***²¹, ***Venture Global Engineering LLC vs. Tech Mahindra Ltd.***²².

¹⁵ (2000) 6 SCC 359

¹⁶ (2019) 4 SCC 376

¹⁷ (2007) 4 SCC 221

¹⁸ (2004) 4 SCC 666

¹⁹ (2018) 1 SCC 656

²⁰ 2008 (3) SCALE 556

²¹ 2007 (9) SCALE 442

²² (2018) 1 SCC 656

However, applying with principles laid down in the above judgments to the present facts of the case, we hold that dismissal of application of these appellants by the Tribunal on the ground of merger is erroneous, for the reason that, there was no challenge to the resolution plan approved by the Tribunal on the ground of misrepresentation or fraudulent misrepresentation.

In view of law laid down by the Apex Court in the judgements referred above, the dismissal of the application on the ground of lack of power to recall the orders and on the principle of doctrine of merger, the order of the Adjudicating Authority is liable to set aside, as it is *ex facie* erroneous. Accordingly, the findings are hereby set aside.

In any view of the matter, based on fact situation, more particularly about the calculation of production capacity by specific formula extracted above and for the failure of these appellants to inspect the premises before making expression of interest for submitting resolution plan indicates that the appellants are not diligent in submitting the resolution plan.

In ***Ebix Singapore Private Limited vs. Committee of Creditors of Educomp Solutions Ltd. and Anr***²³ and ***Kundan Care***

²³ 2021 SCC Online SC 707

Products Ltd. vs. Amit Gupta etc²⁴, the Supreme Court considered the duties of Resolution Professional in para 185 with reference to Section 29 of IBC, BLRC report and the duties of Resolution Professional, held as follows:

“1. The RP must provide the most updated information about the entity as accurately as is reasonably possible to this range of solution providers. In order to do this, the RP has to be able to verify claims to liabilities as well as the assets disclosed by the entity. The RP has the power to appoint whatever outside resources that she may require in order to carry out this task, including accounting and consulting services.

2. The information collected on the entity is used to compile an information memorandum, which is signed off by the debtor and the creditors committee, based on which solutions can be offered to resolve the insolvency. In order for the market to provide solutions to keep the entity as a going concern, the information memorandum must be made available to potential financiers within a reasonable period of time from her appointment to the IRP. If the information is not comprehensive, the RP must put out the information memorandum with a degree of completeness of the information that she is willing to certify.

For example, as part of the information memorandum, the RP must clearly state the expected shortfall in the coverage of the liabilities and assets of the entity presented in the information memorandum. Here, the asset and liabilities include those that the RP can ascertain and verify from the accounts of the entity, the records in the information system, the liabilities submitted at the start of the IRP, or any other source as may be specified by the Regulator.

3. Once the information memorandum is created, the RP must make sure that it is readily available to whoever is interested to bid a solution for the IRP. She has to inform the market (a) that she is the RP in charge of this case, (b) about a transparent mechanism through which interested third parties can access the information memorandum, (c) about the time frame within which possible solutions must be presented and (d) with a channel through which solutions can be submitted for evaluation. The code does not specify details of the manner or the mechanism in which this should be done, but rather emphasis that it must be done in a time-bound manner and that it is accessible to all possible interested parties.”

Similarly, the Apex Court also adverted to UNCITRAL Guide notes, which is as follows:-

²⁴ Civil Appeal No.3560 of 2020 dated 28.07.2021

“ 5. Duties and functions of the insolvency representative [...]

(e) Obtaining information concerning the debtor, its assets, liabilities and past transactions (especially those taking place during the suspect period), including examining the debtor and any third person having had dealings with the debtor.....”

In para 189 of the judgment the Apex Court concluded that under the IBC, duty is cast upon a Resolution Professional to collect as much information about the Corporate Debtor as is accurately possible to him. Then, such information is communicated through an Information Memorandum. The Resolution Professional must be careful to clarify when its information is not comprehensive and what facts may cause change.

The word ‘relevant information’ is required under Section 29 to formulate its resolution plan. When once the Resolution Professional disclosed relevant material in Information Memorandum based on MITCON Report which is equivalent to the information collected by GITCO, which the Appellants relied on is sufficient to conclude that the Resolution Professional did make no misrepresentation or fraudulent misrepresentation, therefore, when the appellants failed to make necessary investigation in the matter and proceeded to submit its resolution plan, this the act of the Resolution Professional cannot be held to be the fraudulent misrepresentation. On the other hand, it appears that this application was filed after 18 months from the date of approval of

resolution plan with an intention to delay the proceedings and to avoid resolution plan submitted by resolution applicants/appellants. If the contention of the Appellants is accepted at this belated stage and permitted the Tribunal to recall such orders after approval of the resolution plan by order of the Adjudicating Authority, it would amount to opening flood gates which would frustrate the very intention of IBC where timely resolution is required at every stage.

Therefore, for the reasons stated above, we find no ground to interfere with the order passed by the Adjudicating Authority in I.A. No. 230 of 2020 (NCLT, Ahmedabad Bench) and consequently the appeal deserves to be dismissed as the appeal is devoid of merits. Accordingly, Comp. App. (AT) (Ins.) No. 681 of 2022 is dismissed.

Comp. App. (AT) (Ins.) No. 678 of 2022

In Comp. App. (AT) (Ins.) No. 678 of 2022, the simple issue is about implementation of resolution plan by the Appellants.

This application was filed by the employees of Corporate Debtor to direct the Respondent to make payments due to the applicants forthwith and evolve mechanism to ensure that future payments are made and initiate action against the Respondent under Section 74 of code for willful contravention of resolution plan approved on 27.02.2019. The Tribunal allowed the petition; directed

the respondent to implement the resolution plan forthwith and to pay the dues to the employees. The same is now challenged on the ground that the resolution plan was submitted due to misrepresentation made by interim resolution professional and therefore no direction be issued against the appellants herein.

In Comp. App. (AT) (Ins.) No. 681 of 2022, a specific finding is recorded by this Tribunal that no fraudulent misrepresentation was made by the CIRP and the CIRP had undertaken an exercise to calculate the production capacity of the industry and concluded that no fraudulent misrepresentation was made by CIRP while issuing Information Memorandum, calling for expression of interest.

As the application to recall the order passed by the Tribunal in I.A. No. 224 of 2018 was dismissed, the appellants are under obligation to implement the resolution plan. In fact, these appellants and others are challenging the order passed by the Tribunal in I.A.No.224 of 2019 preferred the appeals which were dismissed by this Tribunal. In Paragraph No. 45 of the order, the Appellate Tribunal held as follows:-

“45. Therefore, we direct the ‘Successful Resolution Applicant’- 2nd Respondent (‘Kushal Ltd.’) to release full provident fund and interest thereof in terms of the provisions of the ‘Employees Provident Fund’ and Miscellaneous Provision Act 1952’ immediately, as it does not include as an asset of the ‘Corporate Debtor’. The impugned order dated 27th February, 2019 approving the ‘Resolution Plan’ stands modified to the extent above.”

Aggrieved by the order, an Appeal was preferred under Section 62 of the Code before the Apex Court in Civil Appeal and the same was dismissed holding as follows:-

“we find no ground to interfere with the impugned order passed by the/ Tribunal the appeal is, accordingly, dismissed.”

In view of the concurrent findings recorded by the Appellate Tribunal and Supreme Court, the Appellants have no other option except to implement the resolution plan submitted by the resolution applicants/appellants and approved by the Tribunal in I.A. No. 224 of 2018, consequently the Appellants are under obligation to discharge the liability, i.e. the amount due to the applicants.

The Tribunal rightly issue direction for payment of dues and the finding recorded by Tribunal does not call for interference of this Appellate Tribunal, while exercising the power under section 61 of IBC. Hence, the finding recorded by NCLT is upheld. Accordingly, the Comp. App. (AT) (Ins.) No. 678 of 2022 is dismissed.

Comp. App. (AT) (Ins.) No. 680 of 2022

This Comp. App. (AT) (Ins.) No. 680 of 2022 is filed challenging the order in I.A. No. 229 of 2020 was filed by the lead man of the lenders of the Rainbow Papers Ltd. under Section 60 (5) of IBC read with Rule 11 of NCLT, Rules and Regulation 39 of CIRP, with a request to issue appropriate direction against the Appellants herein to implement the resolution plan including the direction for deposit of balance allotment of debentures, giving of guarantees by the

Respondent Nos. 2 to 4 in the application and also made an alternative prayer. However, the Tribunal allowed the application issuing a direction for deposit of amount and issue of debentures etc. aggrieved by the order, Comp. App. (AT) (Ins.) No. 680/2022 is filed.

When the resolution plan is approved and the petition filed for recall of the order of approval by the NCLT was dismissed, it is for the appellants to implement the resolution plan, thus rightly the NCLT allowed the application of lead man of lenders.

In view of our foregoing discussion, this Appellate Tribunal is not required to adjudicate further the matter. Hence, the Comp. App. (AT) (Ins.) No. 680 of 2022 filed by these Appellants is devoid of merits and liable to be dismissed. Accordingly, dismissed.

In the result, the Appeals are dismissed, confirming the orders passed by Hon'ble National Company Law Tribunal, Ahmedabad in I.A. Nos. 229 of 2020, 230 of 2020 and 231 of 2020 dated 24.03.2021, but however, without costs.

[Justice Ashok Bhushan]
Chairperson

[Justice M. Satyanarayana Murthy]
Member (Judicial)

[Barun Mitra]
Member (Technical)

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