

BEFORE THE ADJUDICATING AUTHORITY
NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD BENCH
COURT 1

IA 97 of 2020 in CP(IB) 175 of 2018

Coram: MADAN B. GOSAVI, MEMBER (JUDICIAL)
VIRENDRA KUMAR GUPTA, MEMBER (TECHNICAL)

ATTENDANCE-CUM-ORDER SHEET OF THE HEARING THROUGH VIDEO CONFERENCING BEFORE THE
AHMEDABAD BENCH OF THE NATIONAL COMPANY LAW TRIBUNAL ON 06.01.2021

Name of the Company: Thirdeye Tradlink Pvt Ltd
V/s
Prawincharan P Dwary RP
For Swastik Ceracon Ltd & Ors

Section: IA For Directions

ORDER

The case is fixed for pronouncement of order.

The order is pronounced in open court vide separate sheet.


(VIRENDRA KUMAR GUPTA)
MEMBER (TECHNICAL)


(MADAN B GOSAVI)
MEMBER (JUDICIAL)

Dated this the 6th day of January, 2021.

**BEFORE THE ADJUDICATING AUTHORITY
NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD BENCH
COURT-1**

IA 97 of 2020 in CP (IB) No 175/9/NCLT/AHM/2018

In the matter between:

Thirdeye Tradelink Private Limited

Having its office at:

56/B, Sthanakwasi Jain Society,
Nr. Naranpura Railway Crossing,
Usmanpura, Ahmedabad-380013.

.....Applicant

Address for correspondence or service of notice:

Ravi Pahwa,
Thakkar and Pahwa, Advocates,
71, New York Tower-A,
Near Thaltej Cross Roads,
Thaltej, Ahmedabad-380054

Versus

**1. Shri Prawincharan P. Dwary
Resolution Professional of
Swastik Ceracon Limited**

Having its address at:

407, Akchhat Tower, Pakwan Cross Road,
S.G. Highway, Bodakdev, Ahmedabad

**2. Committee of Creditors of Swastik Ceracon Limited
Through its Lead Bank
Dena Bank**

Having office at:

Industrial Finance Branch,
Dena Laxmi Bhavan, 188-A,
Ashram Road, Navrangpura,

Ahmedabad-380009

3. M/s. Gabon Seramik Private Limited

Having its registered office at:

D-301, Ganesh Meridian,

Opp. Amiraj Farm, Nr. New Gujarat High Court,

S.G. Highway, Ahmedabad-380060

.....Respondents

Order reserved on 15.12.2020

Order delivered on 06.01.2021

Coram: MADAN B. GOSAVI, MEMBER (J)

VIRENDRA KUMAR GUPTA, MEMBER (T)

Appearance ...

Learned senior counsel Mr. Navin Pahwa appeared for the Applicant.

Learned senior counsel Mr. Rashesh Sanjanwala appeared for the Respondent.

Resolution Professional Mr. Prawin C Dwari appeared. Learned counsel Mr. Atul Sharma and learned counsel Mr. Prithu Parimal appeared. Learned Counsel Mr. Pankaj Jain appeared.

[Per: VIRENDRA KUMAR GUPTA, MEMBER (T)]

1. In this application, the applicant is seeking rejection of the approved resolution plan or, in the alternate, direction from this Authority to Resolution Professional to convene the meeting of Committee of Creditors (hereinafter referred to as "COC") to reconsider the eligibility of the resolution applicant

in view of the provisions of Section 29A of Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "CODE"). It has also been prayed that this Authority may take an appropriate decision in the interest of justice and equity.

2. The facts, in brief, are that the Corporate Debtor was admitted into Corporate Insolvency Resolution Process (hereinafter referred to as "CIRP") vide order dated 15.01.2019. The resolution professional conducted CIRP as per the provisions of CODE read with relevant Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (hereinafter referred to as "CIRP Regulations"). Invitation for Expression of Interest was issued on 13.07.2019. The Resolution Professional informed COC that three Resolution Plans were received namely M/s. Gabon Seramik Pvt. Ltd & others [H1], M/s. AjitaSilChem Pvt. Ltd. [H2] and M/s. Thirdeye Tradelink Pvt. Ltd. And others [H3]. COC negotiated with two resolution applicants as regard to revision of the resolution plan. M/s. Gabon Seramik Private Limited revised its resolution plan. COC in its meeting dated 07.10.2019 approved the

Resolution Plan of M/s. Gabon Seramik Private Limited by 70.82% votes and rejected the plan of the applicant before us. This Authority directed COC to have a re-look at the Resolution plan so approved in view of the findings of the Hon'ble Supreme Court in the case of *Committee of Creditors of Essar Steel India Ltd vs. Satish Kumar Gupta and others* order dated 15.11.2019. The COC reviewed the same and again approved the Resolution Plan with 90.44% votes which has been submitted by Resolution Professional for approval of this Authority and is pending for such approval.

3. The learned senior counsel for the applicant appeared and submitted that applicant sent a representation to COC on 24.01.2020 and 05.02.2020 pointing out that the said Resolution Applicant was ineligible under Section 29A of the CODE and there were other irregularities as well. However, COC still approved the Resolution Plan of the said Resolution Applicant. The learned senior counsel, thereafter, submitted that the Resolution Plan so approved was liable to be rejected for the following reasons:

- i. An application under Section 9 was filed by an Operational Creditor for an outstanding amount of Rs. 46 lacs. Whereas the Corporate Debtor was having financial liabilities to the tune of Rs. 120 crores approximately. It was claimed that the petition under Section 9 was filed with the collusion of both the parties and CIRP was initiated with the consent of the Corporate Debtor; hence, a glaring instance of abuse of process of law whereby financial liabilities of Corporate Debtor worth of Rs. 120 Crores approximately were being settled at Rs. 52 Croers only.
- ii. The Successful Resolution Applicant was not having requisite net worth of Rs. 10 Crore as on 31.03.2018 as prescribed in EOI. The share capital was increased in August, 2019 as requisite form was filed on 07.08.2019 and that too by conversion of loan into equity.
- iii. A deed of assignment dated 31.01.2019 had been signed between the Corporate Debtor through Suspended Management with the Resolution Applicant whereby trademarks and copyrights belonging to the

Corporate Debtor were transferred to the Resolution Applicant for a meagre consideration of Rs. 1 lakh only. Although, Resolution Professional had already been appointed but he was not a party to such deed of assignment. Thus, this amounted to an act of fraud which has not been brought on record and this fact established the hobnobbing between Corporate Debtor and Resolution Applicant.

iv. Corporate Debtor and the Resolution Applicant were largely controlled by two persons, namely, Shri Grishkumar Jayantibhai Patel and Shri Pankaj Narangbhai Patel and their relatives and shareholdings were arranged in a manner so that collusion between them could not be established apparently.

4. The Learned senior counsel, thereafter, drew our attention to provisions of Section 29A (j) and explanation thereto of the CODE. He also referred to provisions of Section 5(24A)(h) and contended that Shri Himanshubhai Patel, being a director of Brinda Exports Limited (wholly owned subsidiary of Vimal Oil and Foods Limited) and, thus, liable to or accustomed to act

on the advice, directions or instructions of Vimal Foods and Oils Limited, hence, limitations caused due to such relationship were to be applied to find out the eligibility of the Resolution Applicant. It was further argued that Vimal Oil and Foods Limited was not only a wilful defaulter but also an un-discharged insolvent since 09.11.2015, therefore, Resolution Applicant was ineligible as per clause (a), (b), (c) of Section 29A.

5. Our attention was also drawn to the decision of Hon'ble Supreme Court in the case of *Arcelormittal India Private Limited vs. Satish Kumar Gupta and others* in support of various arguments and strong reliance was placed on the observations of Hon'ble Supreme Court in para 60 of the said order.

6. On behalf of Resolution Professional sequence of events was narrated. It was submitted that the COC after consideration of all factors from time to time approved the Resolution Plan after applying its commercial wisdom and there was no merit in any of the contentions raised by the applicant.

Consequently, this application was liable to be dismissed. In this regard following contentions were raised:

- (i) The applicant being unsuccessful Resolution Applicant had no *locus standi* to file the application at this stage as the applicant did not exercise their right to object earlier in spite of having knowledge of the fact that the Successful Resolution Applicant had also been shortlisted. It was further contended that the Resolution Plan had been approved by COC after applying its commercial wisdom and taking note of all these objections raised by the applicant through its representations; hence, on merit all the aspects had already been considered by COC.
- (ii) As regard to net worth /eligibility criteria, it was emphasized that the Resolution Plans of all the three Resolution Applicants had been evaluated on the same basis and equal footing and the Successful Resolution Applicant had the requisite net worth on a consolidated basis with Co-applicants of each Resolution Applicant.

(iii) As regard to transfer of trademarks and other intangible assets, it was specifically pointed out that the Corporate Debtor was still having ownership of such intellectual properties. It was also contended that lease/job work charges were received from Resolution Applicant especially for meeting CIRP costs. It was also pleaded that there was no transfer/sale of assets/machineries or stocks to Resolution Applicant. Thus, these pleas had been made without verifying the correct facts and, therefore, these did not help the cause of the applicant.

(iv) As regard to the allegation that Resolution Professional had not discharged its duties efficiently, it was vehemently argued that this contention was without substance, particularly when no material had been brought on record to substantiate the same. It was further argued that all the Resolution Applicants were given fair and equal treatment during the CIRP.

(v) As regard to the allegation of collusiveness between the Operational Creditor and the Corporate Debtor, it

was pleaded that application filed under Section 9 of the CODE had been adjudicated by this Authority after taking into consideration all relevant facts and order of initiation of CIRP was passed thereafter, hence, this plea was devoid of any merits and it had been made by the applicant to derail the CIRP.

- (vi) In regard to the supremacy of commercial wisdom of COC, reliance was placed on the decision of the Hon'ble Supreme Court in the case of *COC of Essar India Limited vs. Satish Kumar Gupta and others* and also on the decision in the case of *K. Sashidhar vs. Indian Overseas Bank and Ors. Reliance* was also placed on the decision of the Hon'ble NCLAT in the case of *Shrawan Kumar Agrawal Consortium vs. Rituraj Steel Private Limited and Ors* order dated 10.12.2019 in support of contentions that commercial wisdom of COC was supreme and Adjudicating Authority could not challenge the same and also for the proposition that without bringing any material on record to show that Resolution Professional

manipulatively conducted the process, such alleged claims made by the applicant were of no use.

(vii) As regard to ineligibility of the Successful Resolution Applicant under Clause (c) of Section 29A of the CODE, it was argued that in order to render a Resolution Applicant ineligible under this clause it was necessary that at least period of one year should have lapsed from the date of classification of an account as NPA from the date of commencement of CIRP. It was further contended that in the present case, Corporate Debtor was classified as NPA for the first time on 28.04.2018 and was admitted into CIRP on 15.01.2019, being less than one year; hence, on the basis of this very threshold, the question of ineligibility of Resolution Applicant or of any Directors /Promoters of the Corporate Debtor/Resolution Applicant did not arise. In support of such claim strong reliance was placed on the observations of Hon'ble Supreme Court in para 54 to 57 of its order in the case of *Arcelormittal India Pvt. Ltd vs. Satish Kumar Gupta*.

(viii) As regard to ineligibility of the Resolution Applicant on the ground that Mr. Himanshu B Patel being a Director of M/s. Brinda Exports Limited which is wholly owned subsidiary of Vimal Oil and Foods Limited, a wilful defaulter since 09.01.2015, it was contended that no disqualification could be attached to Resolution Applicant on this score under the provision of Section 29A of the CODE relied on by the applicant as such person was an independent Director of Brinda Export Ltd.; hence, not a related party in view of 2(87) of Companies, Act, 2013. It was further argued that there was no connection between Brinda Exports Ltd. and Resolution Applicant/Corporate Debtor; hence, for this reason also clause 29A(j) was not applicable. It was also argued that Vimal Oil and Foods Limited was under the control of liquidator and not of the Suspended Management of that company; hence, Mr. Himanshu could not be said to act under the control and instructions of said company or its promoters.

7. During the course of hearing, we drew the attention of the learned senior counsel Mr. Rashesh Sanjanwala to the observations made by the Hon'ble Supreme Court in the case of *Arcelormittal India Private Limited vs. Satish Kumar Gupta and Ors.* in para 60 at page 67 (2019) 2 SCC 1 and questioned as to why such observations were not applicable to the present case. The learned senior counsel submitted that it was not in dispute that period of one year had not lapsed on the date of commencement of CIRP and, therefore, by no stretch of imagination, clause (c) of Section 29A could be applied. It was further submitted when the language of the statute was unambiguous and clear, hence, the same was to be given effect and any other interpretation would amount to doing violence to the said provisions or rewriting of the law which was not permissible as the same fell within the domain of legislature. In support of this plea, the learned senior advocate again referred to various paragraphs of the same order of Hon'ble Supreme Court wherein the basic provision and situation had been explained by the Hon'ble Supreme Court and based upon such observations, it was reiterated that in the facts of the case clause (c) of Section

29A of the CODE was not applicable. It was once again submitted that provisions of clause (i) and clause (iii) of Explanation (I) of clause (j) of Section 29A were not applicable as Brinda Exports Limited was not a NPA account.

8. In the rejoinder, the learned senior counsel for the applicant mainly reiterated its submissions and drew our attention to assignment deed dated 31.01.2019 whereby ownership of landmark and brand had been transferred by the Corporate Debtor to the Resolution Applicant and based upon this, it was pleaded that the contentions made by the Resolution Professional in this regard were not correct. Our attention was also drawn to the fact that Pankaj Narayan Bhai Patel and Girishbhai J. Patel were holding equity shares both in the Corporate Debtor and the Resolution Applicant, however, they transferred their shares in Gabon Seramik Private Limited (Resolution Applicant) on 05.03.2018 to their close relatives, though, statutory reporting was done on 08.02.2019 although the due date for such reporting was 29.11.2018 which clearly established the fact that it was an afterthought and done subsequently to avoid ineligibility

under Section 29A of the CODE. Our attention was also drawn to other facts to show that Corporate Debtor and Resolution Applicants were actually connected/related with each other and had manipulated the process to gain undue and unjust advantage; hence, such Resolution Applicant was necessarily be barred from participating in CIRP of Corporate Debtor.

9. We have considered the submissions made by both the sides and material on record. In this application, two issues have been raised by the applicant as regard to the ineligibility of the Resolution Applicant to submit a Resolution Plan. One issue is that the petition under Section 9 was of collusive nature and affairs were so arranged which defeated the object and purpose of Section 29A of IBC, 2016. Second contention is that the resolution applicant is ineligible under Section 29A (j) r.w. Section 5(24A)(h) of IBC, 2016.

10. Firstly, in our considered opinion, the issue of collusiveness needs to be looked into as this is significant not only from the point of view of this specific case but also from the point of

view that it has got large ramifications. However, before entering into this exercise, we need to consider the plea of the Respondent that this application was not maintainable because applicant had been given sufficient opportunities earlier. In our view, this plea is not legally tenable as u/s 60(5)(c) of the CODE after admission of a petition u/s 7 or 9 we have jurisdiction to decide any issue relating to or arising out of the Insolvency Resolution Process. We are further of the view that, it is not in dispute that issue raised in this application is connected with Insolvency Resolution Process of the Corporate Debtor; hence, the same needs to be adjudicated upon before approval of Resolution Plan submitted before us. Having discussed this aspect, now, we proceed to delve upon the relevant facts relating to the issue of manipulative/collusive approach by the Resolution Applicant to keep itself eligible to submit the Resolution Plan. It is noted that the Corporate Debtor has been admitted into CIRP on 15.01.2019 by this Adjudicating Authority in an application filed by an Operational Creditor u/s 9 of IBC, 2016. Notice u/s 8 of IBC, 2016 was delivered by such Operational Creditor on the Corporate Debtor on 19.03.2018.

It is also noteworthy that no reply to such notice was given by the Corporate Debtor as required u/s 8(2) of IBC, 2016. The Operational Creditor filed application u/s 9 of IBC, 2016 on 12.04.2018. It is noted that account of the Corporate Debtor was classified as NPA by SBI in the end of the March, 2018 as per written submissions given on behalf of the Resolution Professional on 21.10.2020. Dena Bank classified the account of the Corporate Debtor as NPA on 28.04.2018. Indian Overseas Bank classified the account of the Corporate Debtor as NPA on 30.06.2018. Thus, considering the sequence of events, it is evident that application filed u/s 9 has been filed just before the account of the Corporate Debtor is being classified as NPA by the Financial Creditors. It is also to be noted that apart from the fact that no reply was submitted to notice delivered by the Operational Creditor u/s 8 of IBC, 2016 the Corporate Debtor has also given its consent for its admission into CIRP and on that basis order has been passed by this Authority on 15.01.2019. Thus, it is apparent that one year has not been passed from the date of classification of account of the Corporate Debtor as NPA by Financial Creditors for the first time on 31.03.2018 or

April/June, 2018. It is on this basis only, the eligibility of Resolution Applicant has been claimed to submit Resolution Plan though there is no dispute that both Corporate Debtor and Resolution Applicant are largely controlled by two persons namely Girish J Patel and Pankaj N Patel. Before going to the legal aspects of the matter, in our considered view, it is imperative for us to look into the certain facts which have been brought to our notice by the Applicant. The same are narrated briefly as under:

- I. The registered office of both the companies, i.e. Corporate Debtor and Resolution Applicant was common and the same was for a period from 02.02.2012 to 31.12.2017;
- II. Even the company secretary's ID was same for both the entities for the period from 31.03.2014 to 31.03.2017;
- III. The Resolution Applicant had made investment in the share capital of the Corporate Debtor on 31.03.2018;

IV. One person namely Mr. Ganpatbhai D Patel was a common director of both the company for same period.

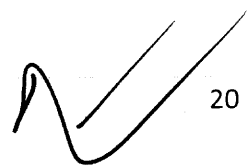
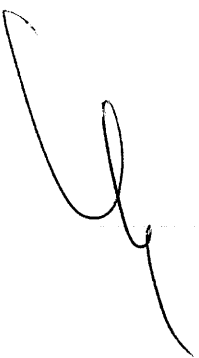
V. There are common shareholders from time to time.

11. One entity M/s. Akik Tiles Ltd. was holding 4.30% of share capital of the Corporate Debtor and 97.33% share capital of Resolution Applicant during the period from 15.05.2012 to 24.03.2013. This company was subsequently merged into the Corporate Debtor on 25.03.2012 and consequently Corporate Debtor had 97.33% of i.e. 9 lacs shares of the Resolution Applicant. On 26.03.2013 the investments/holdings of the Corporate Debtor in the Resolution Applicant were transferred to Girishbhai J Patel and Pankaj N Patel director of the Corporate Debtor in equal proportions. On 05.03.2018 Shareholdings of such persons have been claimed to have been transferred to close relatives i.e., wife/son of such persons though return relating to recording such transfers have been filed much belatedly on 08.02.2019. Thus, these facts reveal that shareholdings of the Corporate Debtor as well as Resolution Applicant are held by family

members/close circles. There is running and live relationship between Corporate Debtor and Resolution Applicant.

12. Apart from above facts, it is also to be noted that assignment deed has been signed on 31st day of January, 2019 by and between the Corporate Debtor and the Resolution Applicant whereby the Corporate Debtor as assigner has assigned trademarks and copyrights together with the goodwill of the business to the assignee and their successors absolutely for a meagre consideration of Rs. 1 lac only. Although, it was vehemently argued that no ownership rights have been transferred by the Corporate Debtor to the Resolution Applicant but from the reading of following para which is part of the said assignment deed, it is evident that in fact ownership has also been transferred to the Resolution Applicant and that too during the CIRP period when the moratorium is in place.

“ASSIGNOR agreed that on aforesaid conditions, the Registered trademark & Copyrights applied in the name of ASSIGNOR automatically assigned and transfer to ASSIGNEE and ASSIGNOR can not legally authorized to claim to ownership in the eyes of law and not any legal rights remain with the ASSIGNOR.”



It is also interesting and revealing fact that trademarks and copyrights in the name of “Gabon” which is the name of the Resolution Applicant also belong to the Corporate Debtor which have also been assigned.

Thus, claims made by Resolution Professional are in fact contrary to the facts and claims made by the Applicant which are correct.

13. Further, the even by the admission of the Resolution Professional the assets/machineries have been given on lease to the Resolution Application in addition to assignment of such rights and goodwill and which appear to prima facie cover only CIRP costs as per submissions made on behalf of the Resolution Professional. No material has been brought ^{or} has been placed on record as to what lease rents/job work charges are being received. No progress/status report at any point of time of CIRP has been filed with this Authority. Agreement for such lease/job work has also not been brought on record.

14. It is also noted that vide letter dated 24.01.2020 the applicant wrote a letter to COC wherein the applicant took various objections against the approval of the Resolution plan submitted by the Resolution Applicant. One of the allegations was that after the default in the payment of loan from February, 2018 as confirmed by the auditors in their audit report of the Corporate Debtor for a financial year 2017-18, the Resolution Applicant had, in fact, started to run the factory of the Corporate Debtor on lease and, thus, a crystal clear understanding had been reached between the Corporate Debtor as well as Resolution Applicant as regard to future action plan. Claims regarding transfer of shares to close relatives by way of gift in the back date i.e. 05.03.2018 were also made. It was also claimed that there was a back door entry of the Successful Resolution Applicant. Other contentions which were made have already been mentioned hereinbefore; hence, not repeated.

15. Another letter dated 05.02.2020 was given to COC by the applicant wherein it was again claimed that both parties were

related and ineligibility u/s 29A(c) of IBC, 2016 was attracted.

16. A special meeting of the COC was held on 05.02.2020 wherein claims made by the Applicant were rejected. However, as regard to transfer/allotment of shares, it is stated that neither Resolution Professional nor COC had any say in that matter and any such transaction could not be invalidated merely because rejecting of the same was belatedly complied with. In the minutes of meeting of such special meeting, it is also mentioned that one more letter dated 01.02.2020 had been written by the applicant wherein one member of COC, however, copy of such letter has not been brought on record.

17. These facts raise serious questions on the conduct of the CIRP process and if analyzed in the proper perspective then a logical and reasonable inference which can be drawn is that affairs of the Corporate Debtor and CIRP Process was designed and implemented in such a manner so that

ineligibility u/s 29A(c) is not attracted. The plea that CIRP was initiated by the order of this Adjudicating Authority does not hold water as these facts were not a consideration for admission of application filed u/s 9 of IBC, 2016 and where consent for its admission had been given by Corporate Debtor itself. Further, from the order of admission dated 15.01.2019 it is evident, the fact of classification of account of Corporate Debtor was never disclosed nor any material in this regard was provided to this Authority. On the directions of the Adjudicating Authority vide order dated 04.06.2018, the Corporate Debtor was required to furnish the details of its net worth as well as list of secured and unsecured creditors as Corporate Debtor had shown its inability to pay its dues. The Corporate Debtor furnished these details vide an affidavit dated 22.06.2018 and in said affidavit also in spite of the fact that Corporate Debtor had already been classified as NPA by the two Financial Creditors, the aforesaid fact was not mentioned. Thus, Corporate Debtor intentionally concealed this fact (refer para 7,8,9 and 12 of said order). Thus, in our considered view, order of admission of

Corporate Debtor into CIRP has been obtained by not revealing complete picture and with ulterior motive.

18. Having come to a conclusion on the facts as narrated hereinbefore that it is a case of collusive initiation of CIRP in a manner that Resolution Applicant does not become ineligible, now, we have to look into the legal aspects of the matter as it has been vehemently pleaded that if the Resolution Applicant is declared ineligible u/s 29A(c) then it would be amount to rewriting of the law. We consider it proper to make it clear that it is not our intention but a question which strikes to our conscience is that whether such types of cases can be allowed to happen which defeat the very purpose of such provisions, particularly when no effort has been made even to repay the loan or to conduct the affairs of the Corporate Debtor by the Resolution Applicant during the CIRP in that direction i.e., repayment of loans even partly. It is also to be noted that whether any relationship with Vimal Oil and Foods Limited results into any disability or not but that entity is also a wilful defaulter and whether directly or indirectly one of the directors of the

Resolution Applicant is connected therewith. In our view, we need to look into the basic objective of such provisions and to draw support from the observations of the Hon'ble Supreme Court in para 60 of order in the case of Arcelormittal wherein Hon'ble Supreme Court after explaining the legal position as relied on by the Respondent has cautioned and given guidelines to go into such cases so that the provisions of Section 29A are effectively put into operation and ineligible people are not allowed come back by doing legal jugglery. The findings of Hon'ble Supreme Court in the case of *Arcelormittal India Private Limited vs. Satish Kumar Gupta and Others* in para 27, 29, 30, 59 and 60 are reproduced as under:

27. The Hon'ble Minister of Finance and Minister of Corporate Affairs, Shri Arun Jaitley, while moving the Insolvency and Bankruptcy Code (Amendment) Bill, 2017, stated on 29.12.2017: "The core and soul of this new Ordinance is really Clause 5, which is Section 29A of the original Bill. I may just explain that once a company goes into the resolution proposals as far as the company is concerned or the enterprise is concerned. Now a number of ineligibility clauses were not there in the original Act and, therefore, Clause 29A introduces those who are not eligible to apply. For instance there is a clause with regard to an undercharged insolvent who is not eligible to apply; a person who has been disqualified under the Companies Act as a director

cannot apply and a person who is prohibited under the SEBI Act cannot apply. So these are statutory disqualifications. And there is also a disqualification in Clause (c) with regard to those who are corporate debtors and who as on the date of the application making a bid do not operationalise the account by paying the interest itself i.e. you cannot say that I have an NPA. I am not making the account operational. The accounts will continue to be NPAs and yet I am going to apply for this. Effectively this clause will mean that those who are in management and on account of whom this insolvent or non-performing asset has arisen will now try and say. I do not discharge any of the outstanding debts in terms of making the accounts operational and yet I would like to apply and set the enterprise back at a discount value, for this is not the object of this particular Act, So clause 5 has been brought in with that purpose in mind". (emphasis supplied).

29. *It is in this background that the section has to be construed. In Ms. Eera v. State (NCLT of Delhi) , this Court, after referring to the golden rule of literal construction, and its older counterpart the object rule in Heydons case 6 referred to the theory of creative interpretation as follows: (SCC pp. 200-01 & 204, paras 122 & 127)*

"122. Instances of creative interpretation are when the Court looks at both the literal language as well as the purpose or object of the statute in order to better determine what the words used by the draftsman of legislation mean. In D.R. Venkatachalam v. Transport Commr. [D.R. Venkatachalam v. Transport Commr., (1977) 2 SCC 273], an early instance of this is found in the concurring judgment of Beg, J. The learned Judge put it rather well when he said: (SCC p. 287, para 28)

'28. It is, however, becoming increasingly fashionable to start with some theory of what is basic to a provision or a chapter or in a statute or even to our Constitution in order to interpret and

determine the meaning of a particular provision or rule made to subserve an assumed basic requirement. I think that this novel method of construction puts, if I may say so, the cart before the horse. It is apt to seriously mislead us unless the tendency to use such a mode of construction is checked or corrected by this Court. What is basic for a section or a chapter in a statute is provided: firstly, by the words used in the statute itself; secondly, by the context in which a provision occurs, or, in other words, by reading the statute as a whole; thirdly, by the Preamble which could supply the key to the meaning of the statute in cases of uncertainty or doubt; and, fourthly, where some further aid to construction may still be needed to resolve an uncertainty, by the legislative history which discloses the wider context or perspective in which a provision was made to meet a particular need or to satisfy a particular purpose. The last mentioned method consists of an application of the mischief rule laid down in Heydon case [Heydon case, (1584) 3 Co Rep 7a : 76 ER 637] long ago.

* * *

127. *It is thus clear on a reading of English, US, Australian and our own Supreme Court judgments that the “Lakshman Rekha” has in fact been extended to move away from the strictly literal rule of interpretation back to the rule of the old English case of Heydon [Heydon case, (1584) 3 Co Rep 7a : 76 ER 637], where the Court must have recourse to the purpose, object, text and context of a particular provision before arriving at a judicial result. In fact, the wheel has turned full circle. It started out by the rule as stated in 1584 in Heydon case [Heydon case, (1584) 3 Co Rep 7a : 76 ER 637], which was then waylaid by the literal interpretation rule laid down by the Privy Council and the House of Lords in the mid-1800s, and has come back to restate the rule somewhat in terms of what was most felicitously put over 400*

years ago in Heydon case [Heydon case, (1584) 3 Co Rep 7a : 76 ER 637].

30. A purposive interpretation of Section 29A, depending both on the text and the context in which the provision was enacted, must, therefore, inform our interpretation of the same. We are concerned in the present matter with sub-clauses (c), (f), (i) and (j) thereof.

59. Since Section 29-A(c) is a see-through provision, great care must be taken to ensure that persons who are in charge of the corporate debtor for whom such resolution plan is made, do not come back in some other form to regain control of the company without first paying off its debts. The Code has bifurcated such persons into two groups, as a perusal of sub-clauses (c) and (g) of Section 29-A shows. If a person has been a promoter, or in the management, or control, of a corporate debtor in which a preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction has taken place, and in respect of which an order has been made by the Adjudicating Authority under the Code, such person is ineligible to present a resolution plan under Section 29-A(g). This ineligibility cannot be cured by paying off the debts of the corporate debtor. Therefore, it is only such persons who do not fall foul of sub-clause (g), who are eligible to submit resolution plans under sub-clause (c) of Section 29-A, if they happen to be persons who were in the erstwhile management or control of the corporate debtor.

60. It is important for the competent authority to see that persons, who are otherwise ineligible and hit by sub-clause (c), do not wriggle out of the proviso to sub-clause (c) by other means, so as to avoid the consequences of the proviso. For this purpose, despite the fact that the relevant time for the ineligibility under

sub- clause (c) to attach is the time of submission of the resolution plan, antecedent facts reasonably proximate to this point of time can always be seen, to determine whether the persons referred to in Section 29-A are, in substance, seeking to avoid the consequences of the proviso to sub-clause (c) before submitting a resolution plan. If it is shown, on facts, that, at a reasonably proximate point of time before the submission of the resolution plan, the affairs of the persons referred to in Section 29-A are so arranged, as to avoid paying off the debts of the non-performing asset concerned, such persons must be held to be ineligible to submit a resolution plan, or otherwise both the purpose of the first proviso to sub-section (c) of Section 29-A, as well as the larger objective sought to be achieved by the said sub-clause in public interest, will be defeated.

19. As regard to supremacy of commercial wisdom of the COC reliance has been placed on several judicial decisions. We do not have any dispute with this proposition of law. However, we consider it relevant to reproduce the para 54 of the decision of Hon'ble Supreme Court in the case of *Committee of Creditors of Essar Steel India Limited Vs Satish Kumar Gupta* order dated 15.11.2019 which is an exception to this to this principle where in a given case Adjudicating Authority can look into approved Resolution Plan:

54. *This is the reason why Regulation 38(1A) speaks of a resolution plan including a statement as to how it has dealt with the interests of all stakeholders, including operational creditors of the corporate debtor. Regulation 38(1) also states that the amount*

due to operational creditors under a resolution plan shall be given priority in payment over financial creditors. If nothing is to be paid to operational creditors, the minimum, being liquidation value - which in most cases would amount to nil after secured creditors have been paid - would certainly not balance the interest of all stakeholders or maximise the value of assets of a corporate debtor if it becomes impossible to continue running its business as a going concern. Thus, it is clear that when the Committee of Creditors exercises its commercial wisdom to arrive at a business decision to revive the corporate debtor, it must necessarily take into account these key features of the Code before it arrives at a commercial decision to pay off the dues of financial and operational creditors. There is no doubt whatsoever that the ultimate discretion of what to pay and how much to pay each class or sub- class of creditors is with the Committee of Creditors, **but, the decision of such Committee must reflect the fact that it has taken into account maximising the value of the assets of the corporate debtor and the fact that it has adequately balanced the interests of all stakeholders including operational creditors. This being the case, judicial review of the Adjudicating Authority that the resolution plan as approved by the Committee of Creditors has met the requirements referred to in Section 30(2) would include judicial review that is mentioned in Section 30(2)(e), as the provisions of the Code are also provisions of law for the time being in force. Thus, while the Adjudicating Authority cannot interfere on merits with the commercial decision taken by the Committee of Creditors, the limited judicial review available is to see that the Committee of Creditors has taken into account the fact that the corporate debtor needs to keep going as a going concern during the insolvency resolution process; that it needs to maximise the value of its assets; and that**

the interests of all stakeholders including operational creditors has been taken care of. If the Adjudicating Authority finds, on a given set of facts, that the aforesaid parameters have not been kept in view, it may send a resolution plan back to the Committee of Creditors to re-submit such plan after satisfying the aforesaid parameters. The reasons given by the Committee of Creditors while approving a resolution plan may thus be looked at by the Adjudicating Authority only from this point of view, and once it is satisfied that the Committee of Creditors has paid attention to these key features, it must then pass the resolution plan, other things being equal.

20. In view of findings given above r.w. findings given in the case of *Arcelormittal India Pvt. Ltd.*, we wonder that if we do not exercise our judicial wisdom in the cases like this then in what cases such judicial wisdom could be used. We also wonder if the abuse of process of law is allowed merely because legal jugglery is done in such a manner so that violation to provisions may not be apparent but in essence it is a planned misuse. Further, from the fact it is established that one of the object i.e., maximization of value of assets of the Corporate Debtor is also not achieved.

21. The applicant has also raised contention regarding lack of net worth or transfer of trademarks/copyrights or lease


assets of the Corporate Debtor to the Resolution Applicant as a reason to declare the Resolution Applicant as ineligible. Other question is regarding applicability of Section 29A(j) r.w. Section 5(24A)(h). We are of the view that since we are convinced that Resolution Applicant is ineligible on the ground of the collusiveness and arranging its affairs in such a manner so as to defeat the basic object and essence of Section 29A(c) which is duly supported by the observations of the Hon'ble Supreme Court in para 60 in the case of Arcelormittal (supra), we left these questions open.

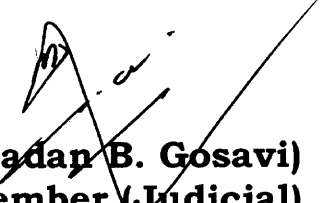
22. In view of above findings and conclusions, we direct the Resolution Professional to convene the meeting of Committee of Creditors to reconsider the eligibility of Resolution Applicant in accordance with such findings/conclusions. We further direct the Resolution Professional to consider the Resolution Plan of the Resolution Applicant or Resolution Professional may obtain any other Resolution Plan from eligible Resolution Applicant(s) for speedy and timely resolution of the Corporate Debtor.

23. Before parting, we may add that though we thought to refer the matter to IBBI as regard to manner in which CIRP has been conducted including manner of decisions taken by Committee of Creditors but we refrain ourselves from doing so in view of the fact that we are hopeful that our directions would be given effect to by Resolution Professional/ Committee of Creditors.

24. In this result, application stands allowed and disposed of in terms indicated above.

24. Urgent certified copy of this order, if applied for, to be issued to all concerned parties upon compliance with all requisite formalities.


(Virendra Kumar Gupta)
Member (Technical)


(Madan B. Gosavi)
Member (Judicial)

Signed on this, the 6th day of January, 2021.

Rajeev Sen/Stenographer