

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) (Ins) No.121 of 2019

[Arising out of Orders dated 04.06.2018 passed by National Company Law Tribunal, Mumbai Bench, Mumbai in CP No.1214/IBC/NCLT/MB/MAH/2017]

IN THE MATTER OF:

Before NCLT

Before NCLAT

Martin S.K.Golla
Erstwhile Resolution
Professional
1704, Tower-3,
Raheja Tipco Heights,
Rani Sati Marg,
Malad (East),
Mumbai – 400097
Maharashtra

...

Appellant

Vs.

- | | | |
|--|-----------|-----------------|
| 1. Wig Associates Pvt.
Ltd.
102, Amar Residency,
Punjabwadi,
Deonar
Mumbai – 400088 | Applicant | Respondent No.1 |
| 2. Committee of Creditors
Through
Bank of Baroda,
Meher Chambers,
Ground Floor,
Dr. Sunderlal Behl
Marg,
Opposite Petrol Pump,
Balard Estate,
Mumbai – 400001 | | Respondent No.2 |
| 3. Insolvency & Bankruptcy
Board of India,
Through its Secretary,
7 th Floor, Mayur Bhawan, | ... | Respondent No.3 |

Shankar Market,
Connaught Circus,
New Delhi,
Delhi – 110001

For Appellant: Mr. Davesh Bhatia and Ms. Progoti Bose,
Advocates
Mr. Martin Golla (Party in person)

For Respondents: Mr. Rajendra Singhvi, Ms. Pooja Pandey and
Ms. Ragini Singh, Advocates for R-1
Ms. Praveena Gautam and Mr. Pawan Shukla,
Advocates for R-2, BOB
Ms. Aishwarya Bhati, ASG, Mr. Vikas Mehta
and Mr. Apoorv Khator, Advocates for R-3,
IBBI

J U D G E M E N T

(04th June, 2021)

A.I.S. Cheema, J. :

1. The Appellant is Resolution Professional who has filed this Appeal claiming that the same is filed in view of the Order dated 1st August, 2018 and Order dated 11th January, 2019 passed by this Tribunal in Company Appeal (AT) (Ins) No.415 of 2018 vide which Order, this Tribunal directed e-filing of the Appeal to clarify correct position of law.

2. The Appellant claims that he was Resolution Professional of “Wig Associates Pvt. Ltd.” – Corporate Debtor. The Adjudicating Authority (National Company Law Tribunal, Mumbai Bench, Mumbai) had admitted CP 1214/IBC/NCLT/MB/MAH/2017 under Section 10 of Insolvency and Bankruptcy Code, 2016 (IBC – in short), on 24th August, 2017. The Resolution Plan submitted by Mr. Mahendra Wig was approved by Committee of Creditors (COC - in short) on 20.04.2018 and was placed

before the Adjudicating Authority for approval. The Adjudicating Authority approved the Resolution Plan vide Impugned Order dated 4th June, 2018 (Annexure - 1A – **Page 39**). The present Appeal is with regard to such Impugned Order.

3. The Appellant claimed that after this Tribunal had given Orders dated 1st August, 2018 he had sought clarification from IBBI (Insolvency and Bankruptcy Board of India) and after the Orders were passed on 11th January, 2019, the present Appeal is filed in order to resolve the legal controversy. The Appellant claims that the Impugned Order may be set aside/affirmed.

4. It is stated that the earlier Appeal was filed by IBBI against the Impugned Order dated 4th June, 2018 when this Tribunal passed Orders dated 1st August, 2018 holding that the IBBI does not have locus to file the Appeal and directed IBBI to ask the Resolution Professional to file the Appeal. This Appeal has been filed claiming that the question of law is as to whether Section 29A of IBC will be applicable with retrospective effect in Section 10 proceedings which were initiated prior to Section 29A coming into force and to decide the issue and any other question of law.

5. We have heard the parties to the Appeal. Before referring to the submissions, a brief background needs to be kept in view.

It appears from the record that CP 1214/IBC/NCLT/MB/MAH/2017 was filed on 19th July, 2017 by the

Corporate Debtor – M/s. Wig Associates Pvt. Ltd. under Section 10 of IBC against itself as there was debt of Rs.4,85,14,000 of Bank of Baroda. The Petition was admitted on 24th August, 2017. After the CIRP started, there was a COC comprising only of one Financial Creditor, that is, Bank of Baroda. It appears that the sole Financial Creditor in third COC meeting held on 6th April, 2018 informed the Resolution Professional that it had sanctioned “One Time Settlement Offer” issued by Mr. Mahendra Wig. The Bank asked the Resolution Professional the option of treating One Time Settlement Offer as Resolution Plan. The Resolution Professional had obtained Valuation Report stating average liquidation value as Rs.87.60 Lakhs. The sole Financial Creditor had to recover Rs.1067.39 Lakhs. The Resolution Professional, it appears, placed such Resolution Plan before COC on 20th April, 2018 and the Resolution Plan was approved. With the approval of such Resolution Plan, it was placed before the Adjudicating Authority which approved the same. The Order of the Adjudicating Authority shows that there were some Operational Creditors also which included sales tax and income tax authorities.

6. The Impugned Order shows that Adjudicating Authority was aware of the Ordinance enacted by the Central Government on 23rd November, 2017 “The Insolvency and Bankruptcy Code (Amendment) Ordinance 2017 No.7 of 2017” (Ordinance – in short). The Ordinance inserted Section 29A of IBC laying down law with regard to persons not eligible to be Resolution Applicants. The Ordinance later on took shape of

Amendment in 2018 when “The Insolvency and Bankruptcy Code (Amendment) Act, 2017 No.8 of 2018” (Amendment – in short) was passed. The Adjudicating Authority was aware that the amendment provided that the amended Act shall be deemed to have come into force on 23rd November, 2017 (the date of the Ordinance). Impugned Order shows that in spite of being aware of such Ordinance and Amendment, the Adjudicating Authority went into an exercise of interpreting this Section and went on to observe that Creditors/Stakeholders must be aware of the Rules at the commencement of the game/proceedings. It observed that “CIRP is a process and can be said to be that the process is nothing but continuous of one proceeding, which commences from the date of “Admission” of an Application Order either under Section 7, 9 or 10 and it ends till the Order is passed under Section 31 approving the Resolution Plan or under Section 33 by initiating “Liquidation”.” The Adjudicating Authority recorded opinion that the CIRP had commenced and Resolution Professional had invited expression of interest which resulted into submission of Resolution Plan by the Resolution Applicant and thus, according to Adjudicating Authority “the same is to be dealt with as per the provisions which existed on the date when the petition was “Admitted”.” Adopting such reasonings, although the Adjudicating Authority recorded that as per Section 29A, Mr. Wig would fall in the category of “connected persons” under Section 29A of IBC, still Adjudicating Authority went to examine the Resolution Plan which was

basically One Time Settlement and to accept the same. The Impugned Order was passed accordingly.

7. The Appellant has filed the present Appeal in the background as recorded earlier and the Appeal has sought that the Impugned Order may be set aside or affirmed. It appears that Respondent No.3 – IBBI has taken action against him and the Appellant has thus made averments in Appeal and submissions so as to justify the actions taken by him in the resolution process and is banking upon the fact that the Adjudicating Authority did accept the Resolution Plan even in the face of Section 29A of IBC. His arguments are on such basis.

8. The Respondent No.1 – Corporate Debtor – Wig Associates in view of the acceptance of the Resolution Plan, has argued to support the Orders passed by the Adjudicating Authority. According to the Respondent No.1, the Appellant had published expression of interest on 4th April, 2018 in newspapers and nobody came forward except Mr. Mahendra Wig who was guarantor of Respondent No.1. Mr. Mahendra Wig is guarantor of Respondent No.1 and he is also father of Mr. Puneet Wig and Mrs. Dolly Wig. In the third meeting of COC, it is claimed that the COC considered previous efforts of the Corporate Debtor and the guarantor of the Corporate Debtor to resolve the matter as per proposals and counter proposals submitted by the parties from time to time and the COC settled the whole matter of the bank qua Corporate Debtor for a sum of Rs.3.55 Crores which, it is claimed, have been repaid to the Bank

long back i.e. on 29th June, 2018. It is also claimed by Respondent No.1 regarding dues of Unsecured Creditors that almost all dues have been settled by the Corporate Debtor. The Respondent No.2 – Bank of Baroda which constituted the Committee of Creditors, has issued No Dues Certificate in favour of Corporate Debtor on 29th June, 2018. Thus, according to Respondent No.1, it is a matter of fait accompli. The Respondent No.1 has argued that it has received Certificate dated 21st April, 2021 of being Small Scale Industries and thus Mr. Mahendra Wig was entitled to file the Resolution Plan in view of Section 240A of IBC which was brought into force with effect from 6th June, 2018 “while the Impugned Order was passed on 4th June, 2018”. The Respondent No.1 is also arguing that acceptance of the Resolution Plan was discretion of the COC and thus, the same cannot be interfered with.

9. The Respondent No.3 – IBBI has strongly opposed the process adopted by the Appellant while conducting the CIRP. According to the Respondent No.3, the Resolution Applicant – Mr. Mahendra Wig was barred under Section 29A of the IBC to even propose Resolution Plan. It is to be stated that the scheme of IBC does not contemplate treating One Time Settlement offers as Resolution Plan and thus the OTS as offered by Mr. Mahendra Wig could not have been accepted. According to the Respondent No.3, the Appellant has conducted the CIRP against the provisions of IBC and the Regulations and thus the Resolution Plan deserves to be set aside.

10. Respondent No.3 claims that Mr. Mahendra Wig who proposed the OTS was a personal guarantor for the loan taken by the Respondent No.1 Company. He was not eligible to be Resolution Applicant. According to Respondent No.3, Section 29A needs to be read with Proviso below Section 30(4) and the legislative intent becomes clear that the Resolution Plan which is not approved before commencement of the Ordinance, if it cannot pass the muster under Section 29A, the Resolution Professional was required to invite fresh Resolution Plans. Section 29A was introduced by way of amendment in the Code and in this regard the Ordinance was promulgated on 23rd November, 2017 and was replaced by the Act bringing into force the provision with effect from 23rd November, 2017. Respondent No.3 has referred to the objects and reasons for introduction of such provision in law which is that the promoters who are themselves responsible for the NPAs should not be allowed to take advantage of the process under IBC. Section 29A has been enacted in larger public interest. On the date of approval of the Resolution Plan, Mr. Mahendra Wig was barred from being Resolution Applicant and the Appellant allowed Mr. Wig to be Resolution Applicant and also wrongly treated OTS as a Resolution Plan and placed the same before the Adjudicating Authority. In the written arguments, Respondent No.3 has submitted as under:-

“24. At this stage, it is pertinent to refer to the landmark judgement passed by the Hon’ble Supreme Court, in the case of *Arcelormittal India (P) Ltd. v. Satish Kumar Gupta, (2019) 2*

SCC 1, wherein the Hon'ble Supreme Court observed, "46....The opening words of Section 29-A state: "a person shall not be eligible to submit a resolution plan....". It is clear therefore that the stage of ineligibility attaches when the resolution plan is submitted by a resolution applicant. The contrary view expressed by Shri Rohatgi is obviously incorrect, as the date of commencement of the corporate insolvency resolution process is only relevant for the purpose of calculating whether one year has lapsed from the date of classification of a person as a non-performing asset"

The view was reiterated by the Hon'ble Supreme Court in *Swiss Ribbons vs. Union of India* (2019) 4 SCC 17."

11. It is also argued by the Respondent No.3 that Section 240A was enacted with effect from 6th June, 2018 and thus the Resolution Applicant cannot take benefit of Section 240A to claim that it is MSME when Impugned Order was passed on 4th June, 2018. It is argued that OTS which was already approved by the Bank could not have been converted into a Resolution Plan and thus the whole process was vitiated.

12. Section 29A deals with persons not eligible to be Resolution Applicants. There is no dispute that earlier an Ordinance was issued on 23rd November, 2017 to stop such ineligible persons (as under Section 29A) from becoming Resolution Applicants and subsequently, the Act came to be passed in this regard and 29A of IBC has become part of the Code.

13. Annexure - 14 (Page - 240) Minutes of the third COC dated 5th April, 2018, shows Mr. Mahendra Wig and Mr. Puneet Wig as representing Corporate Debtor – Wig Associates. Item 7 of the Minutes shows the Secured Financial Creditor – Bank of Baroda asking the Appellant to explore possibility of treating OTS proposal (which it had already accepted) as Resolution Plan. This was subsequent to the passing of the Ordinance and even the Amendment Act which inserted Section 29A on 18th January, 2018. The Resolution Plan of Mr. Wig who was undisputedly a related party, was accepted on 20.04.2018 in the 4th COC (Annexure - 16 – Page 248). Section 29A hits the eligibility of the persons to submit a Resolution Plan if a person falls in any of the categories as mentioned in the Section. Appellant informed the Meeting that based on the OTS dated 27.03.2018, the Resolution Plan was being put up.

14. It is now settled law that ineligibility attaches at the time when the Resolution Plan is submitted by Resolution Applicant. The Respondent No.3 has rightly placed reliance on Judgement in the matter of “Arcelormittal India (P) Ltd. v. Satish Kumar Gupta” (referred supra) and Judgement in the matter of “Swiss Ribbons” (referred supra).

15. The Hon’ble Supreme Court in the matter of **“Arcelormittal India Private Limited vs. Satish Kumar Gupta and Others- (2019) 2 SCC 1”** observed in para 46, as under:-

“46. According to us, it is clear that the opening words of Section 29-A furnish a clue as to the time at

which sub-clause (c) is to operate. The opening words of Section 29A state: “a person shall not be eligible to submit a resolution plan...”. It is clear therefore that the stage of ineligibility attaches when the resolution plan is submitted by a resolution applicant. The contrary view expressed by Shri Rohatgi is obviously incorrect, as the date of commencement of the corporate insolvency resolution process is only relevant for the purpose of calculating whether one year has lapsed from the date of classification of a person as a non-performing asset. Further, the expression used is “has”, which as Dr.Singhvi has correctly argued, is in praesenti. This is to be contrasted with the expression “has been”, which is used in sub-clauses (d) and (g), which refers to an anterior point of time. Consequently, the amendment of 2018 introducing the words “at the time of submission of the resolution plan” is clarificatory, as this was always the correct interpretation as to the point of time at which the disqualification in sub-clause (c) of Section 29-A will attach. In fact, the amendment was made pursuant to the Insolvency Law Committee Report of March, 2018. That report clearly stated:

“In relation to applicability of section 29-A(c), the Committee also discussed that it must be clarified that the disqualification pursuant to section 29-A(c) shall be applicable if such NPA accounts are held by the resolution applicant or its connected persons at the time of submission of the resolution plan to the RP.”

In the matter of **“Swiss Ribbons Private Limited and Another vs. Union of India and Others- (2019) 4 SCC 17”**, the Hon’ble Supreme Court in the context of retrospectivity of Section 29A of the IBC observed in para 98, as under:-

“**98.** This being the case, it is clear that no vested right is taken away by application of Section 29A. However, Shri Viswanathan pointed out the judgments in Ritesh Agarwal and Anr. v. SEBI and

Ors., (at paragraph 25), K.S. Paripoornan v. State of Kerala (at paragraphs 60-66), Darshan Singh v. Ram Pal Singh (at paragraph 35), Pyare Lal Sharma v. Jammu & Kashmir Industries Ltd. (at paragraph 21), P.D. Aggarwal v. State of U.P (at paragraph 18), and Govind Das v. CIT (at paragraphs 6 and 11), to argue that if a Section operates on an antecedent set of facts, but affects a vested right, it can be held to be retrospective, and unless the legislature clearly intends such retrospectivity, the Section should not be construed as such. Each of these judgments deals with different situations in which penal and other enactments interfere with vested rights, as a result of which, they were held to be prospective in nature. However, in our judgment in ArcelorMittal, we have already held that resolution applicants have no vested right to be considered as such in the resolution process. Shri Mukul Rohatgi, however, argued that this judgment is distinguishable as no question of constitutional validity arose in this case, and no issue as to the vested right of a promoter fell for consideration. We are of the view that the observations made in ArcelorMittal directly arose on the facts of the case in order to oust the Ruias as promoters from the pale of consideration of their resolution plan, in which context, this Court held that they had no vested right to be considered as resolution applicants. Accordingly, we follow the aforesaid judgment. Since a resolution applicant who applies Under Section 29A(c) has no vested right to apply for being considered as a resolution applicant, this point is of no avail.”

For reasons recorded by the Hon’ble Supreme Court in the above Judgments, the reasons recorded by the Adjudicating Authority to stretch the interpretations so as to hold that once CIRP is commenced, provisions as existing on the day of admission of the Petition would continue to apply even in the face of amendment brought about by way of Section 29A, the reasons cannot be maintained. Even the Respondent No.2 – Bank of Baroda in its arguments (Diary No.25967) accepts that

Section 29A of IBC was with effect from 23rd November, 2017 and the Hon'ble Supreme Court in "Swiss Ribbons vs. Union of India" (referred supra) has upheld the insertion of Section 29A with retrospective effect.

16. From the above discussion, there is no doubt that at the time when Mr. Wig submitted the One Time Settlement to the Bank, which was converted by Respondent No.2 with the help of Appellant as a Resolution Plan, he could not have done so. The arguments of Respondent No.2 show that it had already approved the OTS of Mr. Wig on 27th March, 2018. It also appears that Mr. Wig had already paid Rs.103 Lakhs to the Bank. This can be seen from the Impugned Order where it has referred to the compliance with Regulation 38 of CIRP Regulations in Para 14.1 of the Impugned Order. Thus, what appears is that the OTS was already approved by the Respondent No.2 Bank, which was the only Financial Creditor and thus the actions taken on 5th April, 2018 in third COC and 20th April, 2018 were only completion of formalities. The subsequent introduction of Section 240A of IBC and subsequent taking of certificate of being MSME will not cure the ineligibility at the time of submitting OTS-cum-Resolution Plan which was not permissible.

17. Considering the provisions of law and the fact as appearing from the record, we find that the said Resolution Plan submitted by Mr. Wig could not have been acted upon and the Appellant erred in presenting the same before COC.

18. For above reasons, the Impugned Order is required to be set aside.

We pass the following Order:-

ORDER

The Appeal is allowed. The Impugned Order approving Resolution Plan is quashed and set aside. The alleged Resolution Plan submitted by Mr. Mahendra Wig is rejected.

The matter is remitted back to the Adjudicating Authority. The Adjudicating Authority is required to pass Orders of liquidation of the Corporate Debtor under Section 33 of the IBC.

The Appeal is disposed accordingly. No Orders as to costs.

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

[Kanthi Narahari]
Member (Technical)

rs