

NATIONAL COMPANY LAW APPELLATE TRIBUNAL

PRINCIPAL BENCH, NEW DELHI

COMPANY APPEAL (AT) (INSOLVENCY) No. 49 of 2022

(Arising out of Order dated 16.11.2021, passed by National Company Law Tribunal, New Delhi, Special Bench, Court-II, in C.P. (IB) No.-417(ND)/2017, I.A. 5278 of 2021)

IN THE MATTER OF:

**Manish Jain,
Ex-Director, M/s. P K Sales Company
Pvt. Ltd.
S/o Shri Sagar Chand Jain
R/o A-2/30, Sector 5,
Rohini, Delhi - 110085.**

...Appellant

Versus

**Sh. Rakesh Bhatia
(Liquidator of P K Sales Company Pvt.
Ltd.)
B-8 Street No. 14, New Gobind Pura,
Delhi - 110051.
Email:
liquidator.pksalescompany@gmail.com**

...Respondent

For Appellant:

**Mr. Manan Batra, Dr. Amit George
Advocate.**

For Respondent:

**Mr. Sumant Khatri, Advocate for
Liquidator.**

J U D G E M E N T

(Per: Shreesha Merla, Member (T))

1. Challenge in this Appeal preferred under Section 61 of the Insolvency and Bankruptcy Code, 2016, (hereinafter referred to as 'the Code'), against the Impugned Order dated 16/11/2021 in C.P. (IB) No.- 417(ND)/2017 passed by the Learned Adjudicating Authority (National Company Law

Tribunal, New Delhi, Special Bench, Court-II) dismissing the I.A. 5278 of 2021 filed by the Appellant Mr. Manish Jain, the Ex-Director of M/s. P.K. Sales Company Private Limited under Section 60(5) of the Code for 'Contempt' against the Liquidator/the Respondent alleging wilful disobedience of the Order dated 08/01/2020 passed by the Coordinate Bench of the Adjudicating Authority.

2. The Learned Adjudicating Authority, by the Impugned Order has observed as follows:

“On 8th January 2020, this Bench has passed an order directing the Liquidator not to proceed to confirm the sale of the assets of the company until the permission is obtained. This particular order was passed on the submission made by the Ld. Counsel for the ex-promoters that a scheme under Section 230-232 of the Companies Act should be considered before proceeding towards liquidation.

Subsequently, the present application for initiation of contempt proceedings has been filed on the ground that the liquidator had sold away the assets of the company. The point to be noted here is that it is 2 years that the applicant has not proceeded to file any scheme and petition under Section 230-232 of the Companies Act and has been dragging the matter. As there is no scheme/petition filed by the Applicant under Section 230-232 of the Companies Act, the action taken by the Liquidator in regard to the assets of the company cannot be considered as 'contempt'.

In view of the same this IA-5278/2021 is Dismissed.”

3. Submissions of the Learned Counsel appearing on behalf of the Appellant:

- Learned Counsel for the Appellant submitted that the Liquidation Order was passed against the 'Corporate Debtor'/M/s. P.K. Sales Company Private Limited on 10/10/2018; that the Appellant along

with the sister concern i.e., M/s. P.K. Industries and Dreamland Realtors Private Limited (also in liquidation) entered into an OTS with the sole Manager 'Financial Creditor'/the Karnataka Bank for Rs.30 Cr./- on 17/08/2019; that on an Appeal preferred against the Liquidation Order, this Tribunal vide Order dated 30/05/2019 directed the Liquidator to take steps as laid down in terms of the Order '**Y Shivaram Prasad' V/s. 'S. Dhannapal and Ors.'** in **Company Appeal (AT) (Insolvency) No. 224 of 2018** that the Appellant herein has indifferent intervals till 20/02/2021 paid a total sum of Rs.11 Crs./- to the Karnataka Bank in accordance with the terms of Settlement of the OTS; that vide email dated 18/08/2019, pursuant to the OTS, the Appellant had requested the Liquidator to file appropriate an Application before the Adjudicating Authority for necessary sanction/approval in terms of the Code and revive the 'Corporate Debtor'; that the Appellant was constrained to file an Application under Section 230-231 of the Companies Act, 2013, (hereinafter referred to as 'The Act') individually before the Adjudicating Authority which was opposed by the Liquidator despite the settled law; the Appellant filed an Application in CA 1064/2019 bringing on record the additional documents pertaining to the payment made to the Karnataka Bank in accordance with the OTS and sent an email dated 15/11/2019 requesting the Liquidator to forward the Settlement Scheme in the interest of the stakeholders.

- It is further submitted by the Counsel for the Appellant that in light of the pendency of CA 1064 of 2019 under Section 230–231 of the Act, the Appellant filed CA No. 166 of 2020 seeking directions for stay of auction of the property of the ‘Corporate Debtor’ and to direct the Liquidator to proceed in terms of Section 230 of the Act and also to decide CA 1064/2019 expeditiously. The Learned Counsel drew our attention to the Order dated 08/01/2020 passed by the Adjudicating Authority in CA 166/2020 which reads as follows:

“2 applications have been filed by Ex-Promoters relying upon the judgement of Hon'ble NCLAT which ordains that a scheme under Section 230-232 should be considered before proceeding towards Liquidation. It is not open to the ex-promoters to consider the same as the decision lies in the hands of the liquidator.

Pending any decision on any proposed scheme being accepted by the Liquidator, the sale of the assets of the Corporate Debtor shall only be confirmed after due permission from this Bench. All records necessary for considering the scheme shall be tendered by the Corporate Debtor to the Liquidator to enable him formalise the same.

To come up for further consideration on 29th January 2020.”

- It is the case of the Appellant that there was a clear direction to the Liquidator vide this Order to formalise the Scheme on the basis of the records available with the Appellant pertaining to the said OTS. It is submitted that in light of the Order dated 06/01/2020, the Liquidator convened a meeting with all the stakeholders in order to formalise a Scheme, but erroneously recorded the Minutes of the Meeting without the knowledge and consent of the Appellant. It is further submitted

that the Appellant has also paid a sum of Rs.2,58,420/- towards the cost and fees of the Liquidator for convening the said meeting.

- It is the case of the Appellant that subsequently on account of the pandemic situation, Application CA 1064 of 2019 was not taken up. IA 2075 of 2020 was filed seeking expeditious disposal of CA 1064 of 2019 which shows that the intention of the Ex-Director was never to delay the proceedings. On 15/06/2020, the Appellant approached the Hon'ble High Court by which Order, the deadline of settling the loan with Karnataka Bank was extended till 31/07/2020. It is the case of the Appellant that without considering the fact that the 'Corporate Debtor' is an MSME, the Special Bench of the Adjudicating Authority, solely on the submissions advanced by the Counsel for the Liquidator, recorded that the Scheme under Section 230 of the Act was not maintainable as the Appellant was hit by Section 29-A of the Order which makes him ineligible. Thereafter the Appellant sent an email on 28/08/2020 and on 31/08/2020 to the Liquidator that the Applicant has a buyer who is ready to purchase the said property for a sum of Rs.11 Crs./- and therefore requested the Liquidator to allow the prospective buyer to inspect the said property at a suitable date and time; that the Liquidator vide email dated 02/09/2020 refused to adhere to the request of the Appellant and with an intention to frustrate the scheme of the Appellant, issued an auction notice dated 20/09/2020 reserving the price of the said property for a sum of Rs.6

Crs./-, though the prospective buyer was ready to purchase the property for a sum of Rs.11 Crs./-.

- It is the main case of the Appellant that despite an Order of this Tribunal directing the Liquidator to comply with the terms laid down in '**Y Shivaram Prasad' (Supra)** the Liquidator has sold the asset for a much lesser price. It is further contended that the Appellant had made a payment of Rs.2.60 Crs./- in compliance of the terms of the said OTS against which the Karnataka Bank issued an NOC dated 15/02/2021 which goes to show that the said OTS was valid till 15/02/2021, that, the Liquidator without the permission of the Adjudicating Authority sold the said property at an extremely low price to the same buyer who had approached the Appellant and the Appellant had sought the permission of the Liquidator to inspect the said property. Due to the complete defiance of the Order dated 08/01/2020, the Appellant filed Contempt Application vide I.A.5278/2021, which was dismissed by the Adjudicating Authority.

4. Submissions of the Learned Counsel appearing on behalf of the Liquidator:

- It is submitted that vide Order dated 07/08/2020, the Adjudicating Authority had given permission to the Liquidator to liquidate the assets and subsequently the Appellant vide email dated 28/08/2020 requested the Liquidator to arrange for physical inspection of the property.

ANNEXURE A-12

Gmail

Manish Jain <pksales.manish@gmail.com>

(Copy)

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Regarding inspection of all the three companies property

1 message

Fri, Aug 28, 2020 at 8:47 PM

Manish Jain <pksales.manish@gmail.com>
To: liquidator.pkindustries@gmail.com, Liquidator P K Sales company Pvt Ltd <liquidator.pksalescompany@gmail.com>, liquidator.dirpl@gmail.com
Cc: SAGARANDSAGAR@live.com, legal.recovery@klkbank.com, delhiarm@klkbank.com, 553@klkbank.com, koshavakumera@klkbank.com, shivkumar.k@klkbank.com

Shri Rakesh Bhatia G

As you are aware that our Application U/S 230 of the Companies Act 2013 is pending in all the three Companies for approval vide CA No. 551/2019 of P K Industries Private Limited, CA No. 1064/2019 in P K Sales Company Private Limited and CA No. 1063/2019 in Dreamland Realtors Private Limited.

As per the settlement the sources of fund for payment of the OTS amount was to be realised from the sale of the properties mortgage with the Bank. Present situation is that we have already deposited Rs. 8.24 Crores by the sale of Two Guarantors Property and remaining Property Bearing three floors of A/2-2, Sector - 5 Rohini, Delhi 110085 present position is that the bank had approved to sale the property of A/2-2, Sector - 5 Rohini, Delhi 110085 for an amount of Rs. 2.80 Crores vide its approval letter dated 27.07.2020. Since, then we are trying our level best to find the buyer but due to market present situation and time the process is delayed.

Meanwhile we have buyers who are interested to purchase the property bearing No. G-20, Manglam Paradise Mall, Sec-3, Rohini, Delhi 110085, Shop No. 103-107 Manglam Paradise Mall, Sec-3, Rohini, Delhi 110085 and Hall No. 110-117, Manglam Paradise Mall, Sec-3, Rohini, Delhi 110085 and it is expected that all the three properties will fetch an amount of Rs. 19.00 Crores. However, the buyers are insisting upon physical inspection before proceeding further.

Hence we request you to let this opportunity not go out of our hands and allow physical inspection of above mentioned three properties and arrange day and time suitable to you for physical inspection and minimum 10 days time is prayed for in this regard.

Thanks & Regards:

P K SALES COMPANY PVT. LTD.
New Delhi- 110085

Mohit

(Signature)

- The Liquidator complied with the Order of the Adjudicating Authority and disposed of the assets conducting a public auction. It was also submitted that a local commissioner was appointed by the Adjudicating Authority on account of complete non-cooperation of the 'Corporate Debtor'. Learned Counsel for the Liquidator further contended that the 'Corporate Debtor' did not attend the meeting of the concerned stakeholders held on 17/01/2020, wherein the Liquidator requested the representatives of the Suspended Board of Directors to furnish the copy of the MSME Certificate as submitted on 06/01/2020, as they initially denied having such a Certificate, but had later furnished the copy of the Certificate applied on 06/01/2020, which was on the same day as that of the Order of the Adjudicating Authority. The Liquidator has recorded in the Minutes that the Certificate was to be produced for examination. Learned Counsel drew our attention to the 'Complaint' given by the 'Financial Creditor'/Karnataka Bank on 01/05/20/19, at S.H.O Patel Nagar, on the ground that the 'Corporate Debtor' had forged the 'Settlement Letter'.

Assessment:

5. The Order dated 15/07/2020 passed by the Adjudicating Authority directing the Liquidator to liquidate the assets is reproduced as hereunder;

"Counsel for the Applicant is present. Counsel for Liquidator is present. Counsel for Financial Creditor is present. It is brought to notice that a writ petition was filed by the applicant before the Hon'ble High Court of Delhi, wherein time up to 31st July 2020 is granted for making payment to the Financial Creditor. It is

necessary to record the submission of the Counsel for Financial Creditor that the Applicant has approached to the Financial Creditor to give relaxation in relation to the payment. However, the Financial Creditor has taken a decision that there cannot be any relaxation as requested by the Applicant. It is also on record that Special Bench, NCLT, Delhi on 19.03.2020 directed the liquidator to proceed to liquidate the CD in accordance with the law. The matter stands adjourned.

List on 7th August 2020.”

(Emphasis Supplied)

6. The Order of this Tribunal directing the Liquidator to proceed as per terms of **‘Y Shivaram Prasad’ (Supra)** is dated 21/05/2019. In this interim period it is an admitted fact that there was no Scheme which was formalised under Section 230 of the Act. It is the main case of the Appellant that the Liquidator had acted in breach of the Order dated 29/01/2020 passed by the Adjudicating Authority whereby the Learned Adjudicating Authority has recorded that *‘pending any decision on any proposed Scheme being accepted by the Liquidator, the sale of asset of the ‘Corporate Debtor’ shall only confirm after due permission from this Bench. All records necessary for considering the Scheme shall be tendered by the ‘Corporate Debtor’ to the Liquidator to enable him formalise the same’*. It is the further case of the Appellant that in an early hearing Application seeking early disposal of the Application I.A. 1064 of 2019, the Adjudicating Authority had passed the Order on 26/06/2020 observing that all the Petitions were admitted under Section 10 of the Code and no settlement under Section 230 was arrived at, and Section 12-A proceedings cannot be invoked once the Liquidation Order is passed.

7. This Tribunal in ‘Ramesh Kumar Chaudhary Through its authorised representative Gautam Chaudhary & Anr.’ Vs. ‘Anju Agarwal Liquidator of Shree Bhawani Paper Mills Ltd. & Ors.’ considered the ‘Corporate Debt Restructuring’ under the Scheme of Compromise & Arrangement. While observing that a ‘Debt’ given by a lender can be restructured by the lender by any ‘Scheme’ issued by the lender or RBI or Central Government, held as follows:

“230. Power to compromise or make arrangements with creditors and members.—

.....(2) The company or any other person, by whom an application is made under subsection (1), shall disclose to the Tribunal by affidavit—

(a) all material facts relating to the company, such as the latest financial position of the company, the latest auditor’s report on the accounts of the company and the pendency of any investigation or proceedings against the company;

(b) reduction of share capital of the company, if any, included in the compromise or arrangement;

(c) any scheme of corporate debt restructuring consented to by not less than seventy-five per cent. of the secured creditors in value, including—

(i) a creditor’s responsibility statement in the prescribed form;

(ii) safeguards for the protection of other secured and unsecured creditors;

(iii) report by the auditor that the fund requirements of the company after the corporate debt restructuring as approved shall conform to the liquidity test based upon the estimates provided to them by the Board;

(iv) where the company proposes to adopt the corporate debt restructuring guidelines specified by the Reserve Bank of India, a statement to that

effect; and (v) a valuation report in respect of the shares and the property and all assets, tangible and intangible, movable and immovable, of the company by a registered valuer.”

.....
“23. Section 230(2)(c) uses expression ‘any scheme of corporate debt restructuring consented to by not less than seventy-five per cent of the secured creditors in value’. Sub-clause (c) of sub-section (2) of Section 230 is attracted when there is a scheme of corporate debt restructuring. The expression used in sub-clause (c) is ‘corporate debt restructuring’. Debt restructuring is well known concept. Debt given by a lender can be restructured by the lender by any scheme issued by the lender or Reserve Bank of India or Central Government. Debt restructuring scheme which are issued by the Reserve Bank of India or Central Government from time to time are to mitigate the hardship of the borrowers.”

8. On a pointed query from the Bench as to whether any ‘Scheme’ was formalised or ‘Debt Restructured’ with consent as provided under Section 230(2)(c) of the Code and filed before the Adjudicating Authority or before this Tribunal, Learned Counsel for the Appellant drew our attention to the contents of the Application filed on 19.08.2019 in IB 417(ND)/2017, in which the letter dated 17/08/2019 issued by the ‘Financial Creditor’ to M/s. P.K. Group of Industries is detailed as hereunder:

“ARMB/ND/PF: 290,283,277/ OR: 228/2019-20
Dated 17.08.2019

Mr. Parveen Kumar Jain (Suspended Director)
C/o P K Group of Industries
Delhi,

Dear Sir,

Sub: OTS offer given by Mr. Parveen Kumar Jain for
Liabilities of M/s. P K Sales Pvt. Ltd. (at Delhi-GT

Karnal Road (Branch), M/s. P K Industries (at Delhi-West Patel Nagar Branch), M/s. Dreamland Realtors (at Delhi-West Patel Nagar Branch), & individual accounts of Mr. Parveen Kumar Jain & Mr. Manish Jain (at Delhi-West Patel Nagar Branch).

Ref: Your letter dated 16.08.2019.

In terms of MD/IOTS/50/19-20 dated 17.08.2019, the offer of the borrower for settling the above accounts under OTS by paying Rs.30,00,00,000/- (Thirty Crores only) is accepted in-principle subject to the following condition.

1. OTS amount of Rs.3000.00 Lakh (Thirty Crores Only) should be paid as follows:

a) Rs.25.00 Lakhs immediately. (2 Demand Drafts amounting to Rs.25.00 Lakhs) received by the bank and the same is subject to realization).

b) Rs.25.00 Lakhs payable on or before 31.08.2019.

c) Rs.500.00 Lakhs payable on or before 30.09.2019.

d) Remaining Sum of Rs.2450.00 payable on or before 31.01.2020. If you fail to remit the OTS on or before each scheduled date interest @12% will be charged for the delayed period of instalment. However, the time will not be extended beyond 31.03.2020.

2. This OTS acceptance is subject to approval of the NCLT/NCLAT.

3. The above offer is without prejudice to our right to take further action under SARFAESI Act, if the amount is not paid as per the settlement terms.

4. Time, is the essence of this settlement, if the agreed amount is not paid as agreed, this OTS offer automatically stands cancelled."

(Emphasis Supplied)

9. From the aforementioned, it is clear that an offer of settlement was given by the 'Financial Creditor' on 17/08/2019 with a specific time frame

extending upto 31/07/2020. It is clear that despite the extended time granted by the Hon'ble High Court of Delhi, wherein time was extended up to 31/07/2020 still the 'Corporate Debtor' did not pay the amount. The Adjudicating Authority has observed in their Order dated 15/07/2020 as follows:

"It is necessary to record the submission of the Counsel for the 'Financial Creditor' that the Applicant has approached the 'Financial Creditor' to give relaxation in relation to the payment. However, the 'Financial Creditor' has taken a decision that there cannot be any relaxation as requested by the Applicant."

10. This Order has attained finality and the Liquidator has proceeded to auction the sale of the asset. It is an admitted fact that the property was sold in 2021. It is seen from the Minutes of the Meeting dated 17/01/2020 that the Members of the stakeholders had recorded in the Minutes as follows:

"The Corporate Debtor Company is not going concern since April 2017.

The Corporate Debtor Company is out of business from 2.5 years approximately.

There is no key managerial person available in Corporate Debtor Company.

There is no employee in the Corporate Debtor Company.

Assets against Liabilities and Claims are not favourable to restart and revival of Corporate Debtor Company, however the representative of suspended Board of Directors submitted that once the management is handed over to them they can clear all liabilities and claims of the Corporate Debtor Company."

11. Keeping in view that admittedly the Scheme under Section 230 of the Act was never formalised; the date extended by the Hon'ble High Court of Delhi was only up to 31/07/2020; that more than two years has lapsed subsequent to the Order of this Tribunal; that it is a Section 10 Application under the Code filed by all three Companies together; that the Order dated 15/07/2020 has attained finality, the Liquidator has only complied with the terms of the Order dated 15/07/2020 and lastly there is no Scheme which has been filed till date under Section 230-232 of the Act; it cannot be said that the action of the Liquidator in selling the asset by public auction, be termed as contempt or any breach of the Order of the Adjudicating Authority.

12. For all the aforementioned reasons, this Appeal fails and is accordingly dismissed. No Order as to costs.

**[Justice Ashok Bhushan]
Chairperson**

**[Dr. Alok Srivastava]
Member (Technical)**

**[Ms. Shreesha Merla]
Member (Technical)**

**New Delhi
19th April, 2022**

himanshu