

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
AT CHENNAI

(APPELLATE JURISDICTION)

Company Appeal (AT) (CH) (Ins) No.62/2023
(IA Nos.227/2023, 228/2023, 229/2023, 269/2023 & 403/2024)

In the matter of :

Park Energy Private Limited

Through its Authorized Representative

Mr. Hari Chaudhary

No. 63, Govind Nivas,

Balaji Nagar, Mehta Venue,

Padikuppam Road,

Anna Nagar West, Chennai,

Tamil Nadu – 600 040.

...Appellant

Vs.

1. State Bank of India

Through its Assistant General Manager

Stressed Asset Management Branch

State Bank Bhawan, Corporate Centre,

Madame Cama Road, Nariman Point,

Mumbai – 400 021.

...Respondent No.1

2. Bhadreshwar Vidhyut Private Limited

Through its Interim Resolution Professional

M. Hitesh Goel

C4/1002, The Legend Apartments,

Sector 57, Gurgaon,

Haryana – 122 002.

...Respondent No. 2

Present:

For Appellant : Mr. Abhimanyu Bhandari, Senior Advocate
For Mr. Dhananjaya Sud, Advocate

For Respondents : Mr. M.S. Krishnan, Senior Advocate
For Mr. Pranava Charan, Advocate for R1

Mr. Abhijeet Sinha, Senior Advocate
For Mr. Varun, Advocate for R2

JUDGMENT
(Hybrid Mode)

[Per : Justice Sharad Kumar Sharma, Member (Judicial)]

A question on reference has come up for consideration before the larger bench of three members constituted to decide the following issue:-

“Whether a shareholder/promoter falls within the ambit of an “aggrieved person”, as provided under Section 61 of the I & B Code, 2016, and has a locus to challenge the order of admission of Section 7/Section 9 application, was formulated and has been referred to this 3-member Bench”.

2. This reference has arisen from the Judgment which was rendered by the two-member bench of NCLAT, Chennai Bench on 17.11.2023 in **Comp App (AT) (CH) (Ins) No.62/2023, Park Energy Private Limited Vs State Bank of India & Anr.** In the said Judgment the two-member Bench took the view that the shareholders would be falling within the ambit of the definition of an **“aggrieved person”** as contemplated under Section 61 of the I & B Code and therefore will have locus to challenge the proceeding under Section 7 of the I & B Code.

3. Having taken this view, the same member bench observed that in an earlier Judgment dated 27.02.2023 rendered in **Comp App (AT) (CH) (Ins)**

No.142/2022, Nirej Vadakkedathu Paul & Ors., Vs Sunstar Hotels and Estates Private Limited, another two-member bench while deciding the question as to whether the shareholder of the “Corporate Debtor” has any locus in Section 7 application filed by the Financial Creditor had concluded that the shareholders/Appellants do not have any locus and therefore the Appeals are not maintainable. Thus, there were two conflicting views by two different two member benches, on the issue as to whether the shareholder could be at all treated as to be an ‘aggrieved’ person falling to be within the ambit of definition of an ‘aggrieved person’, as contained under Section 61 of the I & B Code, so as to have the locus to challenge Section 7 proceedings. Judicial propriety in such situation demands that the matter may be decided by a larger Bench. Accordingly, the matter was referred to the Hon’ble Chairperson for the reference to be answered by the larger bench. A three-member bench was constituted by the orders of the Hon’ble Chairperson, to conclusively decide on the aforesaid reference.

4. The matter has been taken up on a number of occasions, wherein the counsels were called upon to address the tribunal on the issue, in order to enable this Bench to answer the question thus referred. On the last occasion, when the matter was taken up, the Learned Counsel for the parties referred to the decision dated 20.11.2024, rendered by a 3-member bench of the Principal Bench in **Comp**

App (AT) (Ins) No.1522/2023, Clarion Health Food LLP Vs Goli Vada Pav Pvt. Ltd. & Another. We will discuss the findings as contained in the said Judgment in detail in subsequent para.

5. This 3-member Bench, while determining various issues that were presented before it, has proceeded to determine the issue of “Whether a shareholder holding the majority share in the Corporate Debtor, can get the status of an ‘Aggrieved Person’ under Section 61 of I & B Code, which would enable him to prefer an Appeal against a proceeding being carried on under Section 7 of the Code”.

6. The Bench considered the issue as above, in the light of the Judgment in Niraj Vadakkedathu Paul (Supra) and in the light of the implications of the provisions contained under Section 53 and has noted that, as soon as the CIRP proceeding against a company is admitted and IRP is appointed, the functions of the Board of Directors of a company is taken over by the IRP and as a result there to, the erstwhile directors of the Corporate Debtor as a representative of the shareholders are only allowed to intervene and file the appeal under Section 61 of the I & B Code, and that individual or majority shareholders are not allowed to pursue the individual derivative actions of preferring an appeal as it was settled in the Judgment in Nirej Vadakkedathu Paul (supra).

7. This bench has further noted the Judgment of this Appellate Tribunal in **Ashish Gupta Vs Delagua Health India Private Limited and Ors. [Comp. App. (AT) (Ins.) No.17/2022]**, wherein vide para 13 of the Judgment, the court had allowed the majority shareholders to file the appeal in the peculiar circumstances of case and observed as under: -

“13.In view of the peculiar circumstances of the present case where the Section 8 Demand Notice could not be responded to by the Corporate Debtor company for reasons beyond their control and a collusive petition having been filed, Respondents No.2 and 3 being majority Company Appeal (AT) (Ins.) No. 17 of 2022 10 shareholders of the Corporate Debtor Company deserve to be heard. It is a well settled canon of natural justice that anything which eludes or frustrates the recipient of justice should be avoided and reasonable opportunity of hearing be allowed to advance the cause of justice. We are of the view that Respondents No.2 and 3 being majority shareholders holding 98.98% share of the Corporate Debtor company, they deserve a chance to safeguard the rights and interests of the Corporate Debtor and their respective stakeholders given that the Appellant and KKV had in collusion foisted an abnormal situation by their resignation from the Corporate Debtor company causing a void and leaving none on the Board of Directors to defend the interests of Respondent No.1/Corporate Debtor company. To add to this, KKV was unauthorisedly representing the Corporate Debtor company before the Adjudicating Authority even after having submitted his resignation thus causing serious miscarriage of justice for the

Respondent No.1. Hence, in the interest of justice, we are of the view that the present appeal filed before this Tribunal by Respondents No.2 and 3 deserves to be considered on merit.”

8. This bench while dealing with the aspect of the locus standi of the person, under Section 61 of the I & B Code, has noted the Judgment of Principal bench of this Tribunal in **Comp App (AT) (Ins) No.1413/2023, Ashmeet Singh Bhatia Vs Pragati Impex India Pvt. Ltd. & Anr.** wherein a person not being a shareholder and only having a stake in group company was considered as ‘person aggrieved’. After analysing the same we observe that the issue therein was only related to the application under Section 65 of the Code alleging fraud, and collusion between Corporate Debtor and the Financial Creditor and the ratio propounded therein will not be applicable in the instant case, to be made applicable to answer the question of the maintainability of the proceedings at the behest of the shareholders.

9. This 3-member bench further referred to an order of Principal Bench of this Court in **Ref. (CH) No.1/2023 in Comp App (AT) (Ins) No.130/2023 Trimex Industries Private Limited Vs Bhuvan Madan, RP of Sathavahana Ispat Ltd. & Anr.** In Para 4 of the Interim Order dated 14th July, 2023 on the issue of who would be and could be the aggrieved person and how the same has to be interpreted, so as to apply the same for a shareholder for the purpose of Section 61 of the Code. This Court observed that the “aggrieved person”, does

not include a person who suffers from a psychological or imaginary injury, but rather he would be a person aggrieved in strict sense and therefore, he must necessarily be the one, whose right or interest has been adversely affected or jeopardized.

10. Further, in **Clarion Health Food LLP (supra)**, the Learned 3-member Bench of this Tribunal held that this, expression of an “aggrieved person”, will not fit into a shareholder, as the facts and circumstances were different and the case being dealt in Trimex was about grant of leave to Appeal, the issue of whether the person is aggrieved was not the question in this case. It ultimately held that the Appellant therein, who were the shareholders of the company would not be treated as an “aggrieved party” as per the provisions of the code, as they have no locus to file the appeal, holding it to be not maintainable. The relevant observation made in para 49 of the Judgment dated 20.11.2024 is extracted hereunder: -

“49. In view of the discussion above, we are of the view that the appellant being a shareholder of the company is not the “aggrieved party” as per the provisions of the code. The appellant has not locus to file this appeal and the same is not maintainable. Accordingly, the appeal is dismissed. Pending I.As if any are closed. There would be no order as to costs”.

11. We further note that the Judgment of 20.11.2024 of the 3-member Bench of NCLAT, is in consonance with the observations made in para 87 of the Judgment of this Tribunal on 27.02.2023 in **Comp App (AT) (CH) (Ins) No.142/2022, Nirej Vadakkedathu Paul & Ors., Vs Sunstar Hotels and Estates Private Limited.**, Vide para 87 & 88 in which it decided that the proceedings at the behest of the shareholder would not be maintainable. The relevant paras are extracted below:-

“87. Heard Learned Counsel for the Appellant and the Respondents and also perused record made available to us. Several issues have been raised in the Appeals which are required to be deliberated upon before coming to final conclusion.

(I) (a) Whether the ‘Adjudicating Authority’ committed an error in admitting the ‘CIRP’ of the ‘Corporate Debtor’

And

(b) Whether, the shareholder of the ‘Corporate Debtor’ has any locus in Section 7 application filed by the ‘Financial Creditor’.

(II) Whether, the shareholders can make payment to satisfy financial debt of financial creditor in order to take away the ‘Corporate Debtor’ from the clutches of the ‘Corporate Insolvency Resolution Process’.

(III) Whether the Respondent No. 2 (‘Corporate Debtor’) is a Non- Banking Financial Company (‘NBFC’) having assets of more than Rs. 500 crores and therefore exempted from the

‘Corporate Insolvency Resolution Process’ ordered by the ‘Adjudicating Authority’.

(IV) Whether, such cases of Non- Banking Financial Company are required to be registered or can fall in the definition of ‘Exemption’ even without being registered with the ‘Reserve Bank of India’.

(V) Whether the permission of the ‘Reserve Bank of India’ is mandatorily to be taken prior to initiating the ‘Corporate Insolvency Resolution Process’ proceedings against the ‘Corporate Debtor’ ---- being adjudicated by the ‘Adjudicating Authority’.

(VI) Whether the Appellants are related parties of the suspended management as claimed by the Respondents and similarly whether the Respondents are related parties of the suspended management of the ‘Corporate Debtor’ as claimed by the Appellants and what is going to be impact of such relationship, if exists, over the maintainability of Section 7 Application under I & B Code, 2016.

88. Issue (I) (a) Whether the ‘Adjudicating Authority’ committed an error in admitting the ‘CIRP’ of the ‘Corporate Debtor’

And

(b) Whether, the shareholder of the ‘Corporate Debtor’ has any locus in Section 7 application filed by the ‘Financial Creditor’.

□ In order to examine this critical issue of locus and maintainability, this 'Appellate Tribunal' needs to look into various provisions of the I & B Code, 2016 carefully. The relevant provision, connected to this issue are:-

“3 (23) “person” includes—

- (a) an individual;*
- (b) a Hindu Undivided Family;*
- (c) a company;*
- (d) a trust;*
- (e) a partnership;*
- (f) a limited liability partnership; and*
- (g) any other entity established under a statute, and includes a person resident outside India;” (emphasis supplied)*

“5(7) “financial creditor” means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to;

(8) “financial debt” means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes—

- (a) money borrowed against the payment of interest;*
- (b) any amount raised by acceptance under any acceptance credit facility or its de-materialised equivalent;*
- (c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;*

(d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;

(e) receivables sold or discounted other than any receivables sold on non-recourse basis;

(f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing. 1[Explanation.—For the purposes of this sub-clause,—

(i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and

(ii) the expressions, “allottee” and “real estate project” shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);]

(g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;

(h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;

(i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause;

“5(26) “resolution plan” means a plan proposed by resolution applicant for insolvency resolution of the corporate debtor as a going concern in accordance with Part II;”

“CHAPTER II

CORPORATE INSOLVENCY RESOLUTION PROCESS

6. *Persons who may initiate corporate insolvency resolution process. – Where any corporate debtor commits a default, a financial creditor, an operational creditor or the corporate debtor itself may initiate corporate insolvency resolution process in respect of such corporate debtor in the manner as provided under this Chapter.”*

(emphasis supplied)

“7. Initiation of corporate insolvency resolution process by financial creditor.—(1) A financial creditor either by itself or jointly with 1[other financial creditors, or any other person on behalf of the financial creditor, as may be notified by the Central Government,] may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred.

Explanation.—For the purposes of this sub-section, a default includes a default in respect of a financial debt owed not only to the applicant financial creditor but to any other financial creditor of the corporate debtor.

(2) *The financial creditor shall make an application under sub-section (1) in such form and manner and accompanied with such fee as may be prescribed.*

(3) *The financial creditor shall, along with the application furnish—*

(a) *record of the default recorded with the information utility or such other record or evidence of default as may be specified;*

(b) *the name of the resolution professional proposed to act as an interim resolution professional; and*

(c) *any other information as may be specified by the Board.*

(4) *The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), ascertain the existence of a default from the records of an information utility or on the basis of other evidence furnished by the financial creditor under sub-section (3).*

(5) *Where the Adjudicating Authority is satisfied that—*

(a) *a default has occurred and the application under sub-section (2) is complete, and there is no disciplinary proceedings pending against the proposed resolution professional, it may, by order, admit such application; or*

(b) *default has not occurred or the application under sub-section (2) is incomplete or any disciplinary proceeding is pending against the proposed resolution professional, it may, by order, reject such application:*

Provided that the Adjudicating Authority shall, before rejecting the application under clause (b) of sub-section (5), give a notice

to the applicant to rectify the defect in his application within seven days of receipt of such notice from the Adjudicating Authority.

(6) The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (5).

(7) The Adjudicating Authority shall communicate—(a) the order under clause (a) of sub-section (5) to the financial creditor and the corporate debtor; (b) the order under clause

(b) of sub-section (5) to the financial creditor, within seven days of admission or rejection of such application, as the case may be.”

(emphasis supplied)

“61. Appeals and Appellate Authority.—(1) Notwithstanding anything to the contrary contained under the Companies Act 2013 (18 of 2013), any person aggrieved by the order of the Adjudicating Authority under this part may prefer an appeal to the National Company Law Appellate Tribunal.

(2) Every appeal under sub-section (1) shall be filed within thirty days before the National Company Law Appellate Tribunal:

Provided that the National Company Law Appellate Tribunal may allow an appeal to be filed after the expiry of the said period of thirty days if it is satisfied that there was sufficient cause for not filing the appeal but such period shall not exceed fifteen days.

(3) An appeal against an order approving a resolution plan under section 31 may be filed on the following grounds, namely:—

- (i) *the approved resolution plan is in contravention of the provisions of any law for the time being in force;*
 - (ii) *there has been material irregularity in exercise of the powers by the resolution professional during the corporate insolvency resolution period;*
 - (iii) *the debts owed to operational creditors of the corporate debtor have not been provided for in the resolution plan in the manner specified by the Board;*
 - (iv) *the insolvency resolution process costs have not been provided for repayment in priority to all other debts; or*
 - (v) *the resolution plan does not comply with any other criteria specified by the Board.*
- (4) *An appeal against a liquidation order passed under section 33, or sub-section (4) of section 54L, or sub-section (4) of section 54N, may be filed on grounds of material irregularity or fraud committed in relation to such a liquidation order.”*
- (5) *An appeal against an order for initiation of corporate insolvency resolution process passed under sub-section (2) of section 54-O, may be filed on grounds of material irregularity or fraud committed in relation to such an order.”*

(emphasis supplied)

- *As per Section 7 of the I & B Code, 2016, a ‘Financial Creditor’ either by itself or jointly with other ‘Financial Creditors’ may file an Application for initiating ‘Corporate Insolvency Resolution Process’ against the ‘Corporate Debtor’*

before the 'Adjudicating Authority' when the default has occurred.

☐ *The 'Adjudicating Authority' shall, within 14 days of receipt of the application, ascertain the existence of default and where the 'Adjudicating Authority' is satisfied that the default has occurred and application is complete, admit such application and 'Corporate Insolvency Resolution Process' shall commence from the date of such admission of the application.*

☐ *According to scheme under Section 7, the 'Adjudicating Authority' is not required to look into other criteria for admission.*

☐ *As per Section 5 (7) of the I & B Code, 2016, 'Financial Creditor', means any person to whom the financial debt is owed and includes a person to whom such a debt is legally assigned or transferred. Where an assignment agreement legally assigns the impugned debt to a person, such a person becomes a financial creditor within a meaning of Section 5(7) of the I & B Code, 2016. In such case, the assignee steps into the shoes of the 'Financial Creditor' and as such he is entitled to the reliefs as available in the I & B Code, 2016.*

☐ *In the present case, undisputedly, the 1st 'Respondent' became 'Financial Creditor' since the assignment was created with all requisite formalities and the 'Corporate Debtor' has not denied the financial transaction. In such case, the 'Adjudicating Authority' is supposed to admit Section 7 Application.*

☐ *It is the case of 'Appellant' that Section 7 Application was filed by the 'Financial Creditor' in collusion with the 'Corporate Debtor'.*

- *After reading Section 61(1) of the I & B Code, 2016, it becomes clear that “any person aggrieved” by the order of the ‘Adjudicating Authority’ may prefer an appeal to “National Company Law Appellate Tribunal”.*
- *The definition of “person” has been given in Section 3(23) of the I & B Code, 2016 which includes an “individual”. This does not specifically mention “shareholder”. However, “individual” is wider term and can include “shareholder”.*
- *Section 6 of the I & B Code, 2016 prescribes as to who may initiate ‘Corporate Insolvency Resolution Process’. It includes a ‘Financial Creditor’ or an ‘Operational Creditor’ or the ‘Corporate Debtor’ itself. This definition is restrictive and includes only ‘Creditors’ both ‘Financial Creditors’ & ‘Operational Creditors’ and the ‘Corporate Debtor’ who may wilful.*
- *As already discussed earlier in preceding paras, the ‘Financial Creditor’ either by itself or jointly with others may file an application for ‘Corporate Insolvency Resolution Process’. In the present case, the ‘Financial Creditors’ had filed the application under Section 7 of the I & B Code, 2016 before the ‘Adjudicating Authority’ which was admitted and ‘Corporate Insolvency Resolution Process’ was initiated.*
- *The ‘Appellants’ herein filed two intervention applications, namely, I.A No. 86 of 2022 and I.A No. 87 of 2022 before the ‘Adjudicating Authority’ claiming to be aggrieved persons seeking to intervene in CP (IB) No. 11/2022 with prayer to declare that the CP amounts to fraudulent and malicious*

initiation of proceedings under I & B Code, 2016 and to dismiss CP (IB) No. 11/2022.

□ *The ‘Adjudicating Authority’ had discussed this aspect in details in para-20 of the ‘impugned order’ which reads as under:-*

“It is the case of the Intervening Applicants that they are holding certain shares in the Respondent/Corporate Debtor Company and if the C.P. is admitted and the Insolvency Resolution Process is initiated against the Corporate Debtor, their right as shareholders will be severely affected and their interest will be prejudiced. It is the settled principle of law that in an Application U/s. 7 of the Code, there is no place for any third party other than the Financial Creditor and the Corporate Debtor. The Shareholders of the Financial Creditor or of the Corporate Debtor in their capacity as a shareholder have no locus standi to get themselves impleaded in the C.P. filed U/s.7 of the IBC, 2016. If any Shareholder of the Financial Creditor or the Corporate Debtor have any grievances with regard to the representation of the Company in the C.P., they can agitate their rights as Shareholders under the applicable provision of the Companies Act, 2013 but cannot be allowed to be impleaded or intervened in the C.P. This Adjudicating Authority, while exercising summary jurisdiction such as Section 7 of the IBC, 2016, cannot adjudicate the disputes, if any, inter se, between the Shareholders or Directors of the Corporate Debtor, Accordingly, both the Interlocutory Applications are dismissed.”

(emphasis supplied)

□ *It is the case of the 'Appellants' that being "shareholders", if 'Corporate Insolvency Resolution Process' is allowed to continue their 'financial interest' will be adversely affected and therefore, they are aggrieved by the 'impugned order'.*

□ *The 'Appellants' cited the judgment of P. Naveen Chakravarthy vs. Punjab National Bank" (W.P No. 27780 of 2019) and "Periasamy Palani Gounder Vs. Radhakrishnan Dharmarajan" (2022 SCC OnLine NCLAT 86) to support their averments.*

□ *The 'Appellants' have further argued that the interest of 'Financial Creditor' is to recover his money and to put 'Corporate Debtor' into 'Corporate Insolvency Resolution Process' or 'Liquidation'.*

□ *To protect the financial interest of a company having assets in form of shares in the other companies of more than Rs. 1000 crores, the 'Appellants' as shareholders are willing to pay the entire outstanding debt including interest.*

□ *In response to a pointed query by this 'Appellate Tribunal' to the 'Appellants', whether the proposition of shareholders to settle the outstanding dues of the 'Corporate Debtor' by shareholders, is permitted by any law especially under the I & B Code, 2016 or the Companies Act, 2013, it transpires that there is no such direct and specific provision allowing the same.*

□ *Similarly, on further specific query by this 'Appellate Tribunal' of any precedent through judgments of the Hon'ble Supreme Court of India or this 'Appellate Tribunal' which*

permitted such settlement of outstanding dues of the 'Corporate Debtor' by the shareholders, the 'Appellants' could not give any direct citations except few citations mentioned earlier which are not directly connected here looking to the facts herein.

□ *This 'Appellate Tribunal' notes that citations made by the 'Appellants' in the 'Written Submissions' and during averments made by the 'Appellants', are not directly on this point and do not support claims of the 'Appellant'.*

□ *It has further been argued by the 'Respondents' that the 'Appellants' have sought to maintain the present appeal as a derivative action which cannot be maintained. Once an IRP/RP has been appointed, he/she becomes responsible for the functioning of the 'Corporate Debtor' and has the sole authority to represent the 'Corporate Debtor' and a derivative action, both at the stage of admission and/or after the corporate debtor has been admitted into 'Corporate Insolvency Resolution Process' cannot be maintained.*

□ *During averments, it has been brought to the notice of this 'Appellate Tribunal' one judgment of Delhi High Court on derivative action on behalf of the Corporate Debtor under I & B Code, 2016. In the case of ICP Investments v. Uppal Housing, 2019 SCC OnLine Del 12371, following has been recorded in the judgment :-*

"18. The IRP appointed with respect to Umang, under the law having powers/authorities as aforesaid, I have wondered about the maintainability of a derivative action on behalf of Umang.

20. *It is felt that once the affairs of the Umang are taken over by an IRP, the Directors of Umang can no longer be blamed for not taking the requisite steps to seek redress for the wrong if any done to Umang, and a derivative action by plaintiff, as a majority shareholder, for the benefit of Umang would not be maintainable. The plaintiff now has to approach the IRP for taking action against Uppal and it is the IRP who has to, if finds any merit in the grievance of the plaintiff, take appropriate remedy on behalf of Umang. Moreover, if the plaintiff remains dissatisfied with the decision of IRP, has remedy before the NCLT.*

22. *I must however note that the aforesaid cases involved a company which was at the stage of liquidation, as distinct from Umang in the present case, against which only the insolvency process has begun. However considering the duties and role of the IRP under the IBC as discussed hereinabove, the principle in each of the aforesaid cases i.e. of the management of the company, on whose fraud/mismanagement a derivative action becomes maintainable, being no longer in power/control, and consequently a derivative action being no longer maintainable, also applies to the present case.”*

23. *I also find a Single Judge of the High Court of Madras OnLine Mad 10472 to have held a suit by way of a derivative action to be not maintainable when the company, for whose benefit derivative action was initiated, was under insolvency. It was held that it is for the RP to act on behalf of the corporate debtor and to initiate suitable proceedings if any deemed necessary for the benefit of the corporate debtor and its creditors.*

24. *I respectfully concur.*

□ *It infers that the ‘Appellants’ even as “shareholders” cannot be aggrieved merely by the admission of the ‘Corporate Debtor’ into ‘Corporate Insolvency Resolution Process’. Such objection may render the object of I & B Code, 2016 illusory since any shareholder of any ‘Corporate Debtor’ against which Insolvency proceedings have been initiated can then seek to maintain a derivative action and sabotage a valid ‘Corporate Insolvency Resolution Process’ initiated by the Adjudicating Authority.*

□ *The ‘Appellants’ have prayed for setting aside the ‘impugned order’ dated 08.04.2022 in their C.A (AT) (Ins.) No. 174 of 2022 whereas in C.A (AT) (Ins.) No. 142 of 2022 the prayer has been made to stay ‘operation of the impugned order’.*

□ *Although, the ‘Appellants’ have not asked in their prayers before this ‘Appellate Tribunal’ for any liberty to seek permission to pay all outstanding dues of the 1st Respondent herein/ Financial Creditor, it has been made in ‘Written Submissions’ as well as in the main application seeking intervention before the ‘Adjudicating Authority’ whereas such requests/ averments were made by the ‘Appellants’.*

□ *As discussed prima-facie there is no specific law which allows any shareholder of the ‘Corporate Debtor’ to challenge the admission of ‘Corporate Insolvency Resolution Process’ of the ‘Corporate Debtor’, once the debt due and default is established by the ‘Adjudicating Authority’, in an application made by the ‘Financial Creditor’ filed under Section 7 of the I & B Code, 2016 before the ‘Adjudicating Authority’.*

□ Moreover, there is no law which allows a third-party to settle the claims of the 'Financial Creditor' on behalf of the 'Corporate Debtor', more so without any consent of the 'Corporate Debtor' and in the teeth of opposition by the 'Financial Creditor'. The 'Appellants' could not produce any precedents in this regard.

□ Theoretically, even a 'person' aggrieved by the 'impugned order' challenges admission of 'Corporate Insolvency Resolution Process', it is not going to resolve the issues under any relevant law and the whole exercise with such appeal become futile, purposeless and will only cause delay in resolution, for which the 'Resolution Plan' has already been approved by the 'Committee of Creditors' and is under consideration of the 'Adjudicating Authority'.

□ We also take into account the judgment of this 'Appellate Tribunal' wherein, it was held that the no direction can be given to any third- party for the settlement between other parties as observed in I.A. No. 642 of 2019 in Company Appeal (AT) (Insolvency) Nos. 255-256 of 2018 in the matter of Punit Garg . Vs. Ericsson India Pvt. Ltd. & Anr., in I.A. No. 637 of 2019 in Company Appeal (AT) (Insolvency) Nos. 257-258 of 2018 in the matter of Satish Seth Vs. Ericsson India Pvt. Ltd. & Anr. and in I.A. No. 638 of 2019 in Company Appeal (AT) (Insolvency) Nos. 259-260 of 2018 in the matter of Mr. Suresh Madihally Rangachar Vs. Ericsson India Pvt. Ltd. & Anr. wherein this 'Appellate Tribunal' observed as under :-

“45. In view of the observations made above, in an appeal filed under Section 61 of the 'I&B Code', no direction can be given to

any party to the settlement (particularly the third party) to perform certain duties to ensure settlement between other parties.

□ Similarly, this 'Appellate Tribunal' also take note of its earlier order, where it has been held that an investor in a 'Corporate Debtor' cannot claim to be an 'aggrieved person' for preferring an appeal against an order against insolvency petition in Company Appeal as held in CA (AT) (Insolvency) No. 296 of 2017 in the matter of Anant Kajare Vs. Eknath Aher & Anr. wherein the relevant para reads as under :-

"4. Heard learned counsel for the Appellant. Admittedly, the Appellant is an Investor therefore, the Appellant cannot claim to be an 'aggrieved person' for preferring appeal against the order dated 2nd May, 2017 passed by Adjudicating Authority whereby the application under Section 9 of the 'I&B Code' was admitted. In fact, the Appellant being an investor is entitled to file its claim before the 'Insolvency Resolution Professional.'"

□ The term 'investor' has not been defined in the I & B Code, 2016 as well as in the Companies Act, 2013. A reference, therefore, has been made to 'Investopedia' where investor has been defined as under :-

"What Is an Investor?"

An investor is any person or other entity (such as a firm or mutual fund) who commits capital with the expectation of receiving financial returns. Investors rely on different financial instruments to earn a rate of return and accomplish important financial objectives like building retirement savings, funding a college education, or merely accumulating additional wealth over time.

A wide variety of investment vehicles exist to accomplish goals, including (but not limited to) stocks, bonds, commodities, mutual funds, exchange-traded funds (ETFs), options, futures, foreign exchange, gold, silver, retirement plans, and real estate. Investors can analyze opportunities from different angles, and generally prefer to minimize risk while maximizing returns.

Investors typically generate returns by deploying capital as either equity or debt investments. Equity investments entail ownership stakes in the form of company stock that may pay dividends in addition to generating capital gains. Debt investments may be as loans extended to other individuals or firms, or in the form of purchasing bonds issued by governments or corporations which pay interest in the form of coupons.”

□ *Therefore, a shareholder is also technically speaking an “investor”/ “owner”, who owns limited investment in the company to the extent of share capital subscribed by him. Therefore, the judgement of Anant Kajare (Supra) is applicable in the present appeal as discussed in preceding paragraphs.*

□ *This ‘Appellate Tribunal’ carefully examined the averments made on behalf of the ‘Appellants’ that this ‘Appellate Tribunal’, has already allowed such appeals in cases of P. Naveen Chakravarthy v. Punjab National Bank (WP No. 22780 of 2019) where it has been held that the right of a shareholder of a ‘Corporate Debtor’ is not jeopardized in so much as a shareholder can espouse their cause qua the ‘Corporate Debtor’ while seeking to right a perceived wrong. This ‘Appellate Tribunal’ also examined citations quoted by the ‘Appellants’ in the case of Periasamy Palani Gounder v. Radhakrishnan*

Dharmarajan (2022 SCC OnLine NCLAT 86), wherein this 'Appellate Tribunal' has held that nothing prevents a shareholder from producing evidence to establish the illegality in the 'Corporate Insolvency Resolution Process'.

□ *However, this 'Appellate Tribunal' after careful considerations of these 'Citations / Judgements', comes to the conclusion that these cases are not directly connected or similar to the present 'Appeal', and therefore, it is not of any assistance to the 'Appellants'.*

□ *Having considered all the averments made by the 'Appellants' as well as the 'Respondents', including various Written Submissions made available to this 'Appellate Tribunal' and after careful consideration of various judicial pronouncements of the Hon'ble Supreme Court of India as well as this 'Appellate Tribunal', comes to concrete conclusion without any hesitation that in the present 'Appeals', the 'Appellants' do not have any 'Locus', and therefore the present 'Appeals', are 'not maintainable'. This 'Appellate Tribunal', therefore, does not find any 'Error' / 'Legal Infirmary', in the 'impugned order', on this issue.*

□ *Having decided the non-maintainability of the 'Appeals' itself, this 'Appellate Tribunal', has not traversed on any other issues, touching upon the 'Appeal', as it is unnecessary to go into the same and as such, they have not been discussed".*

12. We also take note of Judgment of Hon'ble Supreme Court in **Civil Appeal No.9986/2024 in Special Leave Petition (C) No.21023 of 2024, GLAS Trust**

Company LLC Vs BYJU Raveendran and Ors. A similar issue to the issue as to whether at all, the shareholders have a right to maintain a petition under Section 7 (or) Section 9 of I & B Code and the consequential appeal under Section 61 of I & B Code, came up for consideration before the Hon'ble Apex Court on the issue about the expansion of the ambit of the expression of an aggrieved person under Section 62 of IBC, which provides for the Appellate Jurisdiction of the Hon'ble Apex Court. This provision is akin to provision relating to the Appellate Jurisdiction of the NCLAT under Section 61 of IBC. Hon'ble SC while dealing with the expression 'any person' as given therein, and has discussed and analysed the scope of the same in para 75 of the said Judgment.

13. In elaboration to his argument, the Learned Counsel for the Appellant herein has submitted that the question regards "aggrieved person", which has been answered by the Judgment of Hon'ble Apex Court in **BYJU Raveendran's (supra)** would be a complete answer, as to how the word 'affected or an aggrieved person' is to be determined, as expressly provided in the provision contained under Section 61 of I & B Code. The word "aggrieved person", as used under Section 61 of I & B Code, though we have already elaborately dealt with its basic concept, in the preceding paragraph of our Judgment, where we have quite specific in its term has observed that aggrieved person, would be any person except for the shareholders owing to the very legal status of the shareholder which

under law and in common parlance enjoy, in the company, as they are the investors in the Company aimed for the purpose of making investment for gaining the profit over the investment, which they have made in the Company based on its market trends.

14. The Learned Counsel for the Appellant had drawn the attention of this Tribunal, contending thereof that the Judgment of three Member Bench of NCLAT, which had quite elaborately discussed the issue and come to the conclusion that, the **‘shareholder would not be falling within the ambit of the aggrieved person’** and the proceedings at their behest by way of an Appeal would not be maintainable, would be per curiam Judgment, because the Judgment of Byju Raveendran has not been considered. In extension to his argument, the Learned Counsel for the Appellant has referred to para 42 of Byju Raveendran’s Judgment based on which he contends that the Hon’ble Apex Court in fact has granted a liberty and has made the field wide open, interpreting it as if the category of any aggrieved person would be inclusive of the shareholders too, who could file an Appeal being aggrieved against an order passed by the NCLT. For the said purpose he has referred to para 42 of Byju’s Judgment (supra) which is extracted hereunder: -

“42. From this scheme of Chapter II of the Insolvency and Bankruptcy Code, it appears that the admission of an application is

a significant event that alters the nature of the proceedings, and the stakeholders involved. Initially, when the petition is filed by the financial creditor, operational creditor or corporate applicant, as the case may be, the proceedings are in personam and the only relevant stakeholders are the applicant creditor and the corporate debtor. However, once the petition is admitted and the corporate insolvency resolution process is initiated, several significant changes take place, including the transfer of the management of the affairs of the corporate debtor to the interim resolution professional, the declaration of the moratorium, and the collation of the claims against the corporate debtor. Therefore, the proceedings now change character-they become in rem and are no longer the preserve of only the applicant creditor and the corporate debtor and even creditors who were not the original applicants, become necessary stakeholders”.

15. What the Learned Counsel attempts and intends to derive from para 42 of the Byju’s Judgment is, that after admission of a petition and initiation of CIRP, the stakeholders become necessary parties and that in itself will include the shareholders too. But we cannot read this paragraph in piecemeal manner by only making reference to the term stakeholder, without reading the subsequent part of the paragraph, where it states that other creditors become necessary stakeholders. The said Judgment of Byju (supra) in its para 42, does not anywhere expressly observe the sustainability of the petition or even the Appellate Proceedings for that matter at the behest of the shareholders. Thus, the contents of para 42, cannot

be extended to be read as if that, it was an answer given by the Hon'ble Apex Court, that the proceedings at the behest of the shareholder would be maintainable, because that was not an issue, which was being considered by the Hon'ble Apex Court in BYJU Raveendran's matter, because it had only had made a reference to the "aggrieved person", in the context of its expression given in Section 62, which has been confined to be determined to be made applicable to the different classes of creditors. Reference to different classes of creditors in para 42 of the Judgment of BYJU Raveendran matter (supra) it cannot be automatically interpreted to be applied in relation to the shareholders, which was not at all the issue decided by the Hon'ble Apex Court, in the context of the applicability of the provisions of Section 62 and the term "aggrieved person" used therein in context to the "shareholders".

16. We are of the considered view that when rendering a Judgment in an adjudicatory capacity, the Tribunals or the Courts, while exercising their adjudicatory powers will have to consider the rationale, and thought process, i.e., under what circumstances and backdrop a superior court has decided the matter and the interpretation made therein cannot be automatically derived to be applied to an issue until or unless, that particular issue was the specific question to be determined before the superior court, calling for an adjudication. A court decides a matter based on which is actually placed before it. In BYJU Raveendran's case,

the question of the sustainability of the proceedings at the behest of the shareholder was not an issue to be decided before Hon'ble Apex Court and therefore, the limited expression given therein to the term "aggrieved person" as given in the Judgment of BYJU Raveendran cannot automatically be inferred to conclude that it would automatically make the proceedings to be tenable at the behest of the shareholders also. We are of the view that the ratio propounded by the Hon'ble Apex Court in the said Judgment, has to be applied only in the context in which it has been rendered and that we cannot expand its applicability to the issue of whether a shareholder can be an aggrieved person which was not even the subject matter or was at all addressed before the Hon'ble Apex Court, while the aspect of determination of "the aggrieved person" was being considered by it.

17. This is to be considered from yet another perspective, as argued by the Learned Counsel for the Appellant herein, as to what would the term "any person" mean, as it had been referred to in para 75 of the Judgment of BYJU Raveendran which is extracted hereunder: -

*"75. The provision stipulates that **"any person"** who is aggrieved by the order of the National Company Law Appellate Tribunal may file an appeal before the Supreme Court within the prescribed limitation period. Similar language is used in section 61 of the Insolvency and Bankruptcy Code, which provides for appeals to the National Company Law Appellate Tribunal from orders of the National Company Law Tribunal [“61. Appeals and Appellate*

Authority.— (1) Notwithstanding anything to the contrary contained under the Companies Act, 2013 (18 of 2013), any person aggrieved by the order of the Adjudicating Authority under this part may prefer an appeal to the National Company Law Appellate Tribunal.”] . The use of the phrase “any person aggrieved” indicates that there is no rigid locus requirement to institute an appeal challenging an order of the National Company Law Tribunal, before the National Company Law Appellate Tribunal or an order of the National Company Law Appellate Tribunal, before this court. Any person who is aggrieved by the order may institute an appeal, and nothing in the provision restricts the phrase to only the applicant creditor and the corporate debtor. As noted above, once the corporate insolvency resolution process is initiated, the proceedings are no longer restricted to the individual applicant creditor and the corporate debtor but rather become collective proceedings (in rem), where all creditors, such as the appellant, are necessary stakeholders. The appellant is not an unrelated party to the corporate insolvency resolution process, but is in fact, an entity whose claims had been verified by the interim resolution professional vide letter dated August 19, 2024. The appellant who claims to be a financial creditor, has expressed reasonable apprehensions about the prejudice it would face if there were round-tripping of the funds, and the prioritisation of the debts of the second respondent, an operational creditor”.

18. Once again, the answer to the conclusion given by BYJU Raveendran Judgment (supra) as contained in para 75, would be similar to the one which has already been answered by us in the preceding paragraphs. The Hon’ble Apex

Court in the para 75 above was dealing with the issue of aggrieved person, in extension to the observation already made in the preceding part of the Judgment of BYJU Raveendran. The para 75 itself cannot be exclusively extracted to be read, as if the reference made to the word “any person or aggrieved person” as considered therein will include shareholders because it was made in the context of observation made in para 42 which limits the expression to a class of creditors and therefore it would not automatically be made applicable to the shareholders too, even if the Judgment refers, the term ‘person aggrieved’, as **“any person”** who would be affected by the order. The word aggrieved person would be the person who is affected by the order, would be a person who does not have any other forum or a platform under law available to safeguard his right or interest, arising from the proceedings which are being held before the Tribunal. However as far as the interest of the shareholders is concerned, it is protected by the agent or the authority appointed by the NCLT i.e., Resolution Professional, or the liquidator, where the liquidation has been ordered and the shareholders are taken care of by the aforesaid two agents who are appointed by the court under law. Therefore, the proceedings at the behest of the shareholders, in their individual capacity will not be maintainable as in case the shareholders are permitted to maintain the proceedings under the I & B Code, it would run contrary the very object of the Code of timely resolution of insolvency, and would rather be an

abuse the process, in a proceeding where time plays an important role to conclude the proceedings in a time bound basis.

19. There is another logic though we have already observed in the preceding paragraph by way of reiteration, it is once again expressed that the sustainability of the proceedings at the behest of the shareholder, would not be a reasonable proposition, which should be judicially stamped in order to provide avenue for the shareholders, to initiate and pursue the proceeding under any of the provisions of the I & B Code, particularly keeping in mind that the time frame is of a prime relevance under the provisions of the I & B Code. If the said object of permitting the shareholders to sustain the proceedings is permitted, that will run contrary to the very object of the code itself, besides, being contrary to the interest of the decision-making process by creating to a multiplicity of proceedings which otherwise could have stood closed. Further, when the interest of the shareholder itself stands protected by the agents appointed by the Tribunal and when as we have observed above, the status of the shareholders being that of an investor, who have profit interest only in the Company, and who do not have any administrative interest or control in the exercise of administrative functions of the Corporate Debtor, the proceedings at their behest will not be maintainable.

20. Yet another argument, which has been extended by the Learned Counsel for the Appellant, though not very relevant, is that in some of the earlier

proceedings, which was initiated by the shareholders, the matter has been decided on merits and a final determination has already been made. A decision taken by the Tribunal in any earlier proceedings, may be a proceeding initiated by a shareholder, but it was without going into a question of maintainability of the earlier proceedings at the behest of the shareholder or specifically deciding that question, the proceedings in itself may not make it a precedent for the Appellant to argue that in certain proceedings initiated at the behest of the shareholders, since had already been decided, that itself will not lead to an answer to the question of maintainability of the proceedings at the behest of the shareholders. More particularly, when the said question was neither raised, considered nor was ever judicially dealt with by the proceedings drawn under Section 61 or even at the stage of Section 62 before the Hon'ble Apex Court. A lis decided without specifically answering a legal question raised affecting the issue of maintainability of the proceedings cannot be taken as to as an answer, to a question, which was a question of reference made before us about maintainability of the proceedings at the behest of the shareholders, which we answered that the petition at the behest the shareholder will not be maintainable, which we have quite elaborately dealt with in the preceding paragraphs.

21. Owing to the fact that the 3-member bench of the NCLAT, Principal Bench has already answered the question in the matters of Clarion Health Food LLP

(supra) and further because of the Judgment of the Hon'ble Apex Court in Byju's case, the issue no more remains res integra. A fact has been brought on record, that the Judgment rendered by the larger bench of the NCLAT, as rendered in the matters of Clarion Health Food LLP Vs Goli Vada Pav Pvt. Ltd. & Another, is presently a subject matter of challenge before the Hon'ble Apex Court, but merely because of pendency of an appeal before the Hon'ble Apex Court, will not dilute the implications of the Judgment of the 3-member bench deciding the issue qua the sustainability of proceeding under Section 7 and Section 9 at the behest of the shareholders, which has been answered in negative. Hence the question referred to us is answered accordingly.

[Justice Yogesh Khanna]
Member (Judicial)

[Justice Sharad Kumar Sharma]
Member (Judicial)

[Jatindranath Swain]
Member (Technical)

22.07.2025
VG/MS