NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 1263 of 2022

[Arising out of the Impugned Order dated 13.09.2022 passed by the National Company Law Tribunal, Kolkata Bench, Kolkata, in IA (I.B.C)/921(KB)2021 in C.P.(IB)/1470(KB)2018]

In the matter of:

Fortune Chemicals Limited
203, Sukanmall, 2nd Floor,
Near Visat Petrol Pump,
Gandinagar Road, Sabarmati,
Ahmedabad 380005

... Appellant

Versus

1. **Ashok Kumar Jaiswal,**
Resolution Professional of
Aarya Industrial Products Private Limited,
32, Harish Mukherjee Road,
Kolkata – 700025.

2. **Committee of Creditors of**
Aarya Industrial Products Private Limited,
Represented by Ashok Kumar Jaiswal,
Resolution Professional of Aarya Industrial
Products Private Limited (Corporate Debtor),
32, Harish Mukherjee Road,
Kolkata – 700025.

... Respondents

Present:

For Appellant	**:**	Mr. Joy Saha, Sr. Advocate with Mr. Rishav Banerjee, Shambo Nandy, Anoushka Dey, Aishwarya Awasthi, Advocate.
For Respondents	**:**	Mr. K. Datta, Sr. Advocate with Siddharth Sangal, Ms. Richa, Mishra, Ms. Harshita Agrwal, Advocates for R-2. Mr. Shreedhar Gaggar, Advocates for R-1.

<u>J U D G M E N T</u>
<u>(Hybrid Mode)</u>

<u>[Per: Ajai Das Mehrotra, Member (Technical)]</u>

This appeal has been filed against the order dated 13.09.2022 passed by National Company Law Tribunal, Kolkata Bench, Kolkata in IA (I.B.C)/921(KB)2021 in C.P.(IB)/1470(KB)2018, wherein application filed by the Appellant, who had submitted resolution plan in the Corporate Insolvency Resolution Process (hereinafter called the **'CIRP'**) of the Corporate Debtor, Aarya Industrial Products Private Limited (hereinafter called the **'Corporate Debtor'**) was dismissed.

2. The relevant part of the impugned order dated 13.09.2022 of Ld. NCLT, Kolkata is reproduced below for ready reference:

> *"2. This application has been filed on 1 October, 2021 seeking direction on the Resolution Professional to accept the Resolution Plan of the applicant and to forward the same to the Committee of Creditors of the Corporate Debtor for consideration thereof. It is an admitted position that the Committee of Creditors rejected the resolution plan of the applicant on 9/10th April, 2021 which is at page 27/28 of the connected IA /422/KB/2021. It transpires from the minutes of the CoC that the plan submitted by the applicant was non-compliant and the CoC recorded approval for liquidation by 100% voting,*
> *3. It is stated by Ld. Counsel appearing for the RP upon request by the applicant, that the EMD was refunded on 10th May, 2021, which is annexed at page 16 of the Supplementary Affidavit.*
> *4. Admittedly, the EMD was returned to the applicant, and this is apparent from page 16 of the Supplementary Affidavit filed by the RP.*
> *5. As mentioned above, this application seeking consideration of the resolution plan has been filed on 1 October, 2021.*
> *6. Ld. Counsel appearing for the applicant states that he is willing to furnish a compliant resolution plan. It is further submitted by Ld. Counsel that he doesn't know on what grounds his plan was rejected and he was not communicated of this by the CoC or by the RP.*

> *7. Be that at it may, the fact remains the applicant upon his request was paid back his EMD in the month of May. After accepting the amount of EMD, he has no right or locus to file this application and or seek reliefs as prayed for in this application.*
> *8. Further we find that there is an inordinate and unexplained delay of almost six months in approaching this Adjudicating Authority.*
> *9. For the forgoing reasons, we hereby reject this application."*

3. The brief facts of this case are as under:

i) The CIRP in relation to the Corporate Debtor was initiated on 17.09.2019. The appellant had submitted a resolution plan along with EMD of Rs. 25,00,000/- on 19.02.2021.

ii) On 03.04.2021, the Resolution Professional (hereinafter called the **'RP'**) informed the Appellant, through email, that the resolution plan submitted by it has been rejected. The earnest money deposited was refunded to the Appellant on 10.05.2021 on request of the Appellant.

iii) On 01.10.2021, the Appellant filed IA (I.B.C)/921(KB)2021 in which the impugned order dated 13.09.2022 was passed dismissing the said IA.

4. In its oral submissions, the Appellant stated that it was the sole bidder. It was submitted that it is the settled principle of law that liquidation should be the last resort and every effort should be made to revive the Corporate Debtor and this view is supported by the judgment in the case of *'K.N. Rajakumar Versus V. Nagarajan & Ors.', (2022) 4 SCC 617.*

5. It is further submitted that Ld. NCLT failed to appreciate the fact that resolution plan was viable and compliant and its non-consideration will be resulting into liquidation/death of the Corporate Debtor.

6. The Respondent No. 1, who is the RP for the Corporate Debtor has submitted as under:-

i) The Appellant is ineligible under the provisions of Section 29A of Insolvency and Bankruptcy Code, 2016 (hereinafter called the **'IBC, 2016'**) to submit a resolution plan.

ii) The RP submitted that in terms of Regulation 36A (8) of IBBI (Insolvency Resolution Process of Corporate Persons) Regulations, 2016, he had conducted due diligence to satisfy whether the Appellant complies with the applicable provisions of Section 29A of the IBC.

iii) It was found that the Appellant is ineligible to submit resolution plan as per Section 29A. One Mr. Avanish Kumar Singh was a director in two companies, namely, M/s Fortune Chemicals Ltd., the Appellant and M/s Gomtidhara Agro & Dairy Products Pvt. Ltd. (hereinafter called the **'GADPPL'**). The GADPPL was incorporated in 28.02.2014 and since then it has not filed its financial statements or annual returns. Thus, Mr. Avanish Kumar Singh becomes disqualified to be appointed a director of any other company as per provisions of Section 164(2) of Companies Act, 2013 for a period of five years with effect from 01.12.2017 (i.e. the date on which GADPPL failed to file financial statements and annual returns for a continuous period of three financial years).

iv) Since Mr. Avanish Kumar Singh was disqualified to act as a director under the Companies Act, 2013, and he was a director of M/s Fortune Chemicals Ltd., the Appellant was ineligible under Section 29A of IBC, 2016.

v) It was further submitted that *"in the instant case, Mr. Avanish Kumar Singh, being a 'connected person', became a director of the Appellant in 2018, despite being disqualified to become a director, as the same was well within the five-year stipulated period as stated hereinabove. Furthermore, he clearly falls under the category of 'connected person' as he is a director of the appellant and is in control and management of the appellant. Thus, the appellant clearly falls under the category of Section 29A(e) and (j) of the Code and is ineligible to submit a resolution plan"*.

vi) The RP submitted that the Appellant never failed to adhere to any of the timelines during the CIRP of the Corporate Debtor. While last date for submission of resolution plan was 19.02.2021 and deadline for submission of EMD was 25.02.2021, EMD of Rs. 25,00,000/- was credited in the bank account only on 03.03.2021. On 07.04.2021, the Appellant sent email with a proposal to waive the debt assignment clause in their resolution plan thereby reducing resolution plan by approximately 30%.

vii) After being intimated about rejection of its resolution plan, the Appellant had made repeated requests to RP to refund the EMD amount and the relevant emails are at pages 252 to 259 of the Appeal Paper Book. The EMD was refunded on 10.05.2021 and it was only on 01.10.2021 that the Appellant approached the Ld. NCLT by filing the IA No. 921/2021. The Committee of Creditors (hereinafter called as the **'CoC'**) had considered the plan of the Appellant, which is apparent from the minutes of the meeting of the CoC dated 22.02.2021 (16th meeting), dated 04.03.2021 (17th meeting), dated 17.03.2021 (18th meeting), dated 20.03.2021 (19th meeting) and dated 07.04.2021 (20th meeting). The CoC concluded that the resolution plan of the Appellant was non-complaint under Section 29A of IBC, 2016 and further the Appellant had sent an email reducing the plan amount. The plan was rejected by the CoC and decision was taken by the CoC to liquidate the Corporate Debtor.

viii) It was submitted that the Appellant had never adhered to the timelines and was non-complaint to Section 29A of IBC, 2016. It was further submitted that it is the well settled law as per judgments by the Hon'ble Supreme Court in *K. Sashidhar v Indian Overseas bank & Ors., (2019) 12 SCC 150* and this Tribunal in *Harkirat Singh Bedi v Oriental Bank of Commerce & Ors., 2021 SCC Online NCLAT 4* that the commercial wisdom of the CoC in accepting or rejecting a resolution plan is "non-justiciable" and that the scope of judicial intervention is very limited.

7. The Respondent No. 2, the CoC, in their oral and written submissions have stated that State Bank of India is the only financial creditor and sole member of the CoC. The CoC submitted that the Appellant had frequently defaulted in adhering to the timelines. The Appellant was given time till 19.03.2021 to submit requisite documents and information, including eligibility under Section 29A of IBC, 2016, with a rider that in case of non-submission within the time, the plan would stand rejected without any consideration. Since the Appellant did not comply by 19.03.2021, the CoC was informed that the Appellant is only killing time, consequently, in the CoC meeting dated 25.03.2021 it was decided that the Corporate Debtor should be sent to liquidation. The CoC decided that since the proposed plan is non-compliant, and sufficient time has gone by, the only option is to go for liquidation of the Corporate Debtor. Some of the short comings regarding the resolution plan submitted by the Appellant were as under:

i) Mr. Avanish Kumar Singh, Director of the Prospective Resolution Applicant (PRA), is disqualified to be appointed as the Director under Section 164(2) of the Companies Act, 2013. Mr. Singh is a connected person to Fortune Chemicals Ltd.; thus, Fortune Chemicals Ltd. is ineligible to be a resolution applicant;

ii) The Resolution Plan is not accompanied by an Affidavit stating that the PRA is eligible to submit a resolution plan under Section 29-A;

iii) The Resolution Plan does not provide clearly about the CIRP costs, thus, is non-compliant with requirements of Section 30 (2) (a);

iv) The Resolution Plan is not-compliant with requirements of Section 30 (2) (e) regarding compliance to provisions of law;

v) The Resolution Plan does not identify the cause of default and does not also demonstrate how the PRA intends to address the cause of default, thus is non-complaint under Regulation 38 (3) (a);

vi) The feasibility of the Resolution Plan is highly questionable, thus, it is non-complaint under Regulation 38 (3) (b).

8. On 09.04.2021, the CoC voted in favour of the liquidation of the Corporate Debtor with 100% vote. The EMD amount of Rs. 25,00,000/- paid by the Appellant, on repeated requests was refunded to the Appellant on 10.05.2021. It was almost after six months of rejection of resolution plan and after almost five months of refund of the EMD amount, the Appellant approached the Ld.

NCLT for consideration of its resolution plan. The CoC requested that the Appeal be dismissed so that the liquidation process is carried out as expeditiously as possible.

9. We have heard both the sides and have perused the records. It is admitted fact that only one resolution plan was submitted in the CIRP of the Corporate Debtor. The RP has brought out that this plan was not compliant with the eligibility requirements of Section 29A of IBC, 2016. For easy reference, the provisions of Section 29A are reproduced below:

> "***29A. Persons not eligible to be resolution applicant. –***
>
> ***A person shall not be eligible to submit a resolution plan, if such person, or any other person acting jointly or in concert with such person—***
>
> *(a) is an undischarged insolvent;*
>
> *(b) is a wilful defaulter in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949 (10 of 1949);*
>
> *(c) [at the time of submission of the resolution plan has an account,] or an account of a corporate debtor under the management or control of such person or of whom such person is a promoter, classified as non-performing asset in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949 (10 of 1949) 3 [or the guidelines of a financial sector regulator issued under any other law for the time being in force,] and at least a period of one year has lapsed from the date of such classification till the date of commencement of the corporate insolvency resolution process of the corporate debtor:*
>
> *Provided that the person shall be eligible to submit a resolution plan if such person makes payment of all overdue amounts with interest thereon and charges relating to nonperforming asset accounts before submission of resolution plan:*

[Provided further that nothing in this clause shall apply to a resolution applicant where such applicant is a financial entity and is not a related party to the corporate debtor.

Explanation I.- For the purposes of this proviso, the expression "related party" shall not include a financial entity, regulated by a financial sector regulator, if it is a financial creditor of the corporate debtor and is a related party of the corporate debtor solely on account of conversion or substitution of debt into equity shares or instruments convertible into equity shares 2 [or completion of such transactions as may be prescribed], prior to the insolvency commencement date.

Explanation II.— For the purposes of this clause, where a resolution applicant has an account, or an account of a corporate debtor under the management or control of such person or of whom such person is a promoter, classified as non-performing asset and such account was acquired pursuant to a prior resolution plan approved under this Code, then, the provisions of this clause shall not apply to such resolution applicant for a period of three years from the date of approval of such resolution plan by the Adjudicating Authority under this Code;]

[(d) has been convicted for any offence punishable with imprisonment –

(i) for two years or more under any Act specified under the Twelfth Schedule; or

(ii) for seven years or more under any law for the time being in force:

Provided that this clause shall not apply to a person after the expiry of a period of two years from the date of his release from imprisonment:

Provided further that this clause shall not apply in relation to a connected person referred to in clause(iii) of Explanation I];

(e) is disqualified to act as a director under the Companies Act, 2013 (18 of 2013):

[Provided that this clause shall not apply in relation to a connected person referred to in clause (iii) of Explanation I;]

(f) is prohibited by the Securities and Exchange Board of India from trading in securities or accessing the securities markets;

(g) has been a promoter or in the management or control of a corporate debtor in which a preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction has taken place and in respect of which an order has been made by the Adjudicating Authority under this Code:

[Provided that this clause shall not apply if a preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction has taken place prior to the acquisition of the corporate debtor by the resolution applicant pursuant to a resolution plan approved under this Code or pursuant to a scheme or plan approved by a financial sector regulator or a court, and such resolution applicant has not otherwise contributed to the preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction;]

(h) has executed 2 [a guarantee] in favour of a creditor in respect of a corporate debtor against which an application for insolvency resolution made by such creditor has been admitted under this Code 3 [and such guarantee has been invoked by the creditor and remains unpaid in full or part];

(i)[is] subject to any disability, corresponding to clauses (a) to (h), under any law in a jurisdiction outside India; or

(j) has a connected person not eligible under clauses (a) to (i).

Explanation [I]. — For the purposes of this clause, the expression "connected person" means—

(i) any person who is the promoter or in the management or control of the resolution applicant; or
(ii) any person who shall be the promoter or in management or control of the business of the corporate debtor during the implementation of the resolution plan; or
(iii) the holding company, subsidiary company, associate company or related party of a person referred to in clauses (i) and (ii):

[Provided that nothing in clause (iii) of Explanation I shall apply to a resolution applicant where such applicant is a financial entity and is not a related party of the corporate debtor:

Provided further that the expression "related party" shall not include a financial entity, regulated by a financial sector regulator, if it is a financial creditor of the corporate debtor and is a related party of the corporate debtor solely on account of conversion or substitution *of debt into equity shares or instruments convertible into equity shares 1 [or completion of such transactions as may be prescribed], prior to the insolvency commencement date;]*

[Explanation II—For the purposes of this section, "financial entity" shall mean the following entities which meet such criteria or conditions as the Central Government may, in consultation with the financial sector regulator, notify in this behalf, namely: —

(a) a scheduled bank;

(b) any entity regulated by a foreign central bank or a securities market regulator or other financial sector regulator of a jurisdiction outside India which jurisdiction is compliant with the Financial Action Task Force Standards and is a signatory to the International Organisation of Securities Commissions Multilateral Memorandum of Understanding;

(c) any investment vehicle, registered foreign institutional investor, registered foreign portfolio investor or a foreign venture capital investor, where the terms shall have the meaning assigned to them in regulation 2 of the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2017 made under the Foreign Exchange Management Act, 1999 (42 of 1999);

(d) an asset reconstruction company register with the Reserve Bank of India under section 3 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);

(e) an Alternate Investment Fund registered with Securities and Exchange Board of India;

(f) such categories of persons as may be notified by the Central Government.]"

(Emphasis supplied)

10. The RP had shown that one of the directors of the Appellant, who was the Prospective Resolution Applicant, namely, Mr. Avanish Kumar Singh was also director of GADPPL which had failed to file its accounts since inception (i.e. 28.02.2014). As per provisions of Section 164 of the Companies Act, 2013, no person who is or has been director of the company which has not filed financial statements and annual returns for any continuous period of three years shall be eligible to be reappointed as a director of the company or appointed as a director in any other company for the period of five years from the date on which the said company continuously failed to file accounts of three years.

11. The default under Section 164(2) had occurred on 01.12.2017, the date on which the GADPPL failed to file financial statements and annual returns for a continuous period of three years. Thus, Mr. Avanish Kumar Singh was ineligible to be a director as per provisions of Section 164(2) of the Companies Act, 2013 and the Appellant company also accordingly was not eligible to be a resolution applicant in terms of provisions of clause (e) of Section 29A of IBC, 2016. Further, it is noticed that the Appellant, after writing repeated reminders to RP, had taken back the EMD amount, and it is only as an afterthought, after nearly six months, that the Interlocutory Application was filed for consideration of the resolution plan. This clearly appears to be an attempt to delay the process of CIRP/liquidation. The CoC, in its commercial wisdom, has not accepted the resolution plan and had directed the liquidation of the Corporate Debtor. The commercial wisdom of the CoC regarding acceptance/rejection of the resolution plan is "non-justiciable" as held by the Hon'ble Supreme Court in *K. Sashidhar v Indian Overseas bank & Ors., (2019) 12 SCC 150* and this Tribunal in *Harkirat Singh Bedi v Oriental Bank of Commerce & Ors., 2021 SCC Online NCLAT 4*. In a recent judgment, the co-ordinate Bench of this Tribunal in the case of *Kanoria Energy & Infrastructure Limited v. Mr. Avishek Gupta & Ors. in Company Appeal (AT) (Ins.) No. 281 of 2024* has held as under:

> *"**7.** Present Appeal has been filed against the Order of the Adjudicating Authority approving the Resolution Plan submitted by*

the Respondent No. 3. The Appellant was only one of the Resolution Applicant whose plan was also considered by the CoC in its 14th CoC meeting held on 24th May, 2023 but the plan of Respondent No. 3 was approved with 100% vote share of CoC. Appellant whose plan was also considered and not approved by the CoC cannot be said to be aggrieved by the approval of the Resolution Plan of Respondent No. 3. It is well settled that commercial wisdom of CoC in approving the resolution plan is not to be interfered by the Adjudicating Authority in its judicial review and limited ground for interference with the resolution plan is only when resolution plan violates or is in non-compliance of Section 30(2) of the Code. The Appellant has no such right that its resolution plan should be approved by the CoC which proposition has already been laid down by the Hon'ble Supreme Court in ***Arcelor Mittal India Pvt. Ltd. Vs. Satish Kumar Gupta****, (2019) 2 SCC 1"*

12. The Ld. NCLT had rightly refused to intervene in the decision of the CoC and its commercial wisdom in rejecting the resolution plan of the Appellant. In the facts and circumstances of the case, we are of the opinion that there is no ground to interfere with the order of the Ld. NCLT, and accordingly, the appeal fails and is dismissed. All pending application(s), are disposed of. No order as to costs.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Mr. Ajai Das Mehrotra]
Member (Technical)

Place: New Delhi
Dated: 06.01.2025
Ram N.