

NATIONAL COMPANY LAW APPELLATE TRIBUNAL AT CHENNAI
(APPELLATE JURISDICTION)

Company Appeal (AT) (CH) (INS) No. 164 of 2021

(Under Section 61 of the Insolvency and Bankruptcy Code, 2016)

Against the Order dated 15.07.2021 in MA/13/CHE/2021 in IBA/1459/2019

passed by the Adjudicating Authority,

(National Company Law Tribunal, Division Bench-I, Chennai Bench)

In the matter of:

Dr. Periasamy Palani Gounder

(Promoter & Erstwhile Director)

Appu Hotels Limited, 4A,

Dugar Apartments, Raja Rengasamy Road,

Off 4th Seaward Valmiki Nagar,

Thiruvanmiyur, Chennai - 600 041.

...Appellant

V

1.Mr. Radhakrishnan Dharmarajan

Resolution Professional,

Appu Hotels Limited,

D-3, Triumph Apartments, Jawaharlal Nehru Salai,

Arumbakkam, Chennai-600 106.

...Respondent No.1

2.M. K. Rajagopalan

Balaji Villa, No. 30A, Beach Road,

Kapaleeshwarar Nagar, Neelangarai,

Chennai-600 115.

...Respondent No.2

Present:

For Appellant

: Mr. P. H. Arvindh Pandian, Sr. Advocate

and Mr. Rajiv Ranjan, Sr. Advocate

For Mr. K. Surendar and Chenthoori Pugazendhi, Advocate

For Respondent No.1: Mr. Vijay Narayan, Sr. Advocate (Resolution Professional)

For Mr. T. Ravichandran, Advocate

For Respondent No.2: Mr. Ramji Srinivasan, Sr. Advocate

(Successful Resolution Applicant)

and Mr. Devashish Bharuka, Advocate

ORDER
(VIRTUAL MODE)

1. According to the Learned Counsel for the Appellant that the Impugned Order passed by the ‘Adjudicating Authority’ (National Company Law Tribunal, Divison-1, Chennai) in MA/13/CHE/2021 in IBA/1459/2019 dated 15.07.2021 (filed by the Appellant/Applicant) in dismissing the ‘application’ is an erroneous one.

2. The Learned Counsel for the Appellant submits that the whole ‘Resolution Process’ is vitiated by numerous statutory violations of the provisions of the Code and the Regulations.

3. The Learned Counsel for the Appellant contends that the ‘Adjudicating Authority’ had failed to interfere with the attempt to acquire the assets of the ‘Corporate Debtor’ for less than 25% of its actual value, while the ‘Promoters’ are ready and willing to infuse more funds than the 2nd Respondent and to settle all the Creditors in an expeditious manner.

4. The Learned Counsel for the Appellant projects an argument that the ‘Adjudicating Authority’ was not right in dismissing the grievances of unsecured ‘Financial Creditor’ who were excluded from the CIRP process solely on the ground that their full share was paid.

5. The Learned Counsel for the Appellant points out that Mr.M.K. Rajagopalan is the Managing Trustee of Shri Balaji Vidhyapeeth and it is seen from (Minutes of the third CoC Meeting dated 04.09.2020) (vide Page 291 of Volume II of the ‘Appeal Paper Book’), Item No.4 ‘To take note of the status of Insolvency Resolution Process since the last meeting of the Committee (CoC Committee)’ (ii) under the caption “Issuance of Final List of Eligible Prospective Resolution Applicants” it was mentioned as under:

“The Chairman further appraised the CoC members that pursuant to publication of Provisional List on 11.09.2020, the preliminary scrutiny was duly conducted wherein 13 prospective resolution applications were found eligible. Thereafter, the undersigned circulated the Final List of Prospective Resolution Applicants

with members of the CoC on 26.09.2020 with 11 PRAS, as one of the PRA had withdrawn the EOI and another one being a charitable trust with not authorized to take up this activity under the mandate, in terms of CIRP Regulations, 2016.”

6. The Learned Counsel for the Appellant projects an argument that as per Regulation 35(2) of the IBBI Regulations, 2016, the Fair and Liquidation Values had to be provided to the Members of the Committee of Creditors upon receipt of Resolution Plans and this was not done as admitted by the ‘Resolution Professional’ in the 5th CoC Meeting.

7. The other argument projected on behalf of the ‘Appellant’ is that a large chunk of ‘Financial Creditor’ were deliberately excluded from the entire process and no proper valuation of the assets of the ‘Corporate Debtor’ was undertaken and that apart as per the Valuation Report furnished in September 2019, the total value assets comes to INR1641 Crores, which is four times the value proposed in the ‘Resolution Plan’ submitted by the 2nd Respondent.

8. The Learned Counsel for the Appellant refers to Section 166 of the Companies Act which deals with ‘duties of Directors’ and points out that as per Section 166(4) of the Companies Act, 2013 ‘a Director of a Company shall not involve in a situation in which he may have a direct or indirect interest that conflicts or possibly may conflict with the interest of the Company.’

9. The Learned Counsel for the Appellant adverts to Section 88 of the Indian Trust Act, 1882 which speaks of ‘advantage gained by fiduciary’ and takes a stand that Mr.M.K. Rajagopalan, the ‘Managing Trustee’ in a fiduciary character is to protect the interest of another person by availing himself of his character gains for himself any pecuniary advantage etc.

10. The Learned Counsel for the Appellant contends that the ‘Resolution Plan’ was approved at Creditors value and in fact, the Chennai Property is worth Rs.350 Crores and that the shareholders are left high and dry.

11. The Learned Counsel for the Appellant brings to the notice of this

‘Tribunal’ that the covering letter for submission of ‘Resolution Plan’ dated 27.10.2020 addressed to the ‘Resolution professional’ (in the matter of Appu Hotels (P) Ltd.) by the ‘Resolution Applicant’ Mr.M.K. Rajagopalan Para-d ‘Conflict of Interest’ reads to the effect that “I hereby confirm that there is no Conflict of interest that subsists or will occur as a result of submission of ‘Resolution Plan’ under the RFP and in short, the individual plan is completely devoid of illegality.

12. The Learned Counsel for the Appellant emphatically submits that the summary of valuation as per CIRP in respect of ‘Appu Hotels’, (vide page 347, Volume II of the Appeal Paper Books) refers to Fair and Liquidation Value of ‘Appu Hotels Ltd.’ (under CIRP) and the Fair Value is mentioned as 724.985 and the Liquidation Value is mentioned as 565.055. Also, that the Gross value (P&M + L&B + SFA) ‘Valuer-2’ is mentioned as 717.66 and the Gross Liquidation Value is mentioned as 545.89. ‘Valuer -3 + Valuer 1 at Page 347 volume 2 of the paper book ‘summary of valuation’ as per CIRP speaks of 732.31. And the average is mentioned as 724.985.

13. The Learned Counsel for the Appellant relies on the term sheet dated 22.01.2021 issued by M/s.Deutsche Bank for Rs.350 Crores, (vide Annexure-2, Page 339, Volume 2 of the Appeal Paper Book) under the Head Indicative terms and conditions (Term Sheet) at Page 341 reads as under:

“The Term Sheet does not constitute a legally binding offer by the Lender or the Mandated Lead Arranger to finance or invest in the Borrower and does not impose any legal obligation on the Lender or the Mandated Lead Arranger, including to negotiate.

However, notwithstanding anything to the contrary stated above, the parties agree that the provisions of this section and under “Costs and Expenses”, “Exclusivity” and “Governing Law and Jurisdiction” are binding on the parties.”

14. The Learned Counsel for the Appellant submits that the ‘Appellant’ will deposit Rs. 450 Crores (Rs.425 Crores + Rs.25 Crores)and he requires two or three

days time, in this regard and puts forward a plea that this is not the ‘Creditors’ revival case.

15. The Learned Counsel for the Appellant points out that an ‘Appeal’ can be filed Section 61(1) of the I & B Code and under Section 61(3) of the I&B Code on four grounds, when there is a contravention of law.

16. The Learned Counsel for the Appellant refers to the Judgment of this ‘Tribunal’ in company App (AT)(INS) 233 and 333 of 2021 dated 28.06.2021 in the Dwarkadhish Sakhar Karkhanan Ltd. v 1.Pankaj Joshi and anr. wherein at Paragraph 33, it is mentioned as follows:

“In the case of Kalpraj (Supra), Hon’ble Supreme Court examining an appeal against the order u/s 61(3) of IBC, whereby this Appellate Tribunal allowed the Appeal on the ground of material irregularity where we are examining this appeal u/s 61(1) of IBC. The scope of Appeal u/s 61(3) is limited to the grounds as specified in sub section 3. However, there is no such limit for the Appeal u/s 61(1) of IBC. In the case of Kalpraj, Hon’ble Supreme Court held that all the actions of RP, including acceptance of Resolution Plan of Kalpraj after due date, albeit before the expiry of time line specified by the IBC for completion of the process, have been consciously approved by the CoC. In the present case, as we have already discussed, in the 7th CoC meeting with the consultation of Mr. Pankaj Joshi, the request for submitting EOI after due date was rejected. After two months, when Mr Pankaj Joshi appointed RP, he in contravention of Regulation 36A in his own accord overturned the decision of 07th CoC and permitted DSKL to submit EOI. However, DSKL has not requested the CoC to re-visit their earlier decision. Mr. Pankaj Joshi by suppressing material facts and misguiding the CoC procured the desired decision and inducted DSKL in the list of prospective Resolution Applicant. In the case of Kalpraj, RP’s actions are bona fide, impartial and fair and, therefore, the CoC has approved all his actions including the acceptance of Resolution Plans of Kalpraj after due date.

Thus, the facts of the present case are quite distinguishable from the case of Kalpraj. Therefore, we are of the considered view that the ratio fo the judgment of Kalpraj's case does not support the case of DSKL.”

17. The Learned Counsel for the Appellant informs this ‘Tribunal’ that the ‘Appellant’ is ready to pay all the ‘Financial Creditors’, ‘Operational Creditors’ and ‘Unsecured Financial Creditors’.

18. The Learned Counsel for the Appellant submits that the revised ‘Resolution Plan’ (final) submitted by the 2nd Respondent (Mr.M.K. Rajagopalan) dated 25.01.2021 is not a ‘Resolution Plan’ in the eye of law.

19. The Learned Counsel for the Appellant submits that the ‘Adjudicating Authority’ had failed to take note of the fact that he unsecured financial creditor (constituted around 12.61% of the total vote share of the Committeee of Creditors’) were deliberately left out of the ‘Committee of Creditors’. In short, the decisions taken by an improperly constituted ‘Committee of Creditors’ is an invalid one.

20. The Learned Counsel for the Appellant contends that the ‘Resolution Professional’ and the ‘Interim Resolution professional had felicitated the process by which the ‘Resolution Applicant’ was put in a Pole Position to abdicate with assets worth over Rs.1600 Crores for a Paltry sum of Rs.423 Crores.

21. The Learned Counsel for the Appellant submits that there was non-consideration of application under Section12(A) of the Code and further that the existing Resolution Plan’ seeks to convert the Corporate Debtor’ into a hospital, which will put at risk, numerous employees, vendors and other stakeholders.

22. The Learned Counsel for the Appellant points out that the President of Saveetha Institute of Medical and Technical Sciences, Chennai in the letter 14.07.2021 on the subject of ‘letter of intent’, proof of funding to resolve the matter in respect of Appu Hotels Ltd. and consideration of filing an application under Section 12A of the I&B Code had inter alia stated that it demonstrates its ability, bona fides, and wherewithal with the enclosed statement, certificate from Indus Ind, RBL

and Equitas Bank showing the proof of funds in order to support the payment of Rs.340.43 Crores and made a request to the concerned authority to consider moving an application under Section 12(A) of IBC, seeking the withdrawal of application admitted under Section 7.

23. Per contra, it is the submissions of the Learned Counsel for the 1st Respondent that most of the points raised in the Appeal, on behalf of the Appellant before this ‘Tribunal’ were not raised before the ‘Adjudicating Authority’ and as such the 1st Respondent may be given some time to file a detailed Reply/Response/Counter to meet out the same.

24. The Learned Counsel for the 1st Respondent refers to the ‘Impugned Order’ of the ‘Tribunal’ in MA/13/CHE/2021 in IBA/1459/2019 dated 15.07.2021 (vide Page 124 of the Volume 1 of the Paper Book) “(II) on non-consideration of the Section 12A Application and points out that the ‘Adjudicating Authority had extracted the record of the Minutes as found in the 9th CoC meeting in a detailed manner.”

25. The Learned Counsel for the 1st Respondent adverts to Section 12A of the I&B Code, which speaks of ‘withdrawal of application admitted under Section 7, 9 or 10’. Also, on behalf of the 1st Respondent, a reference is made to Regulation 30-A of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

26. The Learned Counsel for the 1st Respondent urges before this ‘Tribunal’ that during the last minute the ‘Corporate Debtor’ endeavoured to project Section 12A withdrawal application and in short, the process of law and Resolution cannot be subverted by anyone.

27. The Learned Counsel for the 1st Respondent submits that the ‘Impugned Order’ of the ‘Adjudicating Authority’ dated 15.07.2021 in MA/13/CHE/2021 in IBA/1459/2019 is a valid one and therefore, this ‘Tribunal’ may not pass any ‘interim Order’ to and in favor of the ‘Appellant’.

28. The Learned Senior Counsel for the 2nd Respondent brings it to the notice of this ‘Tribunal’ that in the instant case that ‘CIRP’ commenced on 05.05.2020 and on 12.10.2020 the ‘Resolution Plan’ was submitted by the 2nd Respondent and the ‘Committee of Creditors’ on 04.01.2021 started the deliberations and there were several applications and finally there were two in the fray and in the 9th CoC meeting on 22.01.2021 the ‘Committee of Creditors’ approved the Plan with a majority of 83% and in fact, the ‘Financial Creditors’ (both secured and unsecured Creditors) were given 100% and Operational Creditors were paid 100% and there was no claim by workmen and further that there was no claim made by the ‘Statutory Authorities’ yet provision was made and these were some of the salient features of the ‘Resolution Plan’.

29. The Learned Counsel for the 2nd Respondent points out that the claims were settled and the upfront payment to be made within 45 days and in fact, the 2nd Respondent deposited within two weeks Rs.150 Crores and that he had taken over and the balance is Rs.423 Crores.

30. The Learned Counsel for the 2nd Respondent submits that the ‘Promoter’ moved the ‘Miscellaneous Application’ and the same can be assailed only on two grounds and that the ‘Tribunal’ had dealt with the same. Moreover, the ‘Resolution Plan’ was approved and in fact, the ‘erstwhile Promoters’ had not participated in all the ‘Committee of Creditor’ meetings.

31. The Learned Counsel for the 2nd Respondent contends that it is projected on the side of the ‘Appellant’ that the 2nd Respondent is the ‘Managing Director’ of the Hospital and that he is a ‘Trustee’ in one Trust and in law the 2nd Respondent can be a ‘Trustee’ and in the ‘Trust’ there are eminent persons and if the debt is more than Rs.one lakh (previously) and (now) Rs.one Crore under IBC, certainly the ‘Corporate Debtor’ is liable under the Code.

32. The Learned Counsel for the 2nd Respondent points out that the ‘Appellant’ participated in the ‘Committee of Creditors’ meeting and they knew well

‘what were the offers’ and even after admission of the Section 7 Application under the Code no Application was filed by the ‘Appellant’ and there was also no correspondence with the ITDC. Even the ITDC said the ‘Appellant’ had not approached it and in fact, Section 12A of the Code uses the word ‘May Allow the Withdrawal of Application admitted under Section 7 or 9 or 10’ etc.

33. Added further, it is the submission of the Learned Counsel for the 2nd Respondent that after constitution of ‘Committee of Creditors’ eight meetings were held and that Section 12 of the I&B Code speaks of ‘time’.

34. The Learned Counsel for the 2nd Respondent points out that the letter dated 22.01.2021 of the Deutsche Bank is a procured one by the ‘Appellant’ and that voting was on the same day i.e. 22.01.2021 and in short, the letter was procured from the Bank for convenience. Even the letter of the Bank says of the non-binding effect.

35. The Learned Counsel for the 2nd Respondent points out that today, the ‘Resolution Plan’ was implemented and money was given and the 2nd Respondent is implementing the same.

36. By way of reply, the Learned Counsel for the Appellant points out that Section 12A ‘Withdrawal Application’ under the I&B Code was not decided by the ‘Adjudicating Authority’ on merits, as seen from the ‘Impugned Order’.

37. Also that, the Learned Counsel for the Appellant refers to the decision of Hon’ble Supreme Court in P. Nallammal’s case reported in 1999(6) SCC at Page 559 (vide Paragraph 7) and contends that even in an ‘Appeal’ the ‘Appellant’ can canvas / project new points for consideration of the ‘Appellate Tribunal’ and in this regard, there is no impediment in law.

38. At this juncture, this Tribunal ‘worth recalls and recollects’ the judgment of Hon’ble Three Member Bench of this Tribunal in Comp App (AT) (Ins) No. 921 /2019 dated 06.09.2019 between Shaji Purusothaman V Union Bank of India & ors, (reported in Manu/NL/0438/2019) whereby and whereunder at paragraph 9 it is observed and held as follows:

“If an application u/s 12A is filed by the Appellant, the ‘Committee of Creditors’ may decide as to whether the proposal given by the Appellant for settlement in terms of Section 12A is better than the ‘Resolution Plan’ as approved by it, and may pass appropriate order. However, as such decision is required to be taken by the ‘Committee of Creditors’, we are not expressing any opinion on the same”

39. The Learned Counsel for the Appellant refers to Paragraph 72 of the Judgment of the Hon’ble Supreme Court in Arun Kumar Jagatramka v Jindal Steel and Power Ltd. and Anr. (Civil Appeal 9664 of 2019 dated 15.03.2021) in regard to the ‘Withdrawal of Application’ under the Code.

40. This ‘Tribunal’ at the ‘admission stage’ has heard the Learned Counsels appearing for the parties and noted their contentions. As a matter of fact, the submissions projected on either side require a detailed rumination in the hands of this ‘Tribunal’ and viewed in this perspective, this ‘Tribunal’ is of the considered view that the Respondents are to file detailed ‘Reply’/Replies by traversing or dealing with the aspects projected by the ‘Appellant’ side before this ‘Appeal’ for an elaborate consideration of ‘Hearing’, to prevent an aberration of justice and to promote substantial cause of justice. Viewed in that perspective, this ‘Tribunal’ grants two weeks time to the Respondents to file detailed ‘Reply’/Replies to the ‘Appeal’ filed by the ‘Appellant’ and the same is to be filed before the ‘Office of the Registry’ not only through e-filing but also through hardcopy and the copy of the same shall be exchanged between them. Soon after the receipt of the Reply/Response/Counter four day’s time is granted to the appellant therein to file ‘Rejoinder’, if any.

41. Till the next date of ‘Hearing’, there shall be a stay of the implementation of the ‘Impugned Order’.

42. The 'Office of the Registry' is directed to List the matter on **25.08.2021**.

**[Justice Venugopal M]
Member (Judicial)**

**[V. P. Singh]
Member (Technical)**

**30.07.2021
SE**