NATIONAL COMPANY LAW APPELLATE TRIBUNAL PRINCIPAL BENCH, NEW DELHI

Comp. App. (AT) (Ins.) No. 153 of 2024 & I.A. No. 486, 487, 488, 1254, 1940, 1945 of 2024

IN THE MATTER OF:

AAA Insolvency Professionals LLP ...**Appellant**

Versus

Edelweiss Asset Reconstruction Pvt. Ltd. ...**Respondent**

Present:

For Appellant :	Mr. Krishnendu Dutta, Sr. Advocate along with Mr. Amar Vivek, Mr. Swechcha Mishra, Mr. Abhihav Tyagi, Advocates.
For Applicant :	Mr. Nakul Mohta & Mr. Puneet Pathak, Advocates.
For Respondent :	Mr. Jayashree Shukla, Mr. R.P. Agrawal & Ms. Reema Mishra, for R-1. Mr. Gautam Singhal along with Mr. Ravinder Kumar Goyal (Liquidator in person), for R-2.

J U D G M E N T

Per: Justice Rakesh Kumar Jain:

This appeal is directed against the order dated 12.01.2024, passed by the Adjudicating Authority (National Company Law Tribunal, Ahmadabad Bench At Ahmadabad) partly allowing the application bearing I.A No. 1230/AHM/2023 filed in C.P. (IB)/37/AHM/2017 appointing Mavent Restructuring Services LLP (Respondent No. 2 herein) as the liquidator of the Corporate Debtor.

2. In brief, PSL Limited (Corporate Debtor) filed an application bearing C.P. (IB)/37/AHM/2017 under Section 10 of the Insolvency and Bankruptcy Code, 2016 (In short 'Code') for the initiation of Corporate Insolvency

Resolution Process (in short 'CIRP') on account of incapacity to discharge its obligation towards the creditors.

3. This application was admitted on 15.02.2019, CIRP was initiated against the Corporate Debtor and Nilesh Sharma was appointed as the Interim Resolution Professional (in short 'IRP') of the Corporate Debtor.

4. The IRP constituted the Committee of Creditors (in short 'CoC') on 16.03.2019. The CoC in its 5th meeting of the CoC held on 22.08.2019 passed a resolution with a voting share of 88.12% to appoint Nitin Jain, designated partner of the Appellant as the Resolution Professional (in short 'RP').

5. The CIRP of the Corporate Debtor failed, consequently, the RP filed an application i.e. I.A No. 132 of 2020 on 15.01.2020 for the initiation of liquidation of the Corporate Debtor.

6. The Adjudicating Authority, vide its order dated 11.09.2020, ordered for liquidation of the Corporate Debtor and appointed the RP as the liquidator of the Corporate Debtor.

7. The Adjudicating Authority directed the said liquidator to conduct the sale of the Corporate Debtor as a going concern. Apropos, the liquidator issued public announcement on 15.09.2020 to invite claims from the stakeholders of the Corporate Debtor, however, the period of 90 days stipulated under Regulation 32A(4) of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 (in short 'Regulations') elapsed on 14.12.2020.

8. The Liquidator filed an application i.e. I.A. No. 20 of 2021 for seeking extension of 90 days which was granted by the Adjudicating Authority on 12.01.2021, extended the liquidation period by an additional period of 90 days commencing from 12.01.2021.

9. The Liquidator received summons dated 15.01.2021 from the Enforcement Directorate (ED) for some clarifications regarding investigations under the PMLA Act, 2002 relating to Corporate Debtor.

10. The liquidator filed a writ petition before the Hon'ble Delhi High Court to challenge the action of the ED. The Hon'ble Delhi High Court directed the liquidator to proceed as per the provisions of the Code.

11. The liquidator filed an application i.e. I.A. No. 391 of 2021 under Section 35(1)(n) of the Code r/w Regulation 44(2) of the Regulations for exclusion of the period from 25.01.2021 to 17.03.2021 which was allowed by the Adjudicating Authority on 08.09.2021 by excluding the period of 51 days and further granted the extension of 180 days from 13.04.2021 for concluding the sale of the Corporate Debtor as a going concern.

12. Though, the Liquidator received the provisional attachment order no. 07 of 2021 dated 02.12.2021 from the ED, provisionally attaching movable and immovable assets of the Corporate Debtor, however, in the writ petition (c) no. 3260 of 2021, the Hon'ble Delhi High Court, vide its order dated 15.12.2021, held that the liquidator is entitled to proceed with the liquidation process in accordance with the provisions of the Code and

restrained ED from taking any action, coercive or otherwise against the liquidation estate of the Corporate Debtor.

13. The liquidator filed MA (CM No. 9111 of 2022) for stay on proceedings before the Adjudicating Authority of the PMLA under OC No. 1594 of 2021 related to confirming the provisional attachment order dated 02.12.2021. The stay was granted by the Hon'ble Delhi High Court on the order dated 02.12.2021. The Liquidator sought permission to proceed with the sale of the assets, not covered by the provisional attachment order dated 02.12.2021, which was granted by the Hon'ble Delhi High Court on 02.05.2022, allowed the liquidator to proceed with the sale of unattached assets, permitting the utilization of the sale proceeds to compensate unpaid workmen and employees. The liquidator thereafter conducted the sale of the assets not covered by the provisional attachment order on 03.06.2022 which was successfully completed.

14. The Liquidator filed an application i.e. I.A. No. 9 of 2022 for exclusion of the time period from 18.03.2021 till 02.03.2021, being the period during which the liquidator could not proceed with distribution/realisation of assets of the Corporate Debtor. while this application was pending, the successful auction purchaser filed an application I.A. No. 240 of 2022 seeking withdrawal from the bid and the return of the EMD of Rs. 35 Cr. The permission was granted on 02.11.2022 which was challenged by the Liquidator before this Appellate Tribunal in CA (AT) (Ins) No. 1390 of 2022. The appeal was dismissed.

15. The Liquidator filed CM Application No. 8085 of 2023 in LPA 513 of 2021 for specific reliefs which was granted by the Hon'ble Delhi High Court on 01.02.2023 regarding approval to proceed with the sale of the Corporate Debtor's assets as per the Code, direction for the sale proceeds (Rs. 274.60 Cr.) from the provisionally attached assets to be held in a designated account with a nationalised bank with a lien in favour of the ED, instructed that any surplus funds beyond Rs. 274.60 Cr. from the liquidation sale of the Corporate Debtor's assets be deposited in the liquidation bank account, established at the commencement of the liquidation process, and distributed among stakeholders following the Code and Regulations.

16. In 26th SCC meeting held on 20.06.2023, the liquidator addressed the need for valuers to assess the Corporate Debtor's assets. Following the valuation, discussions with SCC Members ensued regarding the liquidation value. Additionally, the liquidator deliberated on the e-auction process for the Corporate Debtor, focusing on both 'Core-Operational Assets' and 'Non-core Assets'.

17. The Liquidator issued a sale notice on 04.07.2023 for the sale of the Corporate Debtor's assets and in 27th SCC meeting held on 11.07.2023, the liquidator informed members that the sale notice complies with 26th SCC meeting but the sale notices did not contemplate the sale of the Corporate Debtor as a going concern but despite that the liquidator received proposals from Jindal India Limited and B.C. Jindal Group expressing interest in purchasing the Corporate Debtor as a going concern. The SCC discussed the liquidation value and it was noted that the offered value for

selling the core assets and financial asset as a going concern was Rs. 22 Cr. higher than the average liquidation value. In accordance with deliberations in the 27th SCC meeting, the liquidator rescinded the sale notice on 17.07.2023 and subsequently issued a new sale notice on 30.08.2023. The liquidator planned to publish a sale notice for the sale of core-assets and financial assets of the Corporate Debtor, but the prospective buyer withdrew their proposal to acquire the Corporate Debtor as a going concern. After noticing the same in the 28th meeting, the SCC discussed this development and resolved that the liquidator should proceed as per the guidelines established in the 26th meeting of SCC, however, due to the intricate and complex nature of the case, the liquidator due to personal problems brought to the notice of the SCC that he is not in a position to devote much time to the liquidation and gave a proposal that after the amendment notified in the IBBI (Insolvency Professional) Regulation 2016 on 28.09.2022, the Insolvency Professional Entity (IPE) can also act as an IP (Insolvency Professional), therefore, the present Appellant may be appointed as the liquidator. The minutes recorded is as under:-

> "The Liquidator in furtherance to the discussions held in the above-mentioned agenda items mentioned that he has been working for this case from nearly last 4 years. However, due to some personal difficulty arising on account of health issues of his mother, who is not well for last few months and suffering from multiple medical issues, he may not be able to dedicatedly work in this case as PSL Limited is a complex and large case which requires time. Hence, in the interest of stakeholders the Liquidator gave a proposal that after the amendment notified in the IBBI (Insolvency Professionals) Regulation 2016 on

> 28/09/2022, now the Insolvency Professional Entity (IPE) can also act as an IP (Insolvency Professional). In this matter the support services from the beginning were availed from the AAA Insolvency Professionals, which is one of the Largest Insolvency Professional Entity and Mr. Anil Goel the chairman of AAAIP has always been involved in this case."

18. The resolution put forth and approved by a voting percentage of 81.4%. The said resolution which has been passed in 28th meeting considering the said proposal is as under:-

> "RESOLVED THAT AAA Insolvency Professionals LLP, a registered Insolvency Professional (Registration No. IBBI/IPE- 0002/IPA-1/2022- 23/50001) be and is hereby appointed as the Liquidator by replacing Liquidator, Mr. Nitin Jain, in the matter of PSL Limited - In Liquidation as per the section 31 A (11) of the Insolvency & Bankruptcy Code 2016 Inserted by Notification No. IBBI/2022-23/GN/REG094, dated 16th September, 2022 (w.e.f. 16-09-2022). which reads as follows:- [(11) The consultation committee, after recording the reasons, may by a majority vote of not less sixty-six per cent., propose to replace the liquidator and shall file an application, after obtaining the written consent of the proposed liquidator in Form AA of the Schedule II, before the Adjudicating Authority for replacement of the liquidator: Provided that where a liquidator is proposed to be replaced, he shall- (a) continue to work till his replacement; and (b) be suitably remunerated for work performed till his replacement."

19. In view of the aforesaid resolution, the liquidator (Nitin Jain) filed I.A No. 1230 of 2023 under Regulation 31A(11) of the Regulations r/w Rule 11 of the NCLT Rules for his replacement with the appointment of Appellant, a registered Insolvency Professional as the liquidator of the Corporate Debtor.

20. This application has been partly allowed by the Adjudicating Authority by appointing Respondent No. 2 as the liquidator of the Corporate Debtor instead of the present Appellant, as a result of which this appeal has been filed by the proposed liquidator.

21. The Adjudicating Authority rejected the request for appointment of the Appellant as the liquidator, inter alia, on the ground that there was non-compliance of Regulation 31A of the Regulations as the mandatory written consent form, as stipulated in Form AA Schedule II has not been filed before the Adjudicating Authority and the same was not attached with the application by the Liquidator (previous liquidator) and because of ineligibility of the Appellant to act as an liquidator in accordance with the Regulation 3 of the Regulations.

22. Counsel for the Appellant has submitted that there are two fold requirements of Regulation 31A(11) of the Regulations, namely, that there must be a resolution to replace liquidator with minimum voting percentage of 66% which has been duly complied with because the SCC in its 28th meeting appointed the Appellant as the liquidator with voting share of 81.4% and that there must be a written consent in Form AA by the proposed liquidator to act as the liquidator which was duly signed on 29.08.2023 by the Appellant prior to the filing of the application by the erstwhile liquidator which was though inadvertently could not be annexed with the application which is a curable defect and should not be taken as a disqualification of appellant. In this regard, reliance has been paced by the Appellant on a decision of this Tribunal rendered in CA (AT) (Ins) No.

172 of 2020 titled as 'Tek Travels Pvt. Ltd. Vs. Altius Travels Pvt. Ltd.' decided on 19.04.2021 in which there was a challenge to the order of the Adjudicating Authority dismissing the application under Section 9 of the Code on the ground of maintainability for want of proper authorisation regarding which this Court has observed that the rejection of application without allowing the applicant to rectify the mistakes, is against the statutory provision of the Code.

23. It is further submitted that the Appellant is duly qualified to act as liquidator in accordance with Regulation 3 of the Regulations. There was no pecuniary relationship between the Appellant and the Corporate Debtor. The Appellant provided support services to the erstwhile liquidator for liquidation of the Corporate Debtor. Further, the Appellant never represented any of the members of SCC of the CD and that the Appellant is a duly certified IPE and has valid authorisation for assignment.

24. It is further argued that the Adjudicating Authority has committed an error in appointing the Respondent No. 2 as the liquidator as it is empowered only either approve or reject the appointment of the liquidator as approved by the members of SCC and has no power to appoint any other entity in place of the name proposed by SCC.

25. It is also submitted that the Appellant had been provided support services to the erstwhile liquidator and is well aware of the case of CD and can facilitate the liquidation of the CD more expeditiously in comparison to any other new IPE.

26. In reply, Counsel for Respondent No. 2 has submitted that the Appellant has no locus standi to file the present appeal under Section 61 of the Code because it is not a person aggrieved as the Appellant was only proposed / prospective liquidator having no inherent right to be appointed as the liquidator.

27. It is further submitted that the application was filed by Nitin Jain (erstwhile liquidator) on the resolution passed by the SCC, therefore, they could have been the person aggrieved but they did not choose to file any appeal. It is also submitted that the Appellant did not implead the erstwhile liquidator who had filed the application (IA No. 1230 of 2023 before the Adjudicating Authority) and the SCC as the Respondent rather impleaded \ Respondent No. 1 in its individual capacity. Though, as per the minutes of the 28th SCC meeting held on 24.07.2023, there were total 16 SCC members and Respondent No. 1 is not authorised by the SCC members to represent the SCC before this Tribunal in the present appeal. In support of his submissions, he has referred to a decision of the Hon'ble Supreme Court in the case of Regen Powertech Pvt. Ltd. Vs. Giriraj Enterprises & Anr., Civil Appeal No. 5985 – 6001 of 2023 to contend that in that case the RP was asked to maintain a neutral stand and the aggrieved person was CoC. He has also referred to a decision of this Tribunal in the case of Ganesan Ert. Liquidator of Kamachi Industries Vs. Prudent ARC Limited, CA (AT) (Ins) No. 396 of 2023 in which it has been held that the Liquidator does not have any personal right to continue in a liquidation process and the NCLT has inherent powers to replace the liquidator.

28. On merits, it is submitted that there is no error in the impugned order because of the violation of statutory provisions of law. In this regard, it is submitted that the IBBI vide its notification No. IBBI/2022-23/GN/REG094 dated 16.09.2022 introduced Regulation 31A(11) in IBBI (Liquidation Process), Regulation 2016 which provided that the consultation committee after recording the reasons, by a majority of not less than 66% propose to replace the liquidator and shall file an application, after obtaining the mandatory written consent, as stipulated in Form AA of Schedule II from the proposed liquidator, before the Adjudicating Authority for the replacement of the liquidator.

29. It is further submitted that the resolution was passed by the SCC in its 28th meeting held on 24.07.2023 to propose the appointment of the Appellant as the liquidator by replacing the erstwhile liquidator, however, the consultation committee did not obtain the mandatory written consent form, as stipulated in Form AA of Schedule II from the proposed liquidator (Appellant) before or after the filing of the application i.e. I.A No. 1230 of 2023 nor the same was given by the Appellant to the consultation committee or to the erstwhile liquidator.

30. It is further submitted that as per Section 27(2) of the Code, the CoC may resolve to replace a RP with 66% voting share subject to the written consent from the proposed resolution professional.

31. It is also submitted that Section 34(4)(c) of the Code which was inserted w.e.f. 06.08.2018 provided that the Adjudicating Authority shall by order replace the RP if the RP fails to submit written consent under Section

34(1) of the Code which provides that the RP appointed for the CIRP shall be appointed as the liquidator subject to submission of a written consent to the Adjudicating Authority in specified form unless replaced by the Adjudicating Authority under Section 34(1)(4) of the Code.

32. It is also submitted that the erstwhile liquidator seeking his replacement with the Appellant as the liquidator, however, did not make any averment in the said application about the alleged consent given by the Appellant or sought by the consultation committee before or at the time passing of the resolution or filing of the application. It is also submitted that although it has been alleged in para 46 of the appeal that the Appellant has complied with Regulation 31A(11) of the Regulations as the written consent was given on 29.08.2023 but it was not part of the application before the Adjudicating Authority.

33. It is further submitted that the Appellant did not file any application with the appeal seeking leave of the Tribunal to file and rely on additional documents which were not part of the record before the Adjudicating Authority, therefore, it cannot be relied upon the documents without obtaining leave of this Court.

34. The Respondent has also challenged the authenticity and geniuses of the written consent dated 29.08.2023 which has been allegedly manufactured after the objection were raised before the Adjudicating Authority.

35. It is further argued that the Appellant has not annexed Form IP1 in support of its contention that written consent was furnished on 29.08.2023. As per the IBBI Circular No. IBBI/CIRP/023/2019 dated 14.08.2019 every insolvency professional is required to file Form IP1 within three days of giving consent to act as IRP/RP/Liquidator/Bankruptcy Trustee on IBBI Web Portal. It is submitted that this circular has been issued to prevent a situation like the one which has arisen in the present case in which consent dated 29.08.2023 was allegedly manufactured otherwise had it been already given as stated on 29.08.2023 then it should have been uploaded on the portal of the IBBI within three days which in fact has not been done.

36. In the end, it is submitted that the decision in the case of Tek travels Pvt. Ltd. (Supra) is not applicable because the said decision deals with the authorisation provided for filing application under Section 9 of the Code by the Operational Creditor in favour of its authorised officer.

37. We have heard Counsel for the parties and perused the record with their able assistance.

38. The basic issue involved in this case is about the violation of Regulation 31A of the Regulations which provides for a mandatory written consent on Form AA, Schedule II which was neither before the SCC nor before the Adjudicating Authority. In order to appreciate this argument, it would be relevant to refer to the Regulation 31A(11) of the Regulations which is reproduced as under:-

"(11) The consultation committee, after recording the reasons, may by a majority vote of not less sixty-six per cent., propose to replace the liquidator and shall file an application, after obtaining the written consent of the proposed liquidator in Form AA of the Schedule II, before the Adjudicating Authority for replacement of the liquidator"

39. Form AA, Schedule II of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (in short 'CIRP Regulations') is reproduced as under:-

"**FORM AA**

WRITTEN CONSENT TO ACT AS RESOLUTION PROFESSIONAL

(Under Regulation 3(1A) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016)

[Date]

From
[Name of the insolvency professional]
[Registration number of the insolvency professional]
[Address of the insolvency professional registered with the Board]

To
The Committee of Creditors
[name of corporate debtor]

Subject: Written Consent to act as resolution professional.

I, [name], an insolvency professional enrolled with [name of insolvency professional agency] and registered with the Board, note that the committee proposes to appoint me as resolution professional under section 22(3)(a) / 22(3)(b) / 27(2) of the Code for corporate insolvency resolution process of [name of the corporate debtor].

2. In accordance with regulation 3(1A) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, I hereby give consent to the proposed appointment.

3. I declare and affirm as under: -

a. I am registered with the Board as an insolvency professional.
b. I am not subject to any disciplinary proceedings initiated by the Board or the Insolvency Professional Agency.
c. I do not suffer from any disability to act as a resolution professional.
d. I am eligible to be appointed as resolution professional of the corporate debtor under regulation 3 and other applicable provisions of the Code and regulations.
e. I shall make the disclosures in accordance with the code of conduct for insolvency professionals as set out in the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016;
f. I am having the following processes in hand:

Sl. No.	Role as	No. of Processes on the date of Consent
1	Interim Resolution Professional	
2	Resolution Professional of a. Corporate Debtors b. Individuals	
3	Liquidator of a. Liquidation Processes	

	b.Voluntary Liquidation Processes	
4	Bankruptcy Trustee	
5	Authorised Representative	
6	Any other (Please state)	

Date:
Place:

(Signature of the insolvency professional)
Registration No. ....”

40. Regulation 31A(11) of the Regulations categorically provides for a written consent prior to the filing of the application for replacement of the liquidator. It is an admitted fact that no such written consent was submitted by the Appellant to the SCC when it had voted in its favour in 28th meeting of SCC nor it was annexed with the application filed by the erstwhile liquidator for his replacement with the Appellant by the Adjudicating Authority.

41. The Appellant has however relied on the alleged written consent to act as liquidator which is attached as Annexure A22 dated 29.08.2023 which was addressed to National Company Law Tribunal and the SCC of the CD but neither it had reached the Adjudicating Authority nor to the SCC. Even, the erstwhile liquidator who has been pursuing the case of the Appellant being a partner of the Appellant, placed the said consent before the SCC or the Adjudicating Authority.

42. In order to check as to whether there has been a consent given by the Appellant as stated, circular no. IBBI/CIRP/023/2019 dated 14.08.2019 has been issued by the IBBI to all registered insolvency professionals, all recognised insolvency professional entities and all registered insolvency professional agencies to enable them to submit records and information to the IBBI as well as for monitoring of the processes and performance of IPs, a set of forms was devised in consultation with stakeholders and the IPAs, in pursuance of the mandate and in synchronisation with the provisions in the Code and the form was put out in public domain on 27th April, 2018, the comments received which were considered and the form have since been finalised. As per the said form, different period of time has been given for doing the particular acts. In so far as the present case is concerned, Form No. IP1 is regarding pre-assignment which provides that "this includes consent to accept assignment of an IP as IRP/RP/Liquidator/Bankruptcy Trustee, the details of IP and the applicant, the details of the person which will undergo the process, terms of consent, terms of engagement, filing of application before AA and withdrawal before admission, etc. - to be filed within three days of the relevant date"

43. In the present case, the relevant date was the date when the alleged consent was given by the Appellant i.e. 29.08.2023 when it had sent written consent to the Adjudicating Authority and the SCC as alleged and it was incumbent upon the Appellant to have it uploaded within three days on the portal of the IBBI which is again conspicuous by its absence.

44. Thus, in such circumstances, it is apparent that the Appellant had not given any written consent on 29.08.2023 as alleged rather no written consent has been given in terms of Regulation 31A(11) of the Regulations which is required to be given on Form AA of Schedule II of the CIRP Regulations, therefore, there is no error in the finding recorded by the Adjudicating Authority in this regard.

45. The argument of the Appellant that if the written consent was not given then at the most it is a defect which is curable but the judgment relied upon in this regard in the case of Tek Travels Pvt. Ltd. (Supra) is not applicable because a written consent to act either as the IRP/RP or the liquidator is a mandatory requirement under the law which has to be obtained before the application is filed.

46. The next submission of the Appellant is that the Adjudicating Authority has committed an error in appointing the Respondent No. 2 as the liquidator though it was not approved by the SCC, in this regard, reference may be had to the decision of this Court in the case of CA. V. Venkata Sivakumar Vs IDBI Bank Limited, CA (AT) (CH) (Ins) No. 269 of 2022 in which it has been held that "combined reading of above case laws and provisions alongwith Section 33 and Section 34 of the Code, would make it clear that the AA which had the powers to appoint the Liquidator will also have the powers to remove the liquidator for reasons, the AA may find fit, just valid and proper"

47. Last but not least, the submission made by the Respondent that the Appellant has no locus to file the appeal has substance because it was only

a proposed/prospective liquidator and no inherent right was there to be appointed as such, therefore, the aggrieved person, at the most could have been either the erstwhile liquidator who had filed the application for replacing him with the Appellant or the SCC who had approved the appointment of the Appellant subject to the approval of the Adjudicating Authority.

48. Thus, looking from any angle, we do not find any merit in the present appeal and the same is hereby dismissed though without any order as to costs.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Mr. Naresh Salecha]
Member (Technical)

[Mr. Indevar Pandey]
Member (Technical)

New Delhi
29th April, 2024

Sheetal