

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 312 of 2022

(Arising out of Order dated 22.12.2021 by the Adjudicating Authority (National Company Law Tribunal), Ahmedabad Bench, Court-1 in CP(IB) 395 of 2020)

IN THE MATTER OF:

Pramod Kumar Pathak
Flat No. SQC-7, J.K. Nagar,
Kota, Rajasthan-324003.

.... Appellant

Vs

ARFAT Petrochemicals Private Limited
Regd. Office : B-59, Zainab Park Society
Gorat Road, Rander Surat,
Surat Gujarat-395005.

.... Respondent

Present:

For Appellant: **Mr. Pankaj Jain and Mr. Sarthak Dugar,**
 Advocates

For Respondent: **Mr. Arvind Kumar Gupta, Ms. Purti Gupta,**
 Ms. Henna George, Ms. Shivani Sharma,
 Advocates.

J U D G M E N T

ASHOK BHUSHAN, J.

This Appeal has been filed under Section 61 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred as the “**IB Code**”) challenging the order dated 22.12.2021 passed by National Company Law Tribunal, Ahmedabad Bench, Court-1 in CP(IB) 395 of 2020, dismissing the Application filed under Section 33 read with 34 of the IB Code by the Appellant.

2. The brief facts necessary for deciding this Appeal are:

- (i) M/s J.K. Synthetics Pvt. Ltd. was declared a sick industrial unit by the Board of Industrial and Financial Reconstruction (in short “**BIFR**”) vide order dated 02.04.1998. M/s J.K. Synthetics Pvt. Ltd. entered into Memorandum of Understanding (“**MoU**”) with ARFAT Petrochemicals Private Limited (Respondent herein), on basis of which MoU, Appellate Authority for Industrial & Financial Reconstruction (“**AAIFR**”) vide order dated 07.01.2005, approved and sanctioned the implementation of rehabilitation scheme.
- (ii) The Appellant claiming to be representative of the workmen union of Sick Industry M/s J.K. Synthetics Pvt. Ltd. filed an Application under Section 33 read with Section 34 of the IB Code before the National Company Law Tribunal, Ahmedabad Bench, Ahmedabad alleging that Rehabilitation Scheme has been breached, the Corporate Debtor be liquidated. The Corporate Debtor is in continuance breach of Sanctioned Rehabilitation Scheme and is unable to meet out its responsibility and liabilities towards its creditors and stakeholders. The Appellant in the Application relying on Notification of the Central Government dated 24.05.2017 contended that Rehabilitation Scheme sanctioned and under implementation is a Resolution Plan within the meaning of IB Code. In the Application, the Applicant claimed that an order of Liquidation be passed in terms of Section 33.

(iii) The Application was heard by the Adjudicating Authority and in its order dated 22.12.2021, the Adjudicating Authority framed following two questions for consideration:

I. Whether the sanctioned scheme of rehabilitation dated 07.01.2005 is the Resolution Plan within the meaning of Section 5(26) of the IBC, 2016 in view of the Notification No.S-O-1683 € dated 24.05.2017?

Finding – No.

II. Whether it can be held that the Respondent has committed the breach of the sanctioned rehabilitation scheme and, hence, liable for order of liquidation under Section 33(4) of the IBC, 2016?

Findings-No.

(iv) After hearing the parties, Adjudicating Authority vide its order dated 22.12.2021 rejected the Application filed by the Appellant under Section 33. The Adjudicating Authority came to the conclusion that Sanctioned Scheme of Rehabilitation dated 07.01.2005 cannot be termed as Resolution Plan within the meaning of Section 5(26) of the IB Code. It was further held that Rehabilitation Scheme not being Resolution Plan, there is no question of Respondent committing breach of implementation of the Plan, hence, Application under Section 33 of the IB Code is not a maintainable.

- (v) Aggrieved by the order dated 22.12.2021, this Appeal has been filed by the Appellant.

3. Shri Pankaj Jain, learned Counsel appearing for the Appellant challenging the impugned order submits that the (Removal of Difficulties) Order, 2017 dated 25.11.2016 could not have been set aside by National Company Law Tribunal nor actually it has been set aside by National Company Law Appellate Tribunal vide its judgment dated 28.05.2018 in ***Company Appeal (AT) (Insolvency) No. 160 of 2017 - Pr. Director General of Income Tax (Admn. & TPS) vs. M/s. Spartek Ceramics India Ltd. & Anr.*** The observation by this Tribunal was that the Notification dated 24.05.2017 is in conflict with maximum period granted under sub-section (2) of Section 61 of IB Code, hence, the NCLAT could not have been entertained the Appeal, cannot be read to mean that Notification dated 24.05.2017 have been set aside by the Appellate Tribunal. It is further submitted that the NCLT in its judgment refrained from giving any specific declaration with regard to Notification dated 24.05.2017, hence, the Notification dated 24.05.2017 survives and could have been availed by the Appellant in filing Application under Sections 33 and 34 of the IB Code. It is further submitted that judgment of Hon'ble Supreme Court dated 25.10.2018 in ***M/s Spartek Ceramics India Ltd. vs. Union of India and Ors.*** while dealing with the Notification dated 24.05.2017, had only made observation which being an obitor, cannot be held to be a declaration of law with regard to Notification dated 24.05.2017. The Hon'ble Supreme Court in Spartek judgment has only upheld the judgment of NCLAT by which

sanctity and authenticity of the Notification dated 24.05.2017 is not affected. It is further submitted that NCLT vide its judgment and order dated 05.04.2021 in CP(IB) No.469 of 2018 in the matter of Surendra Singh Hada and Ors. vs. Arfat Petrochemicals Pvt. Ltd. has given liberty to the Operational Creditor to file an Application under Section 33 of the IB Code subject to compliance of relevant provisions of law, while refusing to entertain Application under Section 9. When Application under Section 9 has been refused to be entertained with liberty aforesaid, the Adjudicating Authority could not have rejected the Application under Section 33 read with Section 34 of the IB Code filed by the Appellant.

4. The learned Counsel for the Respondent refuting the submissions of learned Counsel for the Appellant submits that approved Rehabilitation Scheme is not a Resolution Plan within the meaning of IB Code. The Notification dated 24.05.2017 has been held to be in excess of jurisdiction of Central Government, hence, cannot be relied by the Appellant for filing Application under Sections 33 and 34. This Appellate Tribunal has held that Notification dated 24.05.2017 travels beyond the scope of the removal of difficulties provisions, which finding has been approved by the Hon'ble Supreme Court in its judgment dated 25.10.2018. Hence, the reliance on the said Notification for holding approved Rehabilitation Scheme as Resolution Plan is wholly erroneous and no Application on the basis of approved Rehabilitation Scheme can be filed under Sections 33 and 34 and Adjudicating Authority further considering all aspect of the matter and after hearing the parties has rightly rejected the Application filed by the

Appellant. The learned Counsel for the Respondent further submits that this Tribunal in its judgment dated 29.01.2019 in ***Company Appeal (AT) (Insolvency) no.294 of 2018 – Gail (India) Ltd. vs. M/s. Neycer India Ltd.*** had already taken a view relying on judgment of the Hon'ble Supreme Court in M/s. Spartek Ceramics India Ltd. that Notification dated 24.05.2017 is illegal and travels beyond the scope of removal of difficulties order. It is further submitted that the rehabilitation scheme has been fully implemented and for implementation of the scheme Rajasthan High Court has appointed Justice N.N. Mathur, former Judge, Rajasthan High Court, who had submitted an Inspection Report of the Company observing that all dues have been disbursed. It is further submitted that the payment of dues under the Scheme to the Respondent has already been crystalized and were offered to the Respondent, which was less than rupees one lakh. The settled amount is not being received by the Respondent to drag the company into liquidation. The Respondent has not withdrawn the settled amount and has filed the Application to keep the Company engaged in the liquidation, since he has not vacated the official quarter allotted to him by the Company several decades ago. Initiation of proceedings itself is fraudulent with malicious intent.

5. We have considered the submission of the learned Counsel for the parties and have perused the record.

6. The main question to be answered in this Appeal is as to whether Application filed by the Appellant under Section 33 read with Section 34 of the IB Code was maintainable. The basis of Application was approved

Rehabilitation Scheme dated 07.01.2005, alleging contravention of which the Application was filed. The primary question is as to whether the approved Rehabilitation Scheme is a Resolution Plan within the meaning of IB Code. The Appellant in support of his submission relied on order dated 24.05.2017 namely – The Insolvency and Bankruptcy Code (Removal of Difficulties) Order, 2017. The order dated 24.05.2017 was issued in exercise of powers conferred by sub-section (1) of the Section 242 of the IB Code, is to the following:

“Now, therefore, in exercise of the powers conferred by the sub-section (1) of the section 242 of the Insolvency and Bankruptcy Code, 2016 (31 of 2016), the Central Government hereby makes the following Order to remove the above said difficulties, namely:

1. Short title and commencement.—(1) This Order may be called the Insolvency and Bankruptcy Code (Removal of Difficulties) Order, 2017.

2. In the Insolvency and Bankruptcy Code, 2016, in the Eighth Schedule, relating to amendment to the Sick Industrial Companies (Special Provisions) Repeal Act, 2003, in section 4, in clause (b), after the second proviso, the following provisos shall be inserted, namely:—

“Provided also that any scheme sanctioned under sub-section (4) or any scheme under implementation under sub-section (12) of section 18 of the Sick Industrial Companies (Special Provisions) Act, 1985 shall be deemed to be an approved resolution plan under sub-section (1) of section 31 of the Insolvency and Bankruptcy Code, 2016 and the same shall be dealt with, in accordance with the provisions of Part II of the said Code:

Provided also that in case, the statutory period within which an appeal was allowed under the Sick Industrial Companies (Special Provisions) Act, 1985 against an order of the Board had not expired as on the date of notification of this Act, an appeal against any such deemed approved resolution plan may be preferred by any person before National Company Law Appellate Tribunal within ninety days from the date of publication of this order.”

7. Section 242 of the IB Code empowers the Central Government to remove any difficulty arises in giving effect to the provisions of the Code. Section 242 is as follows:

“242. Power to remove difficulties. - (1) *If any difficulty arises in giving effect to the provisions of this Code, the Central Government may, by order, published in the Official Gazette, make such provisions not inconsistent with the provisions of this Code as may appear to be necessary for removing the difficulty:*

Provided that no order shall be made under this section after the expiry of five years from the commencement of this Code.

(2) Every order made under this section shall be laid, as soon as may be after it is made, before each House of Parliament.”

8. The Notification dated 24.05.2017 came for consideration before this Tribunal in **Company Appeal (AT) (Insolvency) No. 160 of 2017 - Pr. Director General of Income Tax (Admn. & TPS) vs. M/s. Spartek Ceramics India Ltd. & Anr.** The order dated 24.05.2017 was extracted

by the Appellant Tribunal in the above judgment in paragraph 17. The Appellate Tribunal noticed Section 242 of the Code and following was laid down in paragraphs 35, 36 and 37:

“35. The question arises for consideration is whether the impugned Notification S.O. 1683(E) dated 24th May, 2017 relates to removal of difficulty arises in giving effect to the provisions of the case.

The Notification aforesaid, mentions the following difficulties:

“And, whereas, difficulties have arisen regarding review or monitoring of the schemes sanctioned under subsection (4) or any scheme under implementation under sub-section (12) of section 18 of the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986) in view of the repeal of the Sick Industrial Companies (Special Provisions) Act, 1985, substitution of clause (b) of section 4 of the Sick Industrial Companies (Special Provisions) Repeal Act, 2003 and omission of sections 253 to 269 of the Companies Act, 2013”

36. *From plain reading of the ground as shown in the impugned Notification S.O. 1683(E) dated 24th May, 2017, we find that the notification has been issued in view of difficulties arisen to give effect to review or monitoring of the schemes sanctioned under sub-section (4) or sub-section (12) of Section 18 of the ‘SICA Act, 1985’, in view of ‘SICA Repeal Act, 2003’ and omission of Sections 253 to 269 of the Companies Act, 2013. It does not relate to removal of any difficulty arises in giving effect to the provisions of the ‘I&B Code’, which is the*

only ground for which Central Government can exercise power conferred under Section 242.

37. *In absence of any ground shown for removing any difficulty in giving effect to the provisions of the 'I&B Code' and as the Central Government cannot exercise powers conferred under Section 242 of the 'I&B Code' for removing the difficulties arisen due to 'SICA Repeal Act, 2003' or omission of provisions of the 'Companies Act, 2013', this Appellate Tribunal cannot act pursuant to impugned Notification S.O. 1683(E) dated 24th May, 2017 to entertain the appeal."*

9. It was held that order dated 24.05.2017 does not relate to removal of any difficulties arises in giving effect to the provisions of the IB Code. In paragraph 57, following observations have been made by this Appellate Tribunal:

"57. *To maintain the judicial decorum, though we have noticed the conflict in the order passed by the Hon'ble High Court of Delhi and the Notification S.O. 1683(E) dated 24th May, 2017, we refrain from giving any specific declaration about the same.*

In spite of observations as made above, the next question requires consideration is that if otherwise the appeals are maintainable the impugned Scheme is legal or not."

10. The order passed by the Appellate Tribunal was challenged before the Hon'ble Supreme Court by M/s Spartek Ceramics India Ltd. by filing Civil Appeal Nos.7291-7292 of 2018, which Appeals were disposed of by

order dated 25.10.2018. It is useful to extract the entire order of the Hon'ble Supreme Court, which is to the following effect:

“1) *Delay condoned.*

2) *Having heard learned counsel in all the three appeals before us for some time, and having gone through the judgment dated 28.05.2018 passed by the the National Company Law Appellate Tribunal (NCLAT), we are of the view that the judgment of the NCLAT holding that the appeal filed by the Central Government in that case not maintainable in view of the fact that the Notification dated 24.05.2017 travels beyond the scope of the removal of difficulties provision is correct. We are of the view that, having held that the appeal is not maintainable, the appellate Tribunal should not have adjudicated upon either the limitation aspect of the case or the merits of the particular Scheme before it. Therefore, while upholding the judgment passed by the appellate Tribunal on the ground that the appeal itself was not maintainable, we set aside the judgment insofar as it purports to deal with the limitation aspect of the case and the merits including the declaration of the Scheme as being illegal.*

3) *Insofar as Civil Appeal No. 8247 of 2018 and Civil Appeal D. No. 33241/2018 are concerned, it is clear that on the facts in these cases, originally, the appellants had approached the High Court of Delhi in writ petitions. The High Court of Delhi, by judgment dated 22.02.2018 (as modified by order dated 17.04.2018) and 14.09.2017, respectively, ordered the parties to avail of the alternative remedy of filing an appeal before the NCLAT in view of the Notification dated 24.05.2017 which was done by the appellants in these appeals.*

4) *As the impugned judgment dated 28.05.2018 has set aside this Notification, and which has been upheld by us, the NCLAT, in both these cases, has dismissed the two appeals so filed, following the main judgment of 28.05.2018. This being the case, we revive the two writ petitions that had been before the High Court of Delhi in both the appeals before us with liberty to the appellants to amend the aforesaid writ petitions within a period of four weeks from today.*

5) *We request the High Court of Delhi to take up the writ petitions at the earliest. It is made clear that pleadings may be completed in both the writ petitions expeditiously, and all points available in fact and law to all parties shall be kept open.*

6) *With these observations, the appeals are disposed of.*

7) *Pending applications shall stand disposed of.”*

11. The submission of the learned Counsel for the Appellant in respect of the above judgment of the Hon’ble Supreme Court dated 25.10.2018 is that the judgment is only an obitor and judgment of this Appellate Tribunal dated 28.05.2018 cannot be read to mean that Notification dated 24.05.2017 is set aside. It is submitted that the Hon’ble Supreme Court has also incorrectly noticed that judgment dated 28.05.2018 has set aside the Notification, whereas the NCLAT has not set aside the Notification, but only made an observation that Notification was in excess of power vested in the Central Government.

12. The Hon’ble Supreme Court in paragraph 2 clearly noticed the view of the Appellate Tribunal that Notification dated 24.05.2017 travels beyond

the scope of removal of difficulties provisions, which observation was approved. The judgment of the Appellate Tribunal has been upheld. Thus, the judgment of the Hon'ble Supreme Court clearly lays down that Notification dated 24.05.2017 travels beyond the scope of removal of difficulties order. The Hon'ble Supreme Court has also noticed the orders of the Delhi High Court, where High Court has ordered the parties to avail of the alternative remedy of filing an appeal before the NCLAT in view of the Notification dated 24.05.2017. After upholding the judgment of the Appellate Tribunal dated 28.05.2018, the Hon'ble Supreme Court has revived the two Writ Petitions filed before the Delhi High Court, which makes it clear that Notification dated 24.05.2017 was treated as Notification not to be given effect to.

13. We are not in agreement with the submission of learned Counsel for the Appellant with regard to Notification dated 24.05.2017 that the judgment of the Hon'ble Supreme Court can be treated as only an obitor. The Hon'ble Supreme Court has clearly approved the view of the Appellate Tribunal that Notification dated 24.05.2017 travels beyond the scope of removal of difficulties provisions, which is law declared by the Hon'ble Supreme Court and is binding on all under Article 141 of the Constitution of India. The judgment of the Adjudicating Authority impugned in the present Appeal follows the judgment of the Hon'ble Supreme Court in ***M/s Spartek Ceramics India Ltd. vs. Union of India & Ors.*** When the Notification dated 24.05.2017, is not a valid Notification, there is no occasion to accept the submission that approved Rehabilitation Scheme

dated 07.01.2005, which is foundation of the Application filed by the Appellant under Sections 33 read with Section 34 can be treated as a Resolution Plan within the meaning of IB Code. The very foundation of the Application filed by the Appellant under Sections 33 and 34 having been knocked out, the Application was rightly rejected by the Adjudicating Authority.

14. The learned Counsel for the Respondent has relied on judgment of this Tribunal in **Company Appeal (AT) (Insolvency) no.294 of 2018 – Gail (India) Ltd. vs. M/s. Neycer India Ltd.** where this Tribunal has considered the Notification dated 24.05.2017 and the judgment of the Hon'ble Supreme Court in **M/s Spartek Ceramics India Ltd.** (supra). In paragraphs 5 and 6, following has been laid down:

*“5. The aforesaid Notification dated 24th May, 2017 issued by the Central Government was referred before this Appellate Tribunal in **M/s. Spartek Ceramics India Ltd. Vs. Union of India & Ors- Company Appeal (AT) (Insolvency) No. 160 of 2017** etc.” wherein this Appellate Tribunal held that the case before the Adjudicating Authority was not maintainable and the Notification dated 24th May, 2017 was illegal as it travels beyond the scope of the removal of difficulties provisions under the Insolvency & Bankruptcy Code. The decision of this Appellate Tribunal dated 28th May, 2018 in **“M/s. Spartek Ceramics India Ltd.”** (Supra) was challenged before the Hon'ble Supreme Court in Civil Appeal Nos.7291-7292 of 2018. The Hon'ble Supreme Court vide its order dated 25th October, 2018 upheld the decision of this Appellate Tribunal and held that the*

Notification dated 24th May, 2017 was illegal as it travels beyond the scope of the removal of difficulties provisions under the Insolvency & Bankruptcy Code.

*6. The case of the Appellant being covered by “**Spartek Ceramics India Ltd. Vs. Union of India & Ors.**” (Supra), we set aside the impugned order dated 13th April, 2018 passed by the Adjudicating Authority, Single Bench, Chennai, being without jurisdiction. The application is not maintainable. However, it will be open to the Respondent to move before the appropriate forum for appropriate relief which may decide the same uninfluenced by the decision of this Appellate Tribunal.”*

15. The learned Counsel for the Appellant has laid great emphasis on the order of the Adjudicating Authority passed in CP(IB) No.469 of 2018 in the matter of **Surendra Singh Hada & Ors. vs. Arfat Petrochemicals Pvt. Ltd.** The said observations were made by Adjudicating Authority in Section 9 Application where liberty was given to the Operational Creditor to file an Application under Section 33 of the IB Code subject to compliance of the relevant provisions of law. The above order of the Adjudicating Authority dated 05.04.2021, does not notice the judgment of the Hon’ble Supreme Court in M/s Spartek Ceramics India Ltd. Hence, the order of the Adjudicating Authority dated 05.04.2021 cannot be held to be any binding precedent to be followed.

16. The learned Counsel for the Appellant has also relied on judgment of Delhi High Court in **Ashapura Minechem Ltd. vs. Union of India and Ors. in Writ Petition (C) 9674 of 2017** decided on 01.11.2017. The Delhi

High Court in the above judgment has also considered the Notification dated 24.05.2017 issued by the Central Government. The above judgment of the Delhi High Court had no occasion to notice the judgment of the Hon'ble Supreme Court in ***M/s Spartek Ceramics India Ltd.***, where notification dated 24.05.2017 has been disregarded by the Hon'ble Supreme Court. Hence, the judgment of the Delhi High Court cannot be held to be any binding precedent.

17. The learned Counsel for the Appellant has also placed reliance on judgment of Madhya Pradesh High Court in ***Girdharilal Sugar & Allied Industries Ltd. vs. Union of India***, where Notification dated 24.05.2017 has been relied and relying on the said Notification the High Court held that the Writ Petition is not maintainable and dismissed the Writ Petition. The judgment of the Madhya Pradesh High Court has simply followed the Notification dated 24.05.2017, which Notification having been held to be in excess of authority of the Central Government as per the judgment of the Hon'ble Supreme Court in ***M/s Spartek Ceramics India Ltd.***, the judgment of the Madhya Pradesh High Court cannot help the Appellant in the facts of the present case.

18. The learned Counsel for the Appellant has also placed reliance on certain judgments of NCLT Mumbai, NCLT Delhi Bench on the Notification dated 24.05.2017. The judgment of NCLT Ahmedabad in ***Surendra Singh Hada & Ors. vs. Arfat Petrochemicals Pvt. Ltd.*** has already been noticed and dealt with by us in preceding paragraph of this judgment. The judgment of the NCLT Mumbai Bench dated 13.10.2017 in S.M. Dyechem

Ltd., in which judgment NCLT had no occasion to notice the judgment of the Hon'ble Supreme Court in ***M/s. Spartek Ceramics India Ltd.***, hence, cannot be treated as any binding precedent.

19. We are of the view that judgment of the Hon'ble Supreme Court in ***M/s Spartek Ceramics India Ltd.*** is a law declared by the Hon'ble Supreme Court, where Hon'ble Supreme Court has specifically approved the view of this Appellate Tribunal that Notification dated 24.05.2017 travels beyond the scope of removal of difficulties provisions. We have already extracted the provisions of Section 242 of the IB Code in preceding paragraphs of this judgment, where as per sub-section (1) of Section 242, Central Government is empowered to issue an order, if any difficulty arises in giving effect to provisions of this Code. The power under Section 242 is thus confine to the powers of Central Government in removing difficulties arising in giving effect to the provisions of the IB Code. The powers cannot be exercised by Central Government to remove any difficulty regarding review or monitoring of scheme sanctioned under Sick Industrial Companies (Special Provisions) Act, 1985 and the repeal of Sick Industrial Companies (Special Provisions) Act, 1985, which is the specific reason mentioned in the Notification dated 24.05.2017, noticing the difficulties, which has arisen for which the order has been issued. It is useful to note following part of the Notification, which deals with difficulties, which has arisen:

“And, whereas, difficulties have arisen regarding review or monitoring of the schemes sanctioned under subsection (4) or any scheme under implementation

under sub-section (12) of section 18 of the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986) in view of the repeal of the Sick Industrial Companies (Special Provisions) Act, 1985, substitution of clause (b) of section 4 of the Sick Industrial Companies (Special Provisions) Repeal Act, 2003 and omission of sections 253 to 269 of the Companies Act, 2013;

20. We, thus, are of the view that no error has been committed by the Adjudicating Authority in rejecting Application filed by the Appellant under Sections 33 and 34. There is no merit in the Appeal. The Appeal is dismissed. No costs.

[Justice Ashok Bhushan]
Chairperson

[Dr. Alok Srivastava]
Member (Technical)

[Barun Mitra]
Member (Technical)

NEW DELHI

12th December, 2022

Ashwani