

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH

Company Appeal (AT) (Insolvency) No. 621 & 622 of 2023

[Arising out of Order dated 29.03.2023 passed by the Adjudicating Authority/National Company Law Tribunal, Allahabad Bench, Prayagraj in IA No. 30/2022 in CP (IB) No. 349/ALD/2018]

IN THE MATTER OF:

Manesh Agarwal

R/o. A-200 Kamla Nagar,
Agra, U.P. – 282005.

...Appellant

Versus

1. Pramod Kumar Sharma,

Resolution Professional of B.B. Foods Pvt.
Ltd.,
C-25, EPIP, Shastripuram, Sikandra,
Agra – 282007.

...Respondent No. 1

2. Sirius Food Pvt. Ltd.

(Resolution Applicant),
C-17, Phase- II, Noida, Gautam Buddha
Nagar – 201305.

...Respondent No. 2

3. Mr. Rahoul Subberwal,

R/o. C-17, Phase- II, Noida, Gautam
Buddha Nagar – 201305.

...Respondent No. 3

**4. Bank of India (Erstwhile Committee of
Creditors)**

Agra MID Corporate Branch, 49/50, Sulabh
Puram, Sikandra Bodla Road,
Agra – 282007.

...Respondent No. 4

Present:

**For Appellant : Mr. Krishnendu Datta, Sr. Advocate along with
Mr. Kumar Anurag Singh, Mr. Shwetank Singh
& Ms. Neha Agarwal, Advocates.**

**For Respondents : Mr. Abhijeet Sinha, Mr. Saif Ali & Mr. Aditya
Shukla, for R-1.**

**Mr. Arvind Nayar, Sr. Advocate along with
Mr. Akshay Joshi, Mr. Abhishek Kumar & Mr.
Shubham Pandey, for R-2 & 3.**

Mr. Nilotpall Shyam, for R-4.

J U D G M E N T

(04.07.2023)

NARESH SALECHA, MEMBER (TECHNICAL)

1. The present appeal has been filed under Section 61 of the Insolvency & Bankruptcy Code, 2016 (in short '**Code**') against the Impugned Order dated 29.03.2023 (first order) in IA No. 30/2022 in CP (IB) No. 349/ALD/2018 passed by the Adjudicating Authority (National Company Law Tribunal, Allahabad Bench, Prayagraj), whereby the Adjudicating Authority rejected the IA filed by the Appellant challenging the Resolution Plan. The Appeal is also challenging the Adjudicating Authority's another order dated 29.03.2023 passed in I.A. No. 3 of 2022 allowing the implementation of Resolution Plan without considering the Appellant's case for settlement under Section 12A of the Code (second order).

2. Section 7 application, filed by sole Financial Creditor- Bank of India against the BB Foods Pvt. Ltd. (the 'Corporate Debtor'), was admitted on 22.10.2019 and Corporate Insolvency Resolution Process (in short '**CIRP**') was allowed to be initiated.

3. The Appellant is Promoter, Shareholder and Suspended Director of the Corporate Debtor and aggrieved by the both Impugned Orders, the present appeal has been filed before this Appellate Tribunal.

4. We note that that the order dated 22.10.2019 for initiating the CIRP against the Corporate Debtor was challenged before this Appellate Tribunal, who granted interim stay on the operation of the said order, however finally this Appellate Tribunal rejected the Appeal of the Appellant on 28.02.2019 and the CIRP order dated 22.10.2020 of the Adjudicating Authority was upheld. It has also been brought out that the Appellant had challenged the judgment of this Appellate Tribunal dated 28.02.2020 before the Hon'ble Supreme Court of India who initially granted interim stay on 14.10.2020 but finally rejected the appeal of the Appellant on 17.08.2021.

5. Heard the Counsel for Appellant and perused the records made available including cited judgments.

6. Learned Counsel for the Appellant submitted that the Respondent No. 1 filed an application before the Adjudicating Authority for exclusion of period of time in which no work was progressed due to stay of this Appellate Tribunal as well as Hon'ble Supreme Court of India and the Adjudicating Authority vide order dated 20.09.2021 permitted exclusion of 409 days but no order was passed regarding excess period of 128 days on account of lockdown.

7. Learned Counsel for the Appellant stated that Respondent No. 1 filed I.A. No. 3 of 2022 seeking approval of the Resolution Plan and the same was challenged by the Appellant through I.A. No. 30 of 2022 on the ground that the Resolution Applicant was barred under Section 29A of the Code. Learned Counsel for the Appellant submitted that after several hearings, the

Adjudicating Authority passed two separate orders, both dated 29.03.2023, whereby the Resolution Plan of Respondent No. 3 was approved and I.A objecting to approval of Resolution Plan filed by the Appellant was rejected.

8. Learned Counsel for the Appellant emphasised that the Resolution Applicant was ineligible under Section 29A of the Code since its Director who has been Managing Director of the companies allowed to be liquidated under UK Laws and therefore the Adjudicating Authority ought to have disqualified him to submit the Resolution Plan.

9. Learned Counsel for the Appellant submitted that since the Adjudicating Authority did not pass any specific order regarding exclusion of 128 days of lockdown, it was wrong on the part of Resolution Professional to have taken liberty of exempting 128 days upto 31.07.2020 on his own and therefore the Adjudicating Authority also erred in holding that the Resolution Plan was submitted within the stipulated timeline under Section 12 of the Code. Learned Counsel for the Appellant further submitted that the Adjudicating Authority did not consider offer of settlement given by the Appellant to the Committee of Creditors (in short '**CoC**') under Section 12A of the Code.

10. Learned Counsel for the Appellant stated that as per Section 12 of the Code, the Resolution Process is required to be completed within 180 days and under Section 12(3) of the Code on the application, the Adjudicating Authority could further consider another 90 days and under Section 12 of the Code, the maximum period for Resolution Process is 330 days. Learned Counsel for the Appellant further stated that the Adjudicating Authority

permitted exclusion of only 409 days spent in litigation before this Appellate Tribunal and Hon'ble Supreme Court of India and therefore the revised Resolution Plan submitted by M/s Sirius Foods Pvt. Ltd./ Respondent No. 2, which was approved by the CoC/ sole Financial Creditor on 22.12.2021, therefore period was much more than allowed time for Resolution Process.

11. Learned Counsel for the Appellant submitted that the Respondent No. 1 has wrongly relied on order dated 03.06.2020 of the Adjudicating Authority presuming that it has granted benefit of 128 days especially when I.A. No. 126 of 2020 filed by the Respondent No. 1 did not contain any table or chart indicating the same.

12. Learned Counsel for the Appellant also assailed that the Adjudicating Authority erred in approving the Resolution Plan of M/s Sirius Foods Pvt. Ltd./ Respondent No. 2 in violation of Section 29A of the Code. Learned Counsel for the Appellant stated that Mr. Rahoul Subberwal, was Ex-Promoter Shareholder of three foreign company in UK, namely, M/s Scalar Engineering Ltd., M/s Falcon Foods Ltd., and M/s Cascade Marine Foods (UK) Ltd., which have been liquidated and Mr. Subberwal was the Sole Promoter of all these foreign companies and being also shareholder of M/s Sirius Foods Pvt. Ltd., he is covered under the definition of related party under Section 5 (24) of the Code. Learned Counsel for the Appellant further stated that being undischarged insolvent, the connected person being undischarged insolvent of three companies in UK, could not have been eligible in terms of the Section 29 A(j) r/w Section 5(24) of the Code.

13. Learned Counsel for the Appellant is also aggrieved believing that his offer of settlement under Section 12A should have been given preference over the Resolution Plan submitted by the Resolution Applicant/ Respondent No. 2 as the Corporate Debtor was MSME and viability & feasibility of the Corporate Debtor are not the criteria for consideration of settlement plan of the Appellant in terms of Section 12 A. Learned Counsel for the Appellant further stated that being Ex-Promoter Director of the Corporate Debtor which is a MSME, he was not barred under Section 29A of the Code to submit a Resolution Plan or settlement offer. Learned Counsel for the Appellant pointed out that in fact, he offered Rs. 19.63 Crores whereas ineligible Resolution Applicant i.e., Respondent No. 2 offered only Rs. 16.25 Crores. Learned Counsel for the Appellant assailed the conduct of the CoC to approve the Resolution Plan of Respondent No. 2 which was finally approved by the Adjudicating Authority incorrectly. Learned Counsel for the Appellant also stated that the Resolution Plan was approved below the liquidation value of Rs. 17.25 Crores and it is contrary to the Code.

14. Learned Counsel for the Appellant concluding his arguments urged this Appellate Tribunal to allow his appeal and dismiss both the Impugned Orders.

15. Per-contra, Learned Counsel for the Respondents denied all the averments.

16. Learned Counsel for the Respondents stated that M/s Sirius Foods Pvt. Ltd. was not ineligible merely on the ground that Mr. Rahoul Subberwal was Managing Director of three companies of UK which went under

Liquidation under UK Laws. Learned Counsel for the Respondents submitted that disqualification under UK Laws start only when the order was made only on an application made by the Secretary of State under Section 6 of the UK Act, which was not the case therein and also no appeal was preferred against the concerned director in the UK, therefore the eligibility criteria as submitted by the Appellant referring to laws 29 A (j) r/w 5 (28) of the Code are not attracted.

17. Learned Counsel for the Respondents submitted that it is the commercial wisdom of the CoC which is paramount and cannot be challenged by the Appellant. Learned Counsel for the Respondents further submitted that in the Court there is no stipulation that the Resolution Plan is required to be more than the liquidation value and the same has been upheld by the Hon'ble Supreme Court of India in the matter of ***Maharashtra Seamless Ltd. V/s. Padmanabhan Venkatesh*** [(2020) 11 SCC 467].

18. Learned Counsel for the Respondents stated that M/s. Sirius Foods Pvt. Ltd. is not ineligible under Section 29A of the Code as Mr. Rahoul Subberwal do not falls under the definition of related person and he does not suffer from any ineligibility under clauses (a) to (i) of Section 29A of the Code. As regards, to clause (iii) to explanation to section 29A, neither Scalar Engineering nor Falcon Foods comes within the definition of connected person as these companies do not fall within the definition of holding company or subsidiary company or associate company of the Respondent No. 2. Learned Counsel for the Respondents also highlighted that the

definition of connected person as per clause (j) to section 29A reads: "*has a connected person not eligible under clauses (a) to (i)*" and during the existence of relevant period. neither Falcon Foods/ Scalar Engineering nor Mr. Rahoul Subberwal had interest in Sirius Foods Private Limited. Hence, the averments of the Appellant on eligibility criteria as per Section 29A of the Code is without appreciating the law in right perspective and therefore not sustainable.

19. Learned Counsel for the Respondents also stated that it is not correct averment that the settlement offer of the Appellant has been much more than the Resolution Plan. Learned Counsel for the Respondents submitted that the total resolution amount is Rs. 27.27 Crores which much more than the liquidation value of Rs. 17.87 Crores and settlement offer of the Appellant of Rs. 19.63 Crores.

20. Learned Counsel for the Respondents concluding his remarks requested that the Appeal may be dismissed with costs.

21. This Appellate Tribunal has considered various issues raised by the Appellant.

22. As regard, the first issue that the Resolution Plan was approved without seeking the Adjudicating Authority's specific approval for exclusion of 128 days on account of the lockdown as there was no explicit order of the same by the Adjudicating Authority. We observe that Regulation 40C was inserted in the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Third Amendment) Regulations, 2020, in view of lockdown. According to the said provision, the period of

lockdown was not to be counted for the purpose of timelines, for any activity that could not be completed due to such lockdown. The central government issued notification declaring total lockdown period to be extended. The Respondent No.1, on the instructions of Committee of creditors filed an application dated 28.05.2020 under Section 12(2) of the code vide which resolution professional sought an extension of 90 days for the CIRP process and further sought the exclusion of lockdown period as per Regulation 40 C. The Adjudicating Authority granted extension of 90 days beyond 180 days of CIRP and further granted exemption of lockdown period w.e.f. 25.03.2020. The order dated 03.06.2020, although did not specify the number of days that stood exempted, but granted exemption in terms of Section 40-C.

We observe from the Order dated 03.06.2020, where the Adjudicating Authority has recorded the following:

"Considering the submission made by the Ld. Counsel for the Applicant, this Court is of the view that the cause shown is sufficient, accordingly, the application is hereby allowed. The extension of further period of 90 days beyond 180 days of CIRP is hereby extended along with exemption of lockdown period w.e.f. 25.03.2020 as per the notification issued by the Central Government".

(Emphasis Supplied)

Thus, it is clear that there was no error in the Impugned Order on this account.

23. Another contention of the Appellant is that the Resolution Plan was challenged by the Appellant through I.A. No. 30 of 2022 on the ground that the Resolution Applicant was barred under Section 29A of the Code. It is a case of the Appellant that Mr. Rahoul Subberwal, Ex- Promoter Shareholder of three foreign company in UK, which have been liquidated and Mr. Subberwal was the Sole Promoter of all these foreign companies and being shareholder of M/s Sirius Foods Pvt. Ltd. comes under the definition of related party under Section 5 (24) of the Code. In this connection, the Section 5(24) and Section 29 A (a) (j) of the Code reads as under :-

5. Definitions. –

(24) “related party”, in relation to a corporate debtor, means-

(a) a director or partner of the corporate debtor or a relative of a director or partner of the corporate debtor;

(d) a private company in which a director, partner or manager of the corporate debtor is a director and holds along with his relatives, more than two per cent. of its share capital;

(i) a body corporate which is a holding, subsidiary or an associate company of the corporate debtor, or a subsidiary of a holding company to which the corporate debtor is a subsidiary;

[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;

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

(Emphasis Supplied)

24. It is the case of the Appellant is that Mr. Rahoul Subberwal was Managing Director of three companies which were liquidated in UK and being undischarged insolvent was not eligible and adversely effected eligibility of the M/s Sirius Foods Pvt. Ltd./ Respondent No. 2 as Mr. Subberwal is a shareholder of Respondent No. 2. In this connection, it is noted that the term ‘undischarged insolvent’ has not been defined in the Code. Moreover, such orders for declaring are required to be issued by the Court. We also take note of the detailed averments of the Respondents that Mr. Subberwal has not been disqualified under Section 6 or Section 7 of the UK Company Directors Disqualification Act, 1986 and he continuous to serve as director in other UK based company in M/s Spice Trail Ltd. and he would not have been allowed to continue in this company, had he remained ineligible as per UK Laws. We find merits in the arguments of the Respondents and also note the detailed deliberations by the Adjudicating Authority on this aspect in the Impugned Orders in IA No. 30 of 2022 covering various laws of the UK and cited judgments. After considering all facts, laws and averments of both the parties and reasoned speaking orders of the Adjudicating Authority on this aspect, we do not find any error on this account in the Impugned Order.

25. One more issue raised by the Appellant is regarding non consideration of the settlement offer made by him to the CoC and also that the Resolution

offer of the M/s Sirius Foods Pvt. Ltd. / Respondent No. 2 / Resolution Applicant is lower than the liquidation value as well as the settlement offer amount of the Appellant. In this connection, during averments it has been brought to our notice that liquidation value was Rs. 17.87 Crores and the settlement offer of the Appellant was Rs. 19.63 Crores. However, the total Resolution Plan was of Rs. 27.27 Crores. As per the Resolution Plan total payment to be made to Financial Creditor consist of Rs. 16.27 Crores, along with CIRP cost of Rs. 1 Crore or actuals and proposal towards working capital and repair/ refurbishment of Rs. 10 Crores. Thus, the total Resolution Plan amounts to Rs. 27.27 Crores which is much more than both the liquidation value of Rs. 17.88 Crores and the settlement offer of the Appellant is Rs. 19.63 Crores. We also tend to agree with averments of the Respondents that the Code do not stipulate that the Resolution Plans size is required to be more than the liquidation value which was also supported by the Hon'ble Supreme Court of India in the matter of **Maharashtra Seamless** (*Supra*). Hence, we are not in position to consider averments of the Appellant on this account and do not find any error in the Impugned Order on this aspect.

26. We also take into account that the Resolution Plan was approved by the CoC with 100% voting share. It is settled law that commercial wisdom of the CoC is not subjected to unnecessarily judicious scrutiny or judicial interference. In fact, this ratio has been stipulated on several occasions both by the Hon'ble Supreme Court of India as well as this Appellate Tribunal.

27. After careful consideration of all the facts, averments made by all parties and cited judgments, we do not find any error in the challenged both Impugned Orders. The 'Appeal' being devoid of any merit is dismissed. No costs. Interlocutory Applications, if any, are closed.

**[Justice Ashok Bhushan]
Chairperson**

**[Naresh Salecha]
Member (Technical)**

Simran