

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 194 of 2020

[Arising out of Impugned Order dated 05th December 2019 passed by the Adjudicating Authority/National Company Law Tribunal, Ahmedabad Bench, Ahmedabad in IA No. 758 of 2019 in CP No. 181/NCLT/AHM/2019]

IN THE MATTER OF:

Sunil S. Kakkad
Promoter and Shareholder of
M/s Sai Infosystems (India) Ltd
(Company under liquidation)
F/103, Satellite, Center Co-operative
Housing Society, 'C' Block,
Ground Floor, Opp. Management Enclave
Vastrapur, Ahmedabad – 380015
(Currently in Sabarmati Jail, Ahmedabad)

...Appellant

Versus

- 1. Atrium Infocom Private Limited**
Through: Sunil Kumar Aggarwal Liquidator
20, First Floor, Super Plaza,
Sandesh Press Road, P.O. - Bodakdev
Vastrapur, Ahmedabad – 380054
...Respondent No.1
- 2. Manish Kumar Bhagat**
Erstwhile Interim Resolution Professional
For Atrium Infocom Private Limited
244/6-7, GIDC Industrial Estate
Waghodia, Vadodara, Gujarat
...Respondent No.2
- 3. State Bank of India**
Lead Bank of Consortium of Banks
Committee of Creditor
Atrium Infocomm Private Limited
Stressed Asset Management Branch
2nd Floor, Param Siddhi Complex
Opp V.S. Hospital
Ashram Road, Ellisbridge
Ahmedabad – 380006
...Respondent No.3

Present:

For Appellant : Mr Abhijeet Sinha, Mr Chirag Gupta, Mr Rajendra Baniwal and Kumar Sumit, Advocates

For Respondent : Mr Sumit Kansal, Advocate

J U D G M E N T

[Per; V. P. Singh, Member (T)]

1. The Appeal emanates from the Impugned Order dated 05th December 2019 passed by the Adjudicating Authority/National Company Law Tribunal, Ahmedabad Bench, Ahmedabad in IA No.758 of 2019, in CP No. 181/NCLT/AHM/2019. Parties are represented by their original status in the company petition for the sake of convenience.

2. The Appellant has filed this Appeal under Section 61 of Insolvency and Bankruptcy Code, 2016 (in short “I&B Code”) praying for setting aside the Impugned Order dated 05th December 2019.

3. Brief facts of the case are as follows:

The Learned Adjudicating Authority by its order dated 10th July 2019 triggered Corporate Insolvency Resolution Process (from now on referred to as ‘CIRP’) against the Corporate Debtor in CP No. 181/NCLT/AHM/2019. During CIRP, the Interim Resolution Professional (from now on referred to as ‘IRP’) after receiving the claims, formed the Committee of Creditors (in short ‘CoC’). After that, three meetings of CoC took place. In the second meeting, the Committee of Creditors resolved to defer the publishing of Expression of interest till the next CoC meeting. After that, in the third CoC meeting dated 21st September 2019, the CoC passed the Resolution that Corporate Debtor Company is not working for the last five years and there is no possibility/hope of Resolution Plan, therefore decided to liquidate the Corporate Debtor, i.e. Atrium Infocomm Private Limited. It was further

resolved by the CoC with 100% vote share to apply for initiation of liquidation of the Corporate Debtor.

4. Based on the unanimous decision of the CoC, the IRP applied for the liquidation of Corporate Debtor which was allowed by the impugned order of the Adjudicating Authority dated 05th December 2019. Being aggrieved by order of the Adjudicating Authority dated 05th December 2019 under Sections 33(1), 33(2) and 33(3) of the I&B Code, 2016, the Appellant has preferred this Appeal.

5. The Appeal is filed mainly on the ground that the Adjudicating Authority has failed to acknowledge the fact that the Respondent No.2/IRP Mr Manish Kumar Bhagat was unable to perform any of the necessary steps under the CIR Process, i.e. to prepare Information Memorandum, evaluation matrix, evaluation of assets etc. which are significant towards achieving the objective of the Code, i.e. maximization of the assets of the Corporate Debtor; the Adjudicating Authority failed to appreciate that the IRP completely overlooked the process for inviting Expression of Interest. Despite that, one of the prospective Resolution Applicants in a meeting dated 09th September 2019 showed its willingness to submit EOI; the Adjudicating Authority failed to adhere to the timeline as prescribed under the Code to conduct CIR Process to afford a chance for Resolution of the Corporate Debtor, somewhat intentionally delayed the required process to push the Corporate Debtor into liquidation; the Adjudicating Authority has failed to appreciate that I&B Code is not a forum for recovery proceeding, and Resolution is the prime objective of the Code when there are viable prospects

of revival of a Corporate Debtor; the Adjudicating Authority erred in passing the impugned order of liquidation under Section 33 of the Code ex-parte without affording a chance to the Appellant herein to put facts. The Adjudicating Authority failed to appreciate that liquidation is not a general rule but is as an exception as a part of the Code. The liquidation fetches corporate death to the Corporate Debtor while I&B Code, 2016 strongly propagates Resolution qua CIRP in order to take the Corporate Debtor out of the financial woes.

6. The Learned Counsel for the Respondents submits that the Adjudicating Authority has passed the impugned order under Sections 33(1), 33(2) and 33(3) of the I&B Code, 2016 based on the Resolution passed by the CoC with 100% vote share to liquidate the Corporate Debtor.

7. The Learned Counsel for the Respondents has placed reliance on the judgment of this Appellate Tribunal in case of Global Business Corporation Vs. Punjab National Bank 2020 (117) Taxman.com162 (NCLAT) dated 23rd January 2020 wherein it is held :

“In their commercial wisdom, COC have decided not to accept the Resolution Plan with conditions contained therein. Even though the suspended Board of Directors has a right to attend the meeting and may offer any suggestion but they cannot force their decision on their terms to Committee of Creditors especially when the suspended Board of Directors has no right to vote on the Resolution Plan. We also note that Committee of Creditors has rejected the resolution plan with 100% voting”.

‘Verbatim copy’

It is further contended that the commercial decisions of the Committee of Creditors are non-justiciable; therefore, they cannot be assailed in this Appeal.

8. We have heard the arguments of the Learned Counsel for the parties and perused the record.

9. The issue, which arises for our consideration is as under:

Can the Resolution Professional, with the approval of CoC with 66% vote share, directly proceed for the liquidation of Corporate Debtor Company without taking any steps for Resolution of the Corporate Debtor?

Issue No.1;

10. Appellant shareholder/promoter and erstwhile Director of the Corporate Debtor, 'Atrium Infocomm Private Limited' has assailed the liquidation order passed under Section 33(2) of the I&B Code by the Adjudicating Authority. The Appellants contends that liquidation is the last resort and it cannot and should not be passed without following due process of Resolution of the Corporate Debtor. It is alleged that impugned order is passed in gross violation of the Principles of Natural Justice. It is further contended that the Learned Adjudicating Authority has failed to appreciate that the Committee of Creditors with 100% vote share took a decision to liquidate the Corporate Debtor, without even issuing notice in Form-G for inviting Expression of Interest for submission of Resolution Plan. It is also pointed out that neither the Resolution Professional nor the CoC took any steps for Resolution of the Corporate Debtor.

11. It is important to mention that the impugned order is passed under Section 33(2) of the I&B Code, which is given as under:

“33. Initiation of liquidation — (1) Where the Adjudicating Authority,—

(a) before the expiry of the insolvency resolution process period or the maximum period permitted for completion of the corporate insolvency resolution process under Section 12 or the fast track Corporate Insolvency Resolution Process under Section 56, as the case may be, does not receive a resolution plan under sub- Section (6) of Section 30; or

(b) rejects the resolution plan under Section 31 for the non-compliance of the requirements specified therein, it shall—

(i) pass an order requiring the corporate debtor to be liquidated in the manner as laid down in this Chapter;

(ii) issue a public announcement stating that the corporate debtor is in liquidation and

(iii) require such order to be sent to the authority with which the corporate debtor is registered.

(2) Where the Resolution professional, at any time during the corporate insolvency resolution process but before confirmation of resolution plan, intimates the Adjudicating Authority of the decision of the committee of creditors [approved by not less than sixty-six per cent. of the voting share] to liquidate the corporate debtor, the Adjudicating Authority shall pass

a liquidation order as referred to in sub-clauses (i), (ii) and (iii) of clause (b) of sub-section (1).

[Explanation.—For the purposes of this sub-section, it is hereby declared that the committee of creditors may take the decision to liquidate the corporate debtor, any time after its constitution under sub- Section (1) of Section 21 and before the confirmation of the resolution plan, including at any time before the preparation of the information memorandum.]

Prior to amendment by Insolvency and Bankruptcy Code (Amendment) Act, 2019 (Act 26 of 2019), Section 33 read as:

Chapter III
LIQUIDATION PROCESS

33. Initiation of liquidation.-(1) Where the Adjudicating Authority,—

(a) before the expiry of the insolvency resolution process period or the maximum period permitted for completion of the corporate Insolvency resolution process under Section 12 or the fast track corporate Insolvency resolution process under Section 56, as the case may be, does not receive a resolution plan under sub-section (6) of Section 30; or

(b) rejects the resolution plan under Section 31 for the non-compliance of the requirements specified therein, it shall—

(i) pass an order requiring the corporate debtor to be liquidated in the manner as laid down in this Chapter;

- (ii) *issue a public announcement stating that the corporate debtor is in liquidation; and*
- (iii) *require such order to be sent to the authority with which the corporate debtor is registered.*

(2) *Where the Resolution professional, at any time during the corporate Insolvency resolution process but before confirmation of resolution plan, intimates the Adjudicating Authority of the decision of the committee of creditors [approved by not less than sixty-six per cent. of the voting share] to liquidate the corporate debtor, the Adjudicating Authority shall pass a liquidation order as referred to in sub-clauses (i), (ii) and (iii) of clause (b) of sub-section (1).*

12. The explanation to sub-section (2) of Section 33 of the I&B Code, which is added by the amendment in the I&B Code w.e.f 16th August 2019, specifically provides that **“the Committee of Creditors may take the decision to liquidate the Corporate Debtor, any time after its constitution under sub-section (1) of Section 21 and before the confirmation of the Resolution Plan, including at any time before the preparation of the information memorandum.”**

13. Based on the added explanation to sub-section (2) of Section 33 of the I&B Code, 2019, it is evident that the Committee of Creditors after its constitution under sub-section (1) of Section 21 of the Code, at any stage during Corporate Insolvency Resolution Process and before the confirmation of Resolution plan, including at any time before preparation of Information

Memorandum, is authorized to take a decision to liquidate the Corporate Debtor.

14. Admittedly, in this case, only three meetings of Committee of Creditors took place, and without making any endeavour for inviting Expression of Interest, the CoC unanimously resolved to liquidate the Corporate Debtor.

15. In the Minutes of the second CoC meeting, it is stated that the IRP apprised CoC that EOI for Resolution Plan, evaluation matrix and eligibility criteria had been documented.

16. The extract of Minutes of CoC meeting in this regard is as follows;

“4. To provide approval on Expression of Interest, resolution plan, eligibility criteria for resolution applicant, last date for submission of resolution plan, evaluation matrix, location of publishing EOI.

IRP apprised CoC that form-G (Invitation for Expression of Interest) (Under Regulation 36A (1) of the Insolvency and Bankruptcy (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 has been prepared. IRP has to make public announcement to invite interest resolution Applicants to submit resolution plan. The committee after discussion passed the following Resolution:

“RESOLVED THAT the decision to publish EOI has been deferred till next CoC meeting.”

Thus, it is evident that the Resolution Professional sought approval for inviting Expression of Interest for submission of Resolution Plan and for

fixing eligibility criteria for the Resolution Applicant. However, the CoC deferred the matter and passed the Resolution to the effect stating that;

“the decision to publish EoI has been deferred till next CoC meeting”.

17. It is also on record that in the third CoC meeting held on 01st October 2019, wherein Agenda item No 5 was for the approval of Expression of Interest for inviting Resolution Plan, fixing eligibility criteria for Resolution Applicant and for fixing the last dates for submission of Resolution Plan, the CoC with requisite vote share resolved to Liquidate the Corporate Debtor. The extract of the relevant copy of Minutes are as under;

Agenda Item No. 5 alongwith the Resolution passed by the CoC is given below for ready reference:

To provide approval on Expression of Interest for Resolution Plan, eligibility criteria for resolution applicant, last date for submission of Resolution Plan, evaluation matrix, location of publishing EOI.

IRP briefed CoC to publish Form-G – Invitation for Expression of Interest as per Insolvency and Bankruptcy Code, 2016. IRP also briefed about evaluation matrix, eligibility criteria and other procedural documents relating to resolution plan.

It was resolved that;

“since Company is not working since last five years and there is no possibility/hope for resolution plan, it is decided to liquidate the corporate debtor, i.e. Atrium Infocomm Private Limited the CoC also requested the IRP

for filing an application before the Adjudicating Authority.”

18. Based on the Resolution passed by CoC with 100% vote share, the IRP filed the Application under Section 33(2) of the I&B Code for liquidation of the Corporate Debtor. The Adjudicating Authority has allowed the Application filed by IRP and passed an order of liquidation of the Corporate Debtor based on the Resolution passed by the CoC with 100% vote share.

19. It is pertinent to mention that explanation to sub-section (2) of Section 33 of the I&B Code, 2016 depicts that the CoC is fully empowered to order for liquidation at any stage of the CIRP, but before the confirmation of the Resolution Plan.

20. In the circumstances, it is apparent that statutory provision permits CoC to take the decision for liquidation of Corporate Debtor at any stage of CIRP, but before confirmation of Resolution Plan. In the instant case, the CoC intentionally deferred the matter for approving EoI for inviting the Expression of Interest for submission of Resolution Plan and unanimously decided to liquidate the Corporate Debtor. As per the explanation added to sub-clause (2) of Section 33 of the I&B Code, it is clear that the CoC has the power to order for liquidation at any stage of CIRP but before confirmation of Resolution Plan.

It is germane to mention that CIRP of the Corporate Debtor was initiated on 10th July 2019 and during Corporate Insolvency Resolution Process, the CoC unanimously, with 100%vote share took the commercial

decision to liquidate the Corporate Debtor, which is non-justiciable as per the law laid down by Hon'ble the Supreme Court of India in case of **K. Sashidhar v. Indian Overseas Bank, (2019) 12 SCC 150: (2019) 4 SCC (Civ) 222: 2019 SCC OnLine SC 257 at page 187.**

In the above case Hon'ble the Supreme Court held;

“58. Indubitably, the inquiry in such an appeal would be limited to the power exercisable by the Resolution professional under Section 30(2) of the I&B Code or, at best, by the adjudicating authority (NCLT) under Section 31(2) read with Section 31(1) of the I&B Code. No other inquiry would be permissible. Further, the jurisdiction bestowed upon the appellate authority (NCLAT) is also expressly circumscribed. It can examine the challenge only in relation to the grounds specified in Section 61(3) of the I&B Code, which is limited to matters “other than” enquiry into the autonomy or commercial wisdom of the dissenting financial creditors. Thus, the prescribed authorities (NCLT/NCLAT) have been endowed with limited jurisdiction as specified in the I&B Code and not to act as a court of equity or exercise plenary powers.

59. In our view, neither the adjudicating authority (NCLT) nor the appellate authority (NCLAT) has been endowed with the jurisdiction to reverse the commercial wisdom of the dissenting financial creditors and that too on the specious ground that it is only an opinion of the minority financial creditors. *The fact that substantial or majority per cent of financial creditors have accorded approval to the resolution plan would be of no avail, unless the approval is by a vote of not less than 75% (after amendment of 2018 w.e.f. 6-6-2018, 66%) of voting share of the financial creditors. To put it differently, the action of liquidation process postulated in*

Chapter III of the I&B Code, is avoidable, only if approval of the resolution plan is by a vote of not less than 75% (as in October 2017) of voting share of the financial creditors. Conversely, the legislative intent is to uphold the opinion or hypothesis of the minority dissenting financial creditors. That must prevail, if it is not less than the specified per cent (25% in October 2017; and now after the amendment w.e.f. 6-6-2018, 44%). The inevitable outcome of voting by not less than requisite per cent of voting share of financial creditors to disapprove the proposed resolution plan, de jure, entails in its deemed rejection.

62. *The argument, though attractive at the first blush, but if accepted, would require us to rewrite the provisions of the I&B Code. It would also result in doing violence to the legislative intent of having consciously not stipulated that as a ground — to challenge the commercial wisdom of the minority (dissenting) financial creditors. Concededly, the process of resolution plan is necessitated in respect of corporate debtors in whom their financial creditors have lost hope of recovery and who have turned into non-performer or a chronic defaulter. The fact that the corporate debtor concerned was still able to carry on its business activities does not obligate the financial creditors to postpone the recovery of the debt due or to prolong their losses indefinitely. Be that as it may, the scope of enquiry and the grounds on which the decision of “approval” of the resolution plan by CoC can be interfered with by the adjudicating authority (NCLT), has been set out in Section 31(1) read with Section 30(2) and by the Appellate Tribunal (NCLAT) under Section 32 read with Section 61(3) of the I&B Code. No corresponding provision has been envisaged by the legislature to empower the Resolution professional, the adjudicating authority (NCLT) or for that matter the appellate authority (NCLAT), to reverse the “commercial decision” of CoC much less of the dissenting financial creditors*

for not supporting the proposed resolution plan. Whereas, from the legislative history there is contra indication that the commercial or business decisions of the financial creditors are not open to any judicial review by the adjudicating authority or the appellate authority.”

(emphasis supplied)

21. Thus, it is clear that the decision of CoC to liquidate the Corporate Debtor without taking any steps for Resolution of the Corporate Debtor is covered under explanation to sub-clause (2) of Section 33 of the I&B Code and the same being decision on commercial wisdom, is non-justiciable given the law laid by Hon'ble Supreme Court of India in case of K. Sashidhar (supra). Thus, it is clear that there is no illegality in the decision of CoC in liquidating the Corporate Debtor before taking any steps for inviting Expression of Interest for submission of Resolution Plan.

22. Therefore, we are of the considered opinion that there is no reason for interference with the impugned order passed by the Adjudicating Authority. Thus, Appeal is dismissed. No order as to costs.

[Justice Jarat Kumar Jain]
Member (Judicial)

[Mr Balvinder Singh]
Member (Technical)

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

NEW DELHI
10th AUGUST, 2020

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