

NATIONAL COMPANY LAW APPELLATE TRIBUNAL**PRINCIPAL BENCH****NEW DELHI****COMPANY APPEAL (AT)(Ins) No.201/2021**

(Arising out of Judgement and order dated 28.01.2021 passed in IA No.846/2020 in CP (IB) No.404/2019 by the learned Adjudicating Authority, National Company Law Tribunal, Ahmedabad Bench, Ahmedabad)

In the matter of:

Mathuraprasad C Pandey
D-1001, Sarthak Tower, Satellite Road,
Ramdevnagar,
Ahmedabad 380015.
Gujarat

Mr. Vrindavan C Pandey,
702, Palmview,
Opp Shobananagar, Vasna Road,
Vadodara 390015
Gujarat

Mr. Hanumanprasad R Pandey,
403, Shayona Apartment -2,
Behind Karanchi Hotel,
Nr. Nathalal Jhagada Bridge,
Maninagar (W), Ahmedabad 380008
Gujarat

Appellant No.2, 3 are represented by Appellant No.1. Appellant

Vs

Partiv Parikh

RP of M.V. Omni Projects (India) Ltd
 9, Vinanti Apartments,
 Panchwati Second Lane,
 Ambawadi,
 Ahmedabad 380006
 Gujarat.

Address for correspondence:
 RBSA Restructuring Advisors LLP,
 911, Venus Atlantis Business Park,
 Anand Nagar Road, Prahaladnagar,
 Ahmedabad 3800015

Committee of Creditors of
 M/s MV Omni Projects (India) Ltd,
 Represented through Lead Banker
 State Bank of India
 Stressed Asset Management Bank,
 2nd floor, Param Siddhi Complex,
 Opp. V.S. Hospital,
 Ellisbridge,
 Ahmedabad 3080006
 Gujarat
 India

Respondent

For Appellant: Mr. Abhijeet Sinha, Mr. Ravi Pahwa and Ms Aastha Mehta, Mr. Aditya Shukla, Ms Prerana Mahapatra, Advocates.

For Respondent: Mr. Karan Valecha, Mr. Jaimin R. Dave, Advocates for R1.

Mr PBA Srinivasan and Mr Parth Tandon, Advocates for R2/CoC.
 Mr. Abhishek Sharma, Advocate for Yes Bank.

With

COMPANY APPEAL (AT)(Ins) No.266/2021

**(Arising out of Judgement and order dated 28.01.2021 passed in
 IA No.846/2020 in CP (IB) No.404/2019 by the learned**

**Adjudicating Authority, National Company Law Tribunal,
Ahmedabad Bench, Ahmedabad)**

In the matter of:

Nandish Patel
9-Kalyhan Society,
Near Nagri Hospital,
Ellisbridge,
Ahmedabad 380006

Appellant

Vs

Partiv Parikh
RP of M.V. Omni Projects (India) Ltd
Address for correspondence:
RBSA Restructuring Advisors LLP,
911, Venus Atlantis Business Park,
Anand Nagar Road, Prahaladnagar,
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Ahmedabad 3080006
Gujarat
India

Axis Bank Ltd,
Trishul,
Law Garden,
Ellisbridge, Ahmedabad 380006

Respondents

For Appellant: Mr. Nandish Patel, Appellant in person.

For Respondent: Mr. Karan Valecha, Mr. Jaimin R. Dave, Advocates for R1.

Mr Abhijeet Sinha, Ms Aastha Mehta Mr Ravi Pahwa, Advocates for R2-4.

Mr PBA Srinivasan and Mr Parth Tandon, Advocates for R5/CoC.

JUDGEMENT
(14th DECEMBER, 2022)

JUSTICE RAKESH KUMAR, MEMBER (JUDICIAL)

As per order dated 01.04.2021 passed in Company Appeal (AT)(Insolvency) No.266/2021, both the appeals were directed to be listed together. Accordingly, both the appeals were heard together on number of dates and finally after conclusion of hearing on

01.09.2022 Judgement was reserved in both the appeals. Learned counsel for the parties were granted liberty to file Notes of Written Submissions within 10 days.

2. Both the appeals have been preferred under Section 61 of the Insolvency & Bankruptcy Code, 2016 (hereinafter referred to as the IBC) against an order dated 28.01.2021 passed in IA No.846/2020 in CP (IB) No.404/2019. By the said order learned Adjudicating Authority, National Company Law Tribunal, Ahmedabad Bench, Ahmedabad (hereinafter referred as NCLT) approved the Resolution Plan dated **22.09.2020 alongwith addendum dated 13.11.2020 filed by the Resolution Professional namely Mr. Partiv Parikh who has been arrayed as Respondent No.1 in both the appeals.**

3. However, while approving the Resolution Plan the learned Adjudicating Authority modified the Resolution Plan to the extent that “if any member of Resolution applicants has entered into or stand as guarantor in the individual capacity, in that event, he shall not be covered with any immunity given under the Resolution Plan.”

4. Company Appeal (AT)(Ins) No.201/2021 has been preferred by successful resolution applicant who were promoters of the Corporate

Debtor. The appellants in Company Appeal (AT)(Ins) No.201/2021 are aggrieved with modification made by the learned Adjudicating Authority which has been done in para 15 of the impugned order. Whereas Company Appeal (AT)(Ins) No.266/2021 has been preferred by an ex employee of the Corporate Debtor who was operational creditor and had filed petition for initiation of Corporate Insolvency Resolution Process (hereinafter referred to as CIRP) against the Corporate Debtor in the present case. The application filed by the appellant under Section 9 of IBC was admitted by the learned Adjudicating Authority in the month of August, 2019.

5. The appellant, Nandish Patel, in Company Appeal (AT)(Ins) No. 266/2021 while appearing in person has assailed the order of the Learned Adjudicating Authority whereby the Resolution Plan submitted by the Appellants in Company Appeal (AT)(Ins) No.201/2021 was allowed. The appellant, Nandish Patel, has assailed the order of the approval of the resolution plan primarily on the ground that the Resolution Plan submitted by appellants M/s Mathura Prasad Pandey & Ors was fit to be rejected since Mathura Prasad had suppressed the material fact and misrepresented that the

Corporate Debtor was Micro, Small and Medium Enterprise (MSME). In sum and substance on the ground of suppression of fact showing Corporate Debtor as MSME the approval was obtained and as such the entire impugned order is liable to be set aside.

6. Since in both the appeals common order has been assailed fact disclosed in one of the appeal i.e. appeal filed by Mathura Prasad would suffice the purpose in deciding the present appeal.

7. The short fact of the case is that the appellant, Nandish Patel, in the capacity of operational creditor filed the application under Section 9 of the IBC Code which was admitted in the month of August, 20196 and Interim Resolution Professional namely Mr. Parthiv Parikh (Hereinafter referred to as IRP) was appointed as IRP. The present Respondent No.1, Mr. Parthiv Parikh was appointed as Resolution Professional by the Adjudicating Authority on 20.01.2020. After number of meetings of Committee of Creditors (hereinafter referred to as CoC) on 7.9.2020 in 14th CoC Meeting Resolution Plan was discussed with clarificatory addendum dated 01.09.2020 which was submitted by the appellant Mr Mathura Prasad Pandey and others, Resolution Plan as per evaluation matrix.

Thereafter the appellant M/s Mathuraprasad and another communicated revised resolution plan which was put on e-voting before the CoC on 19.11.2020 and e-voting concluded on 21.11.2020. In the said e-voting the plan submitted by the appellant M/s Mathura Prasad was approved by 97.79% of CoC. Whereas about 99% voting was made against liquidation of the Corporate Debtor.

8. After approval of the Resolution Plan which was approved by majority of 97.79% on 23.11.2020, RP filed an application under Section 31 of the IBC before the Learned Adjudicating Authority. Finally by the impugned order the Resolution Plan was approved.

9. Even though the Resolution Plan of the Appellant M/s Mathura Prasad and other was approved by the Learned Adjudicating Authority the appellant M/s Mathura Prasad C Pandey being aggrieved by modification in the Resolution Plan in para 15 of the impugned order M/s Mathura Prasad C Pandey has preferred the present appeal. It would be appropriate to reproduce para No.15 of the impugned order as follows:-

*“15. With regard to the **subrogation** (Clause 4 at page No.78 of the application), it is hereby observed that since Resolution Plan is approved by the CoC, they have already dealt with the Guarantee, if any, provided by the Corporate Debtor i.e. before the approval of the Resolution Plan. Hence, are not dealt herein again. **However, if any member of the Resolution Applicant has entered into or stand as Guarantor in individual capacity, in that event, he shall not be covered with any immunity given under the Resolution Plan.***

10. Mr Abhijeet Sinha, learned counsel appearing on behalf of the appellant submits that by making modification in Resolution Plan which was finally approved by more than 97% of majority of CoC, the Learned Adjudicating Authority has committed error. It was argued that time without number it has been held that the approval of the Resolution Plan by the Coc is within commercial wisdom of the CoC and as such the Adjudicating Authority was not having any jurisdiction to modify or alter any of the condition of the Resolution Plan. According to him once the Resolution Plan was in accordance with the provisions contained in Section 31, and Resolution Plan was in accordance with condition as imposed under Section 30 of the IBC

the learned Adjudicating Authority was having no option but to approve the same. He submits that once Resolution Plan approved by the majority of CoC in its commercial wisdom was submitted before the Adjudicating Authority for his approval, the Adjudicating Authority was only required to examine whether the resolution plan was to be approved or rejected. However, the Adjudicating Authority was not justified in putting any modification or alter any condition in the resolution plan. According to Mr. Sinha para 15 of the impugned order is required to be deleted from the impugned order.

11. Mr. Abhijeet Sinha, learned counsel has referred to judgement of Hon'ble Supreme Court reported in 2019 (12) SCC 150 K Sashidhar Vs IOB and others. He has particularly referred to para 62 of the judgement which has been quoted in the Memo of Appeal and is reproduced below:

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 nonperformer or a chronic defaulter. The fact that the concerned corporate debtor 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 the 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 the CoC muchless 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.”

12. Mr. Nandish Patel, the appellant has appeared in person. He has emphasized in his argument that Resolution Plan was not required to be approved by the Adjudicating Authority since RP in connivance with the Corporate Debtor with a view to get the resolution plan approved by the Adjudicating Authority made a false statement as if the Corporate Debtor was MSME. He emphatically argued that while committing fraud and suppressing fact the RP got the resolution plan approved by Adjudicating Authority.

13. To substantiate his submission regarding suppression of fact and misrepresentation by the RP, Mr Patel has argued that the Corporate Debtor suppressing fact has obtained Udhhyog Aadhar to show that it was MSME and on such strength he obtained the certificate as if the Corporate Debtor was MSME. He has referred to number of documents to show that value of the assets of the Corporate Debtor was much beyond the cap of MSME. Of course, Mr. Nandish Patel who was appearing in person has argued on number of dates and referred to number of documents to show that by suppression of fact or misrepresentation depicting the Corporate Debtor as MSME the RP got its resolution plan approved by the

Adjudicating Authority, we think it appropriate not to go into such detail, in view of facts and circumstances which we may deal hereinafter.

14. Besides making oral submissions Mr. Nandish Patel, appellant in Company Appeal (AT)(Ins) No.266/2021 has also filed Notes of Written submissions. The facts disclosed in the written submissions are as follows:

“1.The 'Resolution Plan' of the 'Promoter Directors', was approved vide impugned order dated 28.01.2021 in IA 846 of 2020 in C.P.(LB.) No. 404 of 2019, which enabled illegal back-door entry of the Promoter Directors who were ineligible persons with non-credible background.

It is submitted that the "Resolution Plan' got approved by playing fraud, suppression of material facts and corporate debtor is not 'MSME'.

Aggrieved by the same, the Appellant herein, who is the original applicant of the C.P. (1.B.) No, 404 of 2019 under which the CIRP was conducted, has filed this first statutory appeal to set-aside the impugned order approving the Resolution Plan.

2. WHAT WAS THE FRAUD PLAYED' AND MATERIAL FACTS SUPPRESSED'?

A)The Promoter Directors made fraudulent misrepresentation that the Corporate Debtor (CD) was 'MSME' by submitting an online generated 'Udyog Aadhar Acknowledgement' dated 30.11.2017 with UAM No. GJ01FO086283 (Page-455 of Appeal Memo).

EVIDENCE

The summary of investment in Plant & Machinery as derived from the Balance Sheets of CD, shows that the CD was never a 'MSME' beyond 31.03.2008 (Page-50 of Appeal Memo).

The Promoter Directors (Successful Resolution Applicants) namely Mr. M. C. Pandey & Mr. V. C. Pandey have been signatories of these balance sheets and thereby were aware that the CD was not 'MSME'

OBJECTIVE

This fraud was played to derive benefit of Section 240A of 1&B Code and evade test of provisions of Section 29A(c) & (h). It was withheld from the Hon'ble NCLT that the accounts of CD were already classified as NPA prior to CIRP commencement.

It was also withheld from the Hon'ble NCLT that the State Bank of India alongwith Consortium Bankers had already invoked the guarantees of the Promoter Directors & others and the same remained unpaid in part or full. (Page 21-58 of Rejoinder to R1).

IMPUGNED ORDER / Page-73 of Appeal Memo

As stated in the impugned order, the Hon'ble NCLT has placed reliance on the representation that the CD is 'MSME' and concluded that the Promoter Directors are not debarred (Page-77, 88 of Appeal Memo).

The Hon'ble Supreme Court of India has held in the following judgements:

AV Popayya Sastry and Ors. V. Govt. of A.P. and Ors.(2007) 4 SCC 221, dated 07.03.2007 (Para- 21, 22, 25, 26, 31, 39)

22. It is thus settled proposition of law that a judgement, decree or order obtained by playing fraud on the court, tribunal or authority is a nullity and non est in the eye of the law. Such a judgement, decree or order---by the first court or by the final court--- has to be treated as nullity by every court, superior or inferior. It can be challenged in any Court, at any time, in appeal, revision, writ or even in collateral proceedings.

A Shamugam V. Ariya Kshatriya Rajakula Vamsathu Madalaya Nandhavana Paripalanai Salngam and Ors. (2012) 6 SCC 430, dated 27.04.2012 (Para-43.1 to 43.5).

43.1. It is the bounden duty of the court to uphold the truth and do justice

43.5 It is the bounden obligation of the court to neutralise any unjust and/or undeserved benefit or advantage obtained by abusing the judicial process.

B) Auto computer generated "Udyog Aadhar" Acknowledgement' (GJ01FO086283) dated 30.11.2017 obtained by Promoter Directors by false submissions. Evidence is as below:

The Udyog Aadhar Booklet by Ministry of MSME, Govt. of India categorically clarifies that the UAM is filed on self certification basis and generated instantly through online auto: computer process. It further clarifies that there is no monitoring of the registration process and the enterprise filing the UAN online is liable to provide documentary proof of the information provided (Page-769 of Appeal Memo). It is therefore not a conclusive proof of MSME.

The certificate from the 'MSME commissionerate shows that the investment details, submitted in online system by the CD to generate the 'Udyog Aadhar Acknowledgement' (GJOIF0086283) on 30.11.2017 was Rs. 4.50 Crores and it further states that the CD has not submitted any document in support of the information (Page-34 of Rejoinder to R 2-4),

Investment in Plant & Machinery	Amount as on 30.11.2017	Reference
As submitted on MSME Portal by CD to generate UAM No.GJ01F0086283	Rs.4.50 crores	Page 34 of Rejoinder to R 2-4
As per Balance Sheets	More than Rs.31.27 crores	Page 50 of the Appeal Memo
Criteria as per MSMED Act, 2006 (Type "service", category 'F')	>Rs.2.00 crores and <= Rs.5.00 crores	Page 756 of Appeal Memo

This proves that the said Udyog Aadhar Acknowledgement' (GJ01FO086283) presented by the Promoter Directors was itself generated by fraudulent means and false submissions.

c) Suppression of PUEE Preferential Undervalued, Extortionate, Fraudulent) Transactions of Promoter Directors amounting to Rs. 240.04 Crores

The Forensic/ Transaction Audit Report (Page-334 Type of Transaction of Appeal Memo) and pending adjudication of IA1 Preferential 531 of 2020 filed by RP regarding the PUEF 2. Undervalued Transactions of Promoter Directors was withheld (Page-43 to 47 of Appeal Memo).

<i>Type of Transaction</i>	<i>Amount in Rs</i>
<i>1.Preferential</i>	<i>3.38 crores</i>
<i>2.Undervalued</i>	<i>2.32 crores</i>
<i>3.Defrauding Creditors</i>	<i>234.35 crores</i>
<i>Tota</i>	<i>240.04 crores</i>

The benefit to be derived behind the same was to prevent the bar of Section 29A(g) on Promoter Directors. The RP in his reply has claimed that there is no law that mandates such disclosure by the RP and thereby the RP has admitted to have deliberately withheld this material information from the Hon'ble NCLT (Para-25, Page-13 of Reply by RP (R-1)).

Contraventions to the Provisions of l&B Code & 1BBI Regulations Section 30 sub-clauses 2(), 3 & 6 of l&B Code categorically states that the Resolution Plan presented to COC & Hon'ble NCLT must confirm to criteria set by 1BB. Regulation 39(2) of IBBI Regulations mandated the RP to submit the details of PUEF transactions along with the Resolution Plan. Regulation 39(3) mandated evaluation of the same by COC and to record its deliberations.

The sub-clause 12 of First Schedule [Under Regulation 7(2)(h)] on "Code of Conduct for Insolvency Professionals" in 1BBI Regulations mandated that the RP must not conceal or withhold any material information from the Hon'ble Adjudicating Authority.

The above violation proves that the Resolution Plan submitted to the Hon'ble NCLT was in contravention to the provisions of l&B Code and was not in compliance with the criteria Specified by the Board.

D) Diversion of funds by Promoter Directors vide Saraswat Co-Operative Bank

In IA 846 of 2020, it was withheld from the Hon'ble NCLT, that the State Bank of India had initiated wilful default process against Promoter Director Mr. M. C. Pandey (Page-618 of Appeal Memo). The details of the diversion of funds by the Promoter Directors through Saraswat Co-operative Bank Account was withheld from the Hon'ble

NCLT. (Bank Statement is placed at Page 256-263 of Appeal Memo). Operating such account by Promoter Directors Was in contravention to the terms of Bank lending arrangement (Page-993 of Appeal Memo)

It shows that at a reasonable proximate point of time before the submission of resolution plan, the affairs of the Promoter Director were so arranged, so as to avoid paying off the debts of the CD. Such a person fell afoul behind the intent of Section 29A.

It is submitted that the abovementioned facts primarily demonstrate that the Promoter Directors intentionally with mala fide intent of playing fraud arranged their affairs designedly so as to wriggle out of the provisions of the I&B Code and suppressed the material fact which if disclosed, would have prevented them from submitting the 'Resolution Plan' and their Resolution Plan would not have been approved by CoC and ultimately Hon'ble NCLT.

Reliance is placed on the following judgements of the Hon'ble Supreme Court of India:

On the subject of Suppression of Facts in the Court Proceedings

K. D. Sharma Vs. Steel. Authority of India Ltd. and Ors., (2008) 12 SCC 481, dated 09.07.2008 (Para-38)

Dalip Singh V State of Uttar Pradesh and Ors., (2010) 2 SCC 114, dated 03.12.2009 (Para -1& 2)

On the subject of Section 29A Ineligible Persons and Intent of the Parliament behind Section 29A

Arcelor Mittal India Private Limited V. Satish Kumar Gupta and Ors., (2019) 2 SCC 1, dated 04.10.2018 (Para-59, 60, 84)

Arun Kumar Jagatranmka vs. Jindal Steel and Power Ltd. and Another, 2021 SCC OnLine SC 220, dated 15.03.2021 (Para - 43 to 57, 104)

E) Non-Disclosure & 1-Inclusion of Net Earnings of Rs. 22 Crores of TC Projects in CIRP

The 2 GSRTC Projects were awarded to the CD (Page-893 of Appeal Memo). They were executed through SPVS with other partners in an arrangement as stated in the MOU dated 24.03.2017 (Page-848 of Appeal Memo).

The MOU stated that the CD will get 22/% of Net Profit for both the Projects collectively or Rs. 22 Crores, whichever is higher (Page-853

of Appeal Memo). The Promoter Directors withheld this information about GSRTC Projects as per the affidavit submitted to the RP (Page 28-33 of Reply Affidavit of RP). The said information of Rs. 22 Crores was also withheld from both the Valuers and they assigned 'NIL' value in the Valuation Reports citing that they have not been provided with projections or financial data of the same (Page 283, 325 of the Appeal Memo).

The 'Fair Valuation'" and Liquidation Value' was therefore lowered by Rs. 22 Crores and such lower valuation was tabled before COC (Page-606 of Appeal Memo).

As admitted by RP in his reply, the said projects were also not included in the 'Information Memorandum' which was prepared based on the limited information provided by Promoter Directors inspite of being called upon by RP to provide all information/ material (Page-9 of Reply Affidavit of RP). The above proves that the Promoter Directors withheld/ concealed the said information of Rs. 22 Crores for their exclusive benefit/ diversion & lower the valuation of CD. The CIRP so conducted is thus nullity in the eyes of law.

3. UNDESERVED BENEFITS SECURED BY PROMOTER DIRECTORS BY THIS FRAUD

Debt of Rs. 353.03 Crores including income tax of Rs. 53.18 Crores restructured & wiped off

Evasion of investigation and clawing back of siphoned money & transactions defrauding the creditors amounting to Rs. 240.04 Crores.

Exclusive enjoyment of Rs. 22 Crores from the GSRTC which rightfully belonged to CIRP.

Wrenching back the Corporate Debtor with clean slate

Seeking exoneration of guarantees under Company Appeal (AT)(Ins.) No. 201 of 2021 for self and entire group of guarantors Premium on Fraud.

4. CONCLUSION

The wrong doer Promoter Directors with non-credible background have gained back-door entry in CD by playing fraud. Resolution Plan in Impugned Order dated 28.01.2021 in IA 846 of 2020 is therefore liable to be set aside

15. Learned counsel for the Respondent in Company appeal (AT)(Ins No.266/2021 have argued that the appeal is fit to be rejected primarily on the ground of maintainability. It was argued that appellant himself was employee of the Corporate Debtor and holding high post. In the capacity of Chief Financial Officer of the corporate debtor, even he made correspondence to SBI, one of the major financial creditors and apprised SBI as if the CD was MSME. It has also been argued that even if for the time being it is assumed that earlier the CD was not MSME, however, it is denied, on the date of filing of the resolution application the Corporate Debtor was MSME in view of amendment in Section 7 of MSMED Act, 2006 vide S.O.1762(E) dated 1.7.2020. It has further been argued that the appellant Nindish Patel never raised such issue prior to the approval of the resolution plan by the Adjudicating Authority. Moreover, one IA No.531/2020 was filed questioning the entity of Corporate Debtor as MSME, however, the said application was dismissed by the Adjudicating Authority, of course, after the approval of the resolution plan by the Adjudicating Authority, but the appellant never challenged the said order and as such said order has attained its finality. According to learned counsel for the Respondents the Company Appeal (AT)(Ins) No.201 and 266/2021

appellant with malafide intention has approached this Tribunal by filing the appeal. Accordingly the appeal is liable to be dismissed with exemplary cost.

16. In the present appeal besides making oral submissions Respondent No.1, RP, Respondent No.2-4 and Respondent 5 have filed their separate Notes of Written Submissions. Respondent No.5 is a lead bank namely SBI, major member of CoC. In his written submission following facts have been elaborated.

“1.The present written submissions are being filed in compliance of order dated 01.09.2022 passed in the captioned appeal, and may be considered in addition to the written submissions filed via diary number 29761 dated 16.09.21.

*2.It is false that Resolution Plan of the promoters of CD was approved by way of 'back door entry', as the Resolution Plan was floated before the CoC only on direction of the Adjudicating Authority. **Refer to Para 2.8 of Impugned Order (at Pg. 76 of Appeal)** where it is observed that since no Resolution Plan was approved by the CoC, IA/670/2020 was filed for liquidation, however, Respondent No. 1-3 also filed an application i.e. IA/667/2020 for opposing liquidation as they had submitted revised Resolution Plans. The Bench directed the RP to re-discuss the revised plans and after following necessary procedure, the CoC, after discussing the plans as per the Evaluation Matrix, approved Resolution Plan submitted by Respondent No. 2, Mr. MC Pandey, by a majority of 97.79% **Refer to Para 2.9 of Impugned Order (at the same page).***

3.The Appellant's allegation that MSME certificate was obtained fraudulently is completely bogus and is urged as a mere afterthought, with the sole intention of frustrating the Resolution Plan.

a. Kindly refer to Para 4.8 of IA/846/2020 (Pg. 138 of Appeal) where Appellant stated that during the 4th CoC meeting held on 16.12.2019 the then IRP, Mr. Manish Kumar Bhagat appraised the CoC that promoters are eligible to submit resolution plan in view of the fact that Corporate Debtor is a registered MSME, however, Appellant never raised an objection to the same.

b. Subsequently, Appellant filed IA/44/2019 praying for investigation into alleged fraudulent activities of the Corporate Debtor (**Please see prayer Para 17.1.1 at Pg 887 Vol 2 of Appeal**), however, here also there was no grievance raised regarding the MSME certificate.

c. Kindly note that IA/44/2019 was disposed off vide order dated 06.09.21 (**At Pg. 27 of Appellant's Supplementary Affidavit**), however the same was never challenged. The present appeal is only an attempt to re-agitate the allegation of fraud and the same amounts to forum shopping.

d. The MSME certificate was obtained on 30.11.2017 when the Appellant was the COO and CFO of the Corporate Debtor and was in charge of the Corporate Debtor's affairs. This goes to show that Appellant himself was privy to the grant of MSME certificate, however, never raised any grievance regarding the same, until after Resolution Plan got approved.

e. Appellant, vide communications dated 11.01.2018 and 29.06.2018 (**Annexure 11 at Pg 118 of Additional Affidavit dated 22.08.22. filed on behalf of Respondent 2-4**), wherein he applied to SBI for grant of loan, projected the Corporate Debtor as an "honest" and "transparent" business, however, is now alleging that Corporate Debtor obtained MSME certificate fraudulently. Relevant portion of the communication dated is reproduced below for the sake of ready reference:

*"The situation now has been going worse as none of the government arms has provided us the required resolution or eased our difficulties. We understand that all the policies and frameworks which has been made or implemented by government through its various arms are for the larger good of the nation but due to defaults/wilful wrong doings of certain individuals, **honest businesses like us are suffering who are working transparently for development of the nation at large with all efforts.**" (Refer Pg. 119 3rd Para)*

It is also pertinent to note that the communication is dated 29.06.2018 i.e. less than one year prior Appellant's Section 9 Application. This sudden contradiction in the stand of the Appellant itself shows that the grievance regarding MSME certificate is fabricated for self-serving interests.

*4. Section 29A(b) only disqualifies a person who is a willful defaulter "in accordance with the guidelines of the Reserve Bank of India..." The relevant guidelines are provided in **RBI Master Circular on Wilful Defaulters bearing No.DBR.No.CID.Bc.57/20.16.003/2015-16**, however, Resolution Applicant in the present case has never been declared a Willful Defaulter as per RBI guidelines and none of the procedures mandated the Master Circular by have been initiated against the Resolution Applicant. Consequently, it is stated that Section 29A(b) of IBC is wholly inapplicable qua the Resolution Applicant. The Respondent herein humbly craves leave to place on record RBI Master Circular, annexed herewith as **Annexure R/1**.*

*5. Appellant, in capacity of COO, vide communication dated 27.01.2019 addressed to Respondent No.2 (**placed on record vide the Appellant's Section 9 Application and referred to in Para 9 of admission order dated 29.08.2019 at Pg 121**), suggested disposing the Corporate's Debtor's assets and further to "devise strategies" for alienating assets "against which loans have been defaulted", which patently proves that the intention of the Appellant behind triggering CIRP was not for resolution of the Corporate Debtor, but instead, to liquidate assets of the Corporate Debtor for personal gains. The aforesaid communication shows that even the present Appeal is nothing but an attempt at sabotaging the resolution of the Corporate Debtor and drive it into liquidation. The Respondent herein humbly craves leave to place on record the aforesaid communication dated 27.01.2019, annexed herewith as **Annexure R/2**.*

6. It is vehemently submitted that the present Appeal reeks of mala fides and is in teeth with the spirit and objective of the Insolvency & Bankruptcy Code, 2016 as the intention of the Appellant is to drive the CD into liquidation and consequently, the Appeal ought to be dismissed with exemplary costs."

17. Of course written submissions have been filed by other Respondent also but in view of peculiar facts and circumstances we

are of the view that it is not necessary to reproduce the same. It can be clarified in view of the facts and circumstances which we may deal hereinafter.

18. On examination of Notes of Written Submissions filed on behalf of Respondent No.2 to 4 it is evident that the appellant himself in the capacity of Chief Financial Officer of the CD had addressed letters to the General Manager, State Bank of India, MCRO Branch seeking financial assistance from the State Bank of India for corporate debtor on the basis of the corporate debtor being MSME. Besides aforesaid fact regarding the CD as MSME some more facts have been brought through additional affidavit filed by the Respondent No.2 to 4. Relevant portion of additional affidavit of Respondent No.2 to 4 is reproduced below:

“Without prejudice to the contention that the Corporate Debtor was an MSME, on the date of submission of resolution plan by Respondent Nos.2 to 4, the amendment to the MSMED Act had already come into force. The amendment to the MSMED Act came into force w.e.f. 1.7.2020 and on 2.7.2020 i.e. one day after the amendment came into force, the Respondent Nos 2 to 4 submitted their Resolution Plan. The Respondent Nos 2 to 4

submitted their revised Resolution Plan on 21.9.2020. Thus, without prejudice to the fact that Corporate Debtor was an MSME all throughout, it is an undisputed fact that as on the date of submission of the resolution plan, the Corporate Debtor was an MSME.

19. From the pleadings it is further evident that the Corporate Debtor was a MSME on the date of submission of resolution plan by Respondent No.2 to 4. The amendment to the MSMED Act had already come into force w.e.f. 2.7.2020 and only thereafter Respondent No.2 to 4 had submitted their Resolution Plan and also revised resolution plan. Meaning thereby that at least on the date of filing of the resolution plan the CD was MSME and as such resolution plan was not required to be questioned on the ground that it was not MSME.

20. The appeal by Mr. Nandish Patel has been preferred primarily on the ground as if by suppression of fact or committing fraud the resolution plan was got approved by the Adjudicating Authority. We are of the opinion that if it was the case of the appellant that Adjudicating Authority was misled or before the Adjudicating Authority fraud has been committed, in that event proper course for

the appellant was to approach the same Court for rectification of the order if in the allegation of the appellant there was some substance, since all the materials were available before the Adjudicating Authority to examine the same. Even though his IA was dismissed by the Adjudicating Authority wherein he had raised the issue of MSME, the said order has never been challenged by the appellant and as such at belated stage and that too before the Appellate Tribunal he is not entitled to raise an issue as if fraud was committed before the Adjudicating Authority. On this score alone we are of the opinion that the appeal is fit to be rejected. Accordingly the **Company Appeal (AT)(Ins) No.266/2021 is hereby dismissed without cost.**

21. So far as appeal filed by M/s Mathuraprasad and others i.e. Company Appeal (AT)(Ins) No.201/2021 is concerned before going into the merit it would be appropriate to reproduce Section 31 of the IBC which is as follows:

“31. (1) If the Adjudicating Authority is satisfied that the resolution plan as approved by the committee of creditors under sub-section (4) of section 30 meets the requirements as referred to in sub-section (2) of section 30, it shall by order approve the resolution plan which

shall be binding on the corporate debtor and its employees, members, creditors, including the Central Government, any State Government or any local authority to whom a debt in respect of the payment of dues arising under any law for the time being in force, such as authorities to whom statutory dues are owed, guarantors and other stakeholders involved in the resolution plan.

Provided that the Adjudicating Authority shall, before passing an order for approval of resolution plan under this sub-section, satisfy that the resolution plan has provisions for its effective implementation.

(2) Where the Adjudicating Authority is satisfied that the resolution plan does not conform to the requirements referred to in sub-section (1), it may, by an order, reject the resolution plan.

(3) After the order of approval under sub-section (1),—

(a) the moratorium order passed by the Adjudicating Authority under section 14 shall cease to have effect; and

(b) the resolution professional shall forward all records relating to the conduct of the corporate insolvency resolution process and the resolution plan to the Board to be recorded on its database.

(4) The resolution applicant shall, pursuant to the resolution plan approved under sub-section (1), obtain the necessary approval

required under any law for the time being in force within a period of one year from the date of approval of the resolution plan by the Adjudicating Authority under sub-section (1) or within such period as provided for in such law, whichever is later;

Provided that where the resolution plan contains a provisions for combination, as referred to in section 5 of the Competition Act, 2002 (12 of 2003), the resolution applicant shall obtain the approval of the Competition Commission of India under that Act prior to the approval of such resolution plan by the committee of creditors.”

22. On examination of the aforesaid provisions there is no doubt that if a resolution plan is submitted before the Adjudicating Authority which is in compliance with sub-section (1) of Section 31 as well as in consonance with the provisions of Section 30 of the Code such resolution plan has to be approved by the Adjudicating Authority since in Section 31 word **“shall”** has been incorporated with proviso that the Adjudicating Authority must be satisfied that the resolution plan has provisions for its effective implementation. Sub-section (2) of Section 31 of the IBC further empowers the Adjudicating Authority to reject the resolution plan, if he is satisfied that resolution plan is not in conformity with the requirements as

referred to in sub-section (1) of Section 31 of the IBC. It is clear that mandate of legislation is either to approve the resolution plan or to reject. However, there is no provision for making alteration or modification in the resolution plan. In view of the statutory provisions as contained in Section 31 of the IBC we are satisfied the learned Adjudicating Authority to some extent exceeded its jurisdiction in modifying/altering the conditions in the resolution plan which has been done in para 15 of the impugned order which we have already quoted hereinabove. In such view of the matter the appeal i.e. Company Appeal (AT)(Ins) No.201/2021 can be allowed and it is held that the condition in para 15 of the impugned order shall not be looked into or may not be taken note of.

23. Accordingly the Company Appeal (AT) (Ins) No.201/2021 is allowed and Company Appeal (AT)(Ins) No. 266/2021 is dismissed with no cost.

(Justice Rakesh Kumar)
Member (Judicial)

(Dr. Ashok Kumar Mishra)
Member (Technical)

Bm