

NATIONAL COMPANY LAW APPELLATE TRIBUNAL

PRINCIPAL BENCH

NEW DELHI

COMPANY APPEAL (AT)((INSOLVENCY) NO.165/2022

(Arising out of order dated 04.01.2022 passed by the Adjudicating Authority (National Company Law Tribunal, New Delhi, Bench II) in IA No.3879/2021 in CP (IB) No.197/(ND)/2018).

In the matter of:

Ramesh Kumar Suneja,
S/o Late Shri Sidhu Ram Suneja,
R/o 59-A, Lane C5, Central Avenue,
Sainik Farm, New Delhi-110062.

Appellant

Vs.

1. Pawan Buildwell Pvt Ltd,
Through its Liquidator Shri Arun Chadha,
59-A, Lane C5, Central Avenue,
Sainik Farm, New Delhi-110061.

2. Brij Mohan Sahni, Creditor,
J-511A, Lane W, 16 Western Avenue,
Sainik Farms, New Delhi-110062.

3. Praveen Chawla, Creditor,
H-2295, Sector 28,
Faridabad, Haryana 121008

4. M/s Bajaj Finance Limited, Creditor,
1152, 11th Floor, Aggarwal Metro Heights,
Plot E5,
Netaji Subhash Place,
Pitampura,
New Delhi-110034

.. Respondents

Present:

Mr. Piyush Singh, Mr. Akshay Srivastava and Ms Aditi Sinha, Advocates for Appellant.

Mr. Abhishek Anand, Mr. Tanveer Oberoi and Mr. Samriddh Bindal, Advocates for Respondents.

JUDGEMENT
VIRTUAL MODE

JUSTICE M. VENUGOPAL, MEMBER (J)

BACKGROUND

The Appellant/Promoter/Formal Director of the “Corporate Debtor” has preferred the instant Company Appeal (AT)(Ins) No.165/2022, as against the impugned order dated 04.01.2022 in IA No.3879/2021 in CP(IB)No.197/ND/2018, passed by the ‘Adjudicating Authority’ (National Company Law Tribunal, New Delhi, Court II).

2. The Adjudicating Authority, (National Company Law Tribunal, New Delhi Court II) while passing the impugned order in IA No.3879/2021 in CP(IB) No.197/ND/2018 (Filed by the Applicant/Petitioner) at paragraph 3 to 9 has observed the following:

3. *“Considering the submissions and the averments made in the application, we observe that the vide order dated 30th July, 2021, this Adjudicating Authority has found the ex-Promoters/ex-Directors guilty for the preferential transactions under Section 43 of the IBC, 2016 and passed the following order*

“So far as the transaction of amount of Rs.10,09,360 with Respondent No.5 is concerned, we hold that it is a preferential transaction under Section 43 of the IBC 2016. Therefore, it is admitted fact that the ex-Promoters/Directors held guilty for the preferential transactions under Section 43 of the IBC, 2016.

4. In the course of hearing, Ld. Counsel for the Applicant also submitted that against this order, the Applicant has preferred an appeal before the Hon'ble NCLAT but the said order has not been stayed. Therefore, the order dated 30th July, 2021 is still in operation.

5. In terms of this order, now we consider the submission of the Applicant as well as the decision of the Hon'ble NCLAT in Company Appeal (AT) No.221 of 2018 and the Hon'ble Supreme Court in Civil Appeal No.9664/2019 dated 15.03.2021 relied upon by the Applicant. The relevant paragraphs of Company Appeal (AT) No.221 of 2018 are as follows:

“12. From the aforesaid provision, it is clear that the Promoter, if ineligible under Section 29A cannot make an application for Compromise and Arrangement for taking back the immovable and movable property or actionable claims of the ‘Corporate Debtor’.

13. The National Company Law Tribunal by impugned order dated 15th May, 2018, though ordered to proceed under Section 230 to 232 of the Companies Act, failed to notice that such application was not maintainable at the instance of 1st Respondent-Arun Kumar Jagatramka (Promoter), who was ineligible under Section 29A to be a ‘Resolution Applicant’.

14. For the reasons aforesaid, we set-aside the impugned order dated 15th May, 2018 and remit the case to ‘Liquidator’/ Adjudicating Authority to proceed in terms of the decision of this Appellate Tribunal in Y. Shivram Prasad (supra). The Appeal is allowed with the aforesaid observations and directions. No costs.”

The relevant paragraph of the judgement of the Hon'ble Supreme Court dated 15.03.2021 are as under:

70. An argument has also been advanced by the appellants and the petitioners that attaching the ineligibilities under [Section 29A](#) and Section 35(1)(f) of the IBC to a scheme of compromise and arrangement under [Section 230](#) of the Act of 2013 would be violative of [Article 14](#) of the Constitution as the appellant would be “deemed ineligible” to submit a proposal under [Section 230](#) of the Act of 2013. We find no merit in this contention. As explained above, the stages of submitting a resolution plan, selling assets of a company in liquidation and selling the company as a going concern during liquidation, all indicate that the promoter or those in the management of the company must not be allowed a back-door entry in the company and are hence, ineligible to participate during these stages. Proposing a scheme of compromise or arrangement under [Section 230](#) of the Act of 2013, while the company is undergoing liquidation under the provisions of the IBC lies in a similar continuum. Thus, the prohibitions that apply in the former situations must naturally also attach to the latter to ensure that like situations are treated equally.

91. Based on the above analysis, we find that the prohibition placed by the Parliament in [Section 29A](#) and Section 35(1)(f) of the IBC must also attach itself to a scheme of compromise or arrangement under [Section 230](#) of the Act of 2013, when the company is undergoing liquidation under the auspices of the IBC. As such, Regulation 2B of the Liquidation Process Regulations, specifically the proviso to Regulation 2B(1), is also constitutionally valid. For the above reasons, we have

come to the conclusion that there is no merit in the appeals and the writ petition. The civil appeals and writ petition are accordingly dismissed.”

9. At this juncture, we also refer to Regulation 2(B)(1) of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016, which is quoted below:

“2B. Compromise or arrangement.

(1) Where a compromise or arrangement is proposed under section 230 of the Companies Act, 2013 (18 of 2013), it shall be completed within ninety days of the order of liquidation under sub-sections (1) and (4) of section 33. 6

[(Provided that a person, who is not eligible under the Code to submit a resolution plan for insolvency resolution of the corporate debtor, shall not be a party in any manner to such compromise or arrangement.)]”

(2)

(3)

9. *Considering the decisions referred supra, we are of the considered view, that in terms of Section 29A (g) of the IBC 2016 and Regulation 2(B)(1) of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 the Applicant is not eligible to file any application under Sections 230-232 of the Companies Act. Hence, we are not inclined to allow the prayer of the Applicant.*

and dismissed the interlocutory application.”

APPELLANT’S CONTENTIONS:

3. The Learned Counsel for the Appellant submits that the 'Adjudicating Authority' had erroneously dismissed the I.A. No. 3879 of 2021 in C.P.(IB) No. 197/ND/2018 on 04.01.2022 without appreciating the fact the 'Liquidator' had in the teeth of the Order dated 08.01.2021 had wrongly convinced the 'Meeting of Creditors' as the 4th Respondent was wrongly and purposefully excluded from the 'Meeting of the Creditors'.

4. The Learned Counsel for the Appellant contends that the 'Adjudicating Authority' had failed to take note of a prime fact that this 'Appellate Tribunal' through an order dated 20.10.2020 in Company Appeal (AT)(INS) No. 915/2020 in the matter of **'Ramesh Kumar Suneja Vs. Pawan Buildwell Pvt. Ltd. & Ors.'** had granted liberty to the 'Appellant', to take recourse under Section 230 of Company's Act, 2013 with a view to settle the claims/dues of Creditors.

5. The Learned Counsel for the Appellant comes with a plea that the impugned order had failed to consider the fact that the 'Appellant' was seeking a direction to convene a meeting of 'All the Creditors and not Selective Creditors' in the light of the order dated 08.07.2021.

6. The Learned Counsel for the Appellant points out that the impugned order had failed to take into account the fact that the Meeting of the Creditors had not taken place in accordance with law and in the light of the directions of the 'Adjudicating Authority'.

7. The Learned Counsel for the Appellant adverts to the fact that the 'Adjudicating Authority' had failed to bear in mind that every endeavour is to be made to revive the concerned 'Corporate Debtor' and to make it as a 'going concern' and liquidation should be the last resort.

8. The Learned Counsel for the Appellant projects an argument that the impugned order proceeds in a wrong misconception of law that the 'Appellant' was barred to place to 'Scheme of Compromise'. In fact, the Learned Counsel for the Appellant points out that the question whether the 'Appellant' was barred or not has not arisen in the Interlocutory Application, dismissal order passed by the 'Adjudicating Authority'.

9. The Learned Counsel for the Appellant contends that the Judgment of Hon'ble Supreme Court in ***Arun Kumar Jagatramka V. Jindal Steel and Power Ltd. & Anr reported in (2021) 7 SCC 474*** does not apply to the facts of the present case.

10. The Learned Counsel for the Appellant prays for allowing the instant Appeal by setting aside the impugned order passed by the 'Adjudicating Authority' (National Company Law Tribunal, New Delhi, Bench-II).

THE FIRST RESPONDENT'S SUBMISSIONS:

11. The Learned Counsel for the 1st Respondent contends that the Applition I.A. No. 3879 of 2021 in IB NO. 197(ND)/2018 was filed by one Brij Mohan Sahni (Applicant/Petitioner before the 'Adjudicating Authority against the 1st Respondent/Pawan Buildwell Private Limited wherein a direction was sought to be issued to the "Liquidator" to convene the meeting of the Creditors (inclusive of all the Creditors i.e. Respondent NO. 2 and place before the 'Scheme of Compromise/Settlement' for their consideration.

12. According to the Learned Counsel for the 1st Respondent, the 'Adjudicating Authority' on 05.02.2020 had passed the 'Order of Liquidation' under Section 33 of the I & B Code, 2016.

13. On behalf of the 1st Respondent, it is projected before this 'Tribunal' that in Company Appeal (AT)(INS) No. 915/2020, (filed by the present Appellant) on 20.10.2020, this 'Tribunal' at paragraphs 3 & 4 had observed the following:

3. "Shri Piyush Singh, learned counsel representing the Appellant submits that Corporate Debtor is prepared to settle the claims of the Creditors. If that be the case, the Corporate Debtor can take resort to provisions of Section 230 of the Companies Act, 2013 even at the liquidation stage by floating Settlement Plan/ Scheme/ Compromise.

4. Keeping in view that submission made by learned counsel for the Appellant and the fact that the Corporate Debtor intends to settle with the Creditors, we dismiss the instant appeal with observation that the dismissal this appeal shall not preclude the Corporate Debtor from advancing proposal or floating a scheme/ settlement in terms of aforesaid provision."

and dismissed the 'Appeal'.

14. The Learned Counsel for the 1st Respondent brings it to the notice of this 'Tribunal' that the 'Appellant' filed I.A. No. 4937 of 2020 before the 'Adjudicating Authority' for a Meeting of Creditors and liberty to be granted to the Appellant to place a 'Scheme of Compromise' before the Creditors and that the Application was opposed by the 1st Respondent because of the fact that a proposal given by the 'Appellant' were not in accordance with law. As a matter of fact, the 'Adjudicating Authority', without going into the merits, through an order dated 08.07.2021 had directed the 1st Respondent to place the matter before the Creditors for consideration. In reality, the 1st Respondent convened a Meeting on 28.07.2021 on which date the Appellant's Scheme was rejected.

15. The Learned Counsel for the 1st Respondent points out that in the interregnum, the 'Adjudicating Authority', through an order dated 30.07.2021 had

decided the I.A. No. 2499 of 2020 filed by the 1st Respondent and held the Appellant 'guilty of preferential transaction' under Section 43 of the I & B Code, 2016. The Appellant had assailed the order dated 30.07.2021 before this 'Tribunal' in Company Appeal(AT)(INS) No. 748 of 2021 and by an order dated 16.09.2021, a 'Notice' was issued on the 'Appeal', but no stay was granted of the order dated 30.07.2021

16. The Learned Counsel for the 1st Respondent points out that I.A. No. 3879 of 2021 in IB 197/ND/2018 was filed before the 'Adjudicating Authority' by the Applicant/Petitioner (Brij Mohan Sahni) seeking to re-convene the Meeting of Creditors to consider the Appellant's Scheme afresh and the said Application on 04.01.2022 by the 'Adjudicating Authority' who held the 'Appellant' being ineligible to submit a 'Scheme' in the light of order dated 30.07.2021 in I.A. No. 2499 of 2020 (filed by the 1st Respondent), in and by which, the 'Appellant' was found guilty of undertaking 'Preferential Transaction' under Section 43 of the I & B. Code. In fact the 'Statutory Bar' under Regulation 2B of the IBBI (Liquidation Process, Regulation 2016) read with Section 21(g) of the Code is applicable and will disqualify 'Appellant' for submitting a 'Scheme of Compromise'

17. The Learned Counsel for the 1st Respondent adverts to the Regulation 2B 'Compromise or arrangement of the IBBI (Liquidation Process) Regulations, 2016 read with Section 29 A of the I & B Code 'persons not eligible to be Resolution Applicant which run as under:

2B 'Compromise or arrangement

(1) Where a compromise or arrangement is proposed under Section 230 of the Companies Act, 2013 (18 of 2018), it shall be completed within ninety days of the order of liquidation under sub-section (1) and (4) of section 33:

[Provided that a person, who is not eligible under the Code to submit a resolution plan for insolvency resolution of the

corporate debtor, shall not be a party in any manner to such compromise or arrangement]

Section 29A of the I & B Code, 2016

*29A. 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—
[..]*

(g) has been a promoter or in the management or control of a corporate debtor in which a preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction has taken place and in respect of which an order has been made by the Adjudicating Authority under this Code

Provided that this clause shall not apply if a preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction has taken place prior to the acquisition of the corporate debtor by the resolution applicant pursuant to a resolution plan approved under this Code or pursuant to a scheme or plan approved by a financial sector regulator or a court, and such resolution applicant has not otherwise contributed to the preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction;

18. The Learned Counsel for the 1st Respondent adverts to the decision of the Hon'ble Supreme Court in ***Arun Kumar Jagatramka v. Jindal Steel and Power Ltd. & Anr. Reported in 2021) 7 SCC 474*** and points out that the Constitution validity of the disqualification under Regulation 2B was upheld and in this connection refers to paragraphs 90 & 97 of the said Judgment which run as under:

90. “ The principal ground of challenge to Regulation 2B is that the regulation transgressed the authority of IBBI by introducing a

disqualification or ineligibility in regard to the presentation of an application for a scheme of compromise or arrangement under Section 230 of the Act of 2013. It has been urged that IBBI, is an entity constituted by the IBC, had no statutory jurisdiction to amend the provision of Section 230 of the Act of 2013 or to impose a restriction which operates under the purview of Section 230. The position in our view can be considered from two perspectives, independent of the provisions of Regulation 2B. We have indicated in the discussion earlier that even in the absence of the Regulation 2B, a person ineligible under Section 29A read with Section 35(1)(f) is not permitted to propose a scheme for revival under Section 230, in the case of a company which is undergoing a liquidation under the IBC. We have come to the conclusion, as noted for the reasons indicated earlier, that in the case of a company which is undergoing liquidation pursuant to the provision of Chapter III of the IBC, a scheme of compromise or arrangement proposed under Section 230 is a facet of the liquidation process. The object of the scheme of compromise or arrangement is to revive the company. The principle was enunciated in the decision in *Meghal Hones (supra)* while construing the provisions of erstwhile Section 391. The same rationale which permeates the resolution process under Chapter II (by virtue of the provisions of Section 29A) permeates the liquidation process under Chapter II (by virtue of the provisions of Section 35(1)(f)). That being the position, there can be no manner of doubt that the proviso to Regulation 2B is clarificatory in nature. Even absent the proviso, a person who is ineligible under Section 29A would not be permitted to propose a compromise or arrangement under Section 230 of the Act of 2013. We therefore do not find any merit in the challenge to the validity of Regulation 2B.

[...]

F Conclusion

97. Based on the above analysis, we find that the prohibition placed by the Parliament in Section 29A and Section 35(1)(f) of the IBC must also attach itself to a scheme of compromise or arrangement under Section 230 of the Act of 2013, when the company is undergoing

liquidation under the auspices of the IBC. As such, Regulation 2B of the Liquidation Process Regulations, specifically the proviso to Regulation 2B(1), is also constitutionally valid. For the above reasons, we have come to the conclusion that there is no merit in the appeals and the writ petition. The Civil appeals and writ petition are accordingly dismissed.

19. The Learned Counsel for the 1st Respondent advances an argument that the Law is well settled by now that if a person is ineligible under Section 29A of the I & B Code, 2016 to submit a Resolution Plan during the stage of ‘Corporate Insolvency Resolution Process’, the same rationale will apply even during the submission of a Scheme under Section 230 of the Companies Act, 2013 under Chapter III [by virtue of the provisions of Section 35(1)(f)] read with Regulation 2B of the Liquidation Process Regulation.

DISCUSSIONS:

20. It is to be point out that Section 29A (c) of the I & B Code, 2016 relates to ‘persons not eligible to be Resolution Applicant’ and in fact, the Code has bifurcated such persons into two groups as seen sub clauses (c) & (g) of Section 29A of the I & B Code, 2016. Moreover, if an individual was a promoter/in the management, or control of a ‘Corporate Debtor’, in which a preferential transaction, undervalue transaction and extortionate credit transaction or a fraudulent transaction had taken place and in respect of which an Order was passed by the ‘Adjudicating Authority’ in terms of the I & B Code, 2016, such person was ineligible to submit a Resolution Plant under 29A (g) of the Code. In effect, only such individuals who do not come under sub-clause (g) of Section 29A of the I & B Code, 2016, are eligible to furnish Resolution Plan under (c) of Section 29A, if they happen to be individuals, who are in the erstwhile management or control of the ‘Corporate Debtor’, as per decision of

the Hon'ble Supreme Court in ***Arcelormittal India Private Limited V. Satish Kumar Gupta***, reported in (2018) 146 CLA 293 (SC).

21. As far as the present case is concerned, even though in I.A. NO. 387/2021 in IB 197(ND) 2018 before the 'Adjudicating Authority' [National Company Law Tribunal, New Delhi Court II], the Applicant/Petitioner had sought a direction to be issued to the 'Liquidator to convene the Meeting of the Creditors (inclusive of all the Creditors i.e., "Respondent No. 2) and place before them the 'Scheme of Compromise/Settlement' for their consideration', this 'Tribunal' taking note of the fact that if the Promoter is ineligible under Section 29A of I & B Code, 2016 cannot make an Application for 'Compromise and Arrangement' for taking the immovable property and actionable claim of the 'Corporate Debtor' coupled with Regulation 2B(1) of the Insolvency of Bankruptcy Board of India (Liquidation Process) Regulations 2016 comes to a resultant conclusion that the Applicant in I.A. No. 387/2021 in IB 197(ND) 2018 before the 'Adjudicating Authority' is ineligible to prefer an Application under Section 230-232 of the Companies Act, 2013 and viewed in that perspective, the impugned order of dismissal passed by the 'Adjudicating Authority' in I.A. No. 387/2021 in IB No. 197(ND) 2018 does not suffer from any material irregularity or patent illegality in the eye of law. Consequently, the Appeal fails.

CONCLUSION:

22. In fine, the Company Appeal (AT)(INS) No. 165 of 2022 is dismissed. No costs. I.A. No. 472/2022 (seeking exemption from filing the true typed/clear/original/legible copies of Annexures etc.) is closed.

(Justice M. Venugopal)
Member (Judicial)

(Dr. Ashok Kumar Mishra)
Member (Technical)

22nd February, 2022

Bm/akc