

NATIONAL COMPANY LAW APPELLATE TRIBUNAL AT CHENNAI
(APPELLATE JURISDICTION)

Company Appeal (AT) (CH) (INS) No. 98 of 2022
(Under Section 61 of the Insolvency and Bankruptcy Code, 2016)
(Arising out of the Order dated 01.02.2022 passed in IA/971//2021 in
IBA/1099/2019 passed by the Adjudicating Authority,
National Company Law Tribunal, Division Bench-II, Chennai)

In the matter of:

Veeral Controls Pvt. Ltd.

...Appellant

B-29, G.I.D.C. Electronics Estate,
Gandhinagar,
Gujarat – 382044

V

1. M/s. Regen Powertech Pvt. Ltd.

...Respondent No.1

Sivanandam, 1st Floor, New No.1, Pulla Avenue,
Shenoy Nagar, Chennai 600 030.

2. Mr. Ebeneze Inbaraj,

...Respondent No.2

Resolution Professional of Respondent No.1
No.397, Precision Plaza, No.23, Third Floor,
Anna Salai, Teynampet,
Chennai - 600 018.

Present:

For Appellant/Operational
Creditor

: Mr. K. Gaurav Kumar,
Practising Company Secretary

For RP/Caveator

: Mr. P.H. Arvindh Pandian, Sr. Advocate,
For A.G. Sathyanarayana, Advocate

JUDGMENT
(VIRTUAL MODE)

Justice M. Venugopal, Member (Judicial)

Heard Mr. K. Gaurav Kumar, Practising Company Secretary, appearing for the 'Appellant'.

1. According to the 'Appellant'/'Applicant' the instant Company Appeal (AT)(CH)((INS) 98 of 2022 is filed by it, being aggrieved against the 'Impugned Order' dated 01.02.2022 in IA/971/IB/2021 in IBA/1099/2019 passed by the 'Adjudicating Authority' [National Company Law Tribunal, Division Bench-II, Chennai].

2. The 'Adjudicating Authority' [National Company Law Tribunal, Division Bench-II, Chennai] while passing the 'Impugned Order' dated 01.02.2022 in IA/971/IB/2021 in IBA/1099/2019 at paragraph Nos.6 to 7 had observed the following:

6. "We have heard the submissions made by the Learned Counsel for the parties. At the first instance, the Applicant herein is not entitled to file an Application seeking replacement of RP since such a provision for replacement of RP has been envisaged only under Section 22 and 27 of IBC, 2016. Secondly, the MA/96/2019 which is relied on by the Applicant in the present case came to be dismissed by this Tribunal vide an order dated 11.01.2022 and also the order dated 20.02.2019 passed by this Tribunal was also stayed by the Hon'ble High Court of Madras. Further, it has been time and again held by the Hon'ble Appellate Tribunal that this Adjudicating Authority cannot enforce disciplinary proceedings against the IRP/RP and

only IBBI would be the competent authority to initiate disciplinary proceedings against the IRP/RP.

7. Further, Section 217 of the IBC empowers a person aggrieved by the functioning of an RP to file a complaint to the IBBI. If the IBBI believes on the receipt of the complaint that any RP has contravened the provisions of IBC, or the rules, regulations or directions issued by the IBBI, it can, under Section 218 of the IBC, direct an inspection or investigation. Under Section 220 of the IBC, IBBI can constitute a disciplinary committee to consider the report submitted by the investigating authority. If the disciplinary committee is satisfied that sufficient cause exists, it can impose a penalty.”

and resultantly dismissed the Application filed by the ‘Applicant’/‘Appellant’ for changing the ‘Resolution Professional’ as ‘not maintainable’ and ‘devoid of merits’.

3. Assailing the legality, validity and propriety the ‘impugned Order’ dated 01.02.2022 in IA/971/IB/2020 in IBA/1099/2019 passed by the ‘Adjudicating Authority’ [National Company Law Tribunal, Division Bench-II, Chennai], the Practising Company Secretary Mr.Gaurav Kumar, for the ‘Appellant’/‘Applicant’ submits that the ‘Impugned Order’ is palpably wrong and an incorrect one in the eye of ‘Law’ because of the simple fact that the ‘Adjudicating Authority’ had committed an error in not appreciating the well laid down principles under the I&B Code, 2016.

4. Advancing his argument, the Practising Company Secretary, Mr.Gaurav Kumar points out that the ‘Appellant’/‘Applicant’ is an ‘Operational

Creditor’ of 1st Respondent/M/s. Regen Powertech Private Limited which was admitted into ‘Insolvency’ as per Order dated 13.12.2019 in IBA/1099/2019.

5. It is the stand of the ‘Appellant’ that the 2nd Respondent was appointed as an ‘Interim Resolution Professional’ and later, as the ‘Resolution Professional’ of the 1st Respondent/Company.

6. On behalf of the ‘Appellant’/‘Applicant’, it is brought to the notice of this ‘Tribunal’ that the ‘Appellant’/‘Applicant’ filed IA/971/IB/2020 in IBA/1099/2019 before the ‘Adjudicating Authority’ [under Section 27 Read With Section 60(5) of the I&B Code, 2016] praying for the following reliefs:-

- (1) “To remove and replace the 2nd Respondent as ‘Resolution Professional’ of 1st Respondent immediately, on account of ‘suppression of facts’ about the Contempt Proceedings”
- (2) “To report to the Insolvency Bankruptcy Board of India with reference to the conduct of the ‘Resolution Professional’ and to stay the frivolous Arbitration Proceedings at Madras High Court filed by the Respondents and for the imposition of costs’.

7. It transpires that the ‘Appellant’/‘Applicant’ had lodged a claim with the 2nd Respondent for the outstanding dues, in respect of the goods supplied to the 1st Respondent for a sum of Rs.2,83,67,286/- only and that the ‘Resolution Professional’/‘2nd Respondent’ had admitted the claim of the ‘Appellant’ amounting to Rs.2,83,67,289/-. Further, prior to the admission under ‘CIRP’, the 1st Respondent had filed a Petition before the Hon’ble Madras High Court for the

purpose of reinstatement of ‘Arbitration’ proceedings in ‘Application No.578/2019, Application No.579/2019 in OA No.72/2019 and OA No.73/2019, which took place, after the outstanding claim of the Applicant/Appellant was admitted by the ‘Resolution Professional’/‘2nd Respondent’.

8. It is the stand of the ‘Appellant’/‘Applicant’ that the Resolution Professional/2nd Respondent is undergoing ‘Contempt Proceedings’ for a deliberate and wilful disobedience of the order passed by the Hon’ble Bench and the same is pending as on date, relating to the Contempt of Court Act, 1971 in MA/39/2019, the Contempt Proceedings was filed through MA/96/2019.

9. It is represented on behalf of the ‘Appellant’/‘Applicant’ that the copy of the Order dated 06.02.2019 passed in ‘Contempt Proceedings’ in MA/96/2019 shows that the ‘Adjudicating Authority’ had made certain observations and held that the Act of the ‘Resolution Professional’/2nd Respondent was contumacious one and the same is reproduced for favour of ready reference.

*“It is apparent from the order dated 28.01.2019 passed by this Authority that the order was comprehensive, unambiguous and clear in directing the respondents to conduct the CoC meeting and re-consider the proposal that has been given by the Applicant by providing him the opportunity of being heard. **Despite this, the Resolution Professional/1st Respondent viz., Mr.Ebenazar Inbaraj did not conduct the meeting as directed and wilfully and knowingly disobeyed the orders of this Authority thereby has***

conducted himself in the most reprehensible and unbecoming manner showing scant regard to the order of this Adjudicating Authority which conduct on the part of Mr.Ebenazar Inbraj is palpably, manifestly and gravely contumacious and makes him liable to be dealt with in accordance with the law.”

10. It is the case of the ‘Appellant’ that the Resolution Professional fails the first test mentioned in Clause 4 sub clause (g) of the IBBI (Insolvency Professionals) Regulations, 2016 for the purpose of continuing as a ‘Resolution Professional’ and that the ‘parameters of integrity’, ‘absence of convictions’ and competence clearly shows the incapability of the ‘Resolution Professional’ to be eligible, to be the No.1 place.

11. The clear cut stand of the ‘Appellant’/‘Applicant’ is that the ‘Insolvency Resolution Professional’ is to maintain integrity by being honest, straight forward, forthright in all his professional relationships and that the ‘Insolvency Resolution Professional’ is not to misrepresent any fact situation and refrain himself from being involved in any act that would bring disrepute to him.

12. It is projected on the side of the ‘Appellant’ that the ‘Resolution Professional’/2nd Respondent is in complete breach of the ‘Code of Conduct’ prescribed for the ‘Resolution Professionals’ has acted thereby failed to match the test of integrity, transparency, etc., which establishes that the ‘Resolution Professional’ is not in a ‘state’ to come to a proper decision regarding the matter.

Replacement of Resolution Professional:

13. Section 27 of the I&B Code, 2016 enjoins that a 'Resolution Professional' may be replaced at any time, during 'CIRP' by the 'Committee of Creditors' with a 60% majority of voting shares subject to the written 'consent' purported 'Resolution Professional'. A 'Corporate Debtor' may have initiated CIRP and may have appointed the 'Resolution Professional' of their choice. The fact of the matter is that the 'Committee of Creditors' do have the right to replace such 'Resolution Professional' when they suspected collusion between the 'Resolution Professional' and the 'Management'.

14. If the 'Resolution Professional' is required to be replaced by the 'Committee of Creditors' the 'Adjudicating Authority' is bound to consider the name proposed by the 'Committee of Creditors'. However, if any name is proposed by the 'Committee of Creditors', the 'Adjudicating Authority' may call for a name from the IBBI until a replacement of 'Resolution Professional' is appointed. The 'Adjudicating Authority' may ask the name of Resolution Professional/IRP to function for the purpose of ensuring the smooth functioning of 'Resolution Process'.

IBBI [GRIEVANCES AND COMPLAINT HANDLING PROCEDURE REGULATION, 2017]

15. It is to be remembered that a ‘stakeholder’ in the ‘Insolvency’ may file a complaint against the ‘Resolution Professional’ or a ‘Liquidator’ mentioning the details of the ‘conduct’ that forms the foundation of a ‘complaint’, details of loss suffered, the causative link between the ‘conduct’ and the loss suffered and the relief sought for.

16. The Regulation 2(j) of the above Regulation defines the ‘Stakeholder’ as ‘Debtor’, ‘Creditor’, ‘Claimant’, ‘Service Provider’, ‘Resolution Applicant’, any person having interest in ‘Insolvency’, ‘Liquidation’, ‘Voluntary Liquidation’ or ‘Bankruptcy Transaction’ under the Code.

JURISDICTION OF ADJUDICATING AUTHORITY:

17. Section 60(5) of the I&B Code, 2016 showers jurisdiction upon the ‘Adjudicating Authority’ to decide the ‘questions of priority’, ‘issue of law’ or facts emanating out of or in relation to the ‘Insolvency Regulation’.

18. Section 60(5) of the I&B Code, 2016 is not of pervasive Section conferring jurisdiction upon the ‘Adjudicating Authority’ to determine any question relating to the ‘Corporate Debtor’ in relation to the ‘Insolvency Regulation’.

19. The ‘Adjudicating Authority’ is to adhere to the procedural aspects, while determining the question of priorities, ‘question of law’ and facts, arising out of an order, of course, depending on the issue involved.

20. In fact, the ‘Appellant’/‘Applicant’ in IA/971/IB/2021 in IBA/1099/2019 had prayed for the removal and replacement of the 2nd Respondent as ‘Resolution Professional’ of the 1st Respondent immediately on account of suppression of facts about the ‘Contempt Proceedings’ and to report to the IBBI relating to the conduct of the ‘Resolution Professional’ and to state a frivolous ‘Arbitration Proceedings’ at Madras High Court filed by the ‘Respondent’.

21. It comes to be known that the ‘Appellant’/‘Applicant’ had filed IA/971/IB/2021 in IBA/1099/2019 under Section 27 read with Section 60(5) of the Insolvency and Bankruptcy Code, 2016. In this connection, on the part of the ‘Appellant’ it is pointed out that the ‘Adjudicating Authority’ [National Company Law Tribunal, Division Bench-II, Chennai] in MA/96/2019 in MA/39/2019 in CP/540/2018 on 06.02.2019, at paragraph Nos.4 and 5 had observed the following:

4. *“It is apparent from the order dated 28.01.2019 passed by this Authority that the order was comprehensive, unambiguous and clear in directing the respondents to conduct the CoC meeting and re-consider the proposal that has been given by the Applicant by providing him the opportunity of being heard. Despite this, the Resolution Professional/1st Respondent viz. Mr.*
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Ebenazar Inbaraj did not conduct the meeting as directed and wilfully and knowingly disobeyed the orders of this Authority thereby has conducted himself in the most reprehensible and unbecoming manner showing scant regard to the orders of this Adjudicating Authority which conduct on the part of Mr. Ebenazar Inbaraj is palpably, manifestly and gravely contumacious and makes him liable to be dealt with in accordance with the law.

5. In view of the above, I hereby in exercise of the powers conferred under Section 425 of the Companies Act, 2013 read with Section 12 of the Contempt of the Courts Act, 1971, issue notice to the Resolution Professional/1st Respondent viz. Mr. Ebenazar Inbaraj to show cause as to why he should not be prosecuted for committing contempt of this Tribunal under the contempt of the Courts Act, 1971 and direct him to file the explanation in the shape of an Affidavit within two weeks.”

and is directed to ‘List’ the matter on 22.02.2019 at 10.30.A.M.

22. It is not out of place for this ‘Tribunal’ to make a pertinent mention that Section 27 of the I&B Code, 2016 under the caption ‘Replacement’ of Resolution Professional by ‘Committee of Creditors’ enjoins ‘Replacement of Resolution Professional’ by the ‘Committee of Creditors’, and the same reads as under:-

27. “Replacement of resolution professional by committee of creditors.

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(1) Where, at any time during the corporate insolvency resolution process, the committee of creditors is of the opinion that a resolution professional appointed under section 22 is required to be replaced, it may replace him

with another resolution professional in the manner provided under this Section.

Substituted by Act 26 of 2018, S. 20, for sub-S. (2) (w.r.e.f. 6-6-2018). (2) The Committee of Creditors may, at a meeting, by a vote of sixty-six per cent of voting shares, resolve to replace the resolution professional appointed under section 22 with another resolution professional, subject to a written consent from the proposed resolution professional in the specified form.]

(3) The committee of creditors shall forward the name of the insolvency professional proposed by them to the Adjudicating Authority.

(4) The Adjudicating Authority shall forward the name of the proposed resolution professional to the Board for its confirmation and a resolution professional shall be appointed in the same manner as laid down in section 16.

(5) Where any disciplinary proceedings are pending against the proposed resolution professional under sub-section (3), the resolution professional appointed under Section 22 shall continue till the appointment of another resolution professional under this section.”

23. Besides the above, the ‘Appellant’/‘Applicant’ also bank upon Section 60(5) of the Code under the caption ‘Adjudicating Authority’ for ‘Corporate Persons’ and the same is as under:

(5) “Notwithstanding anything to the contrary contained in any other law for the time being in force, the National Company Law Tribunal shall have jurisdiction to entertain or dispose of –

(a) any application or proceeding by or against the corporate debtor or corporate person;

(b) any claim made by or against the corporate debtor or corporate person, including claims by or against any of its subsidiaries situated in India; and

(c) any question of priorities or any question of law or facts arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under this Code.

(6) Notwithstanding anything contained in the Limitation Act, 1963 (36 of 1963) or in any other law for the time being in force, in computing the period of limitation specified for any suit or application by or against a corporate debtor for which an order of moratorium has been made under this Part, the period during which such moratorium is in place shall be excluded.

61. Appeals and Appellate Authority. – (1) Notwithstanding, anything to the contrary contained under the Companies Act, 2013 (18 of 2013), any person aggrieved by the order of the Adjudicating Authority under this part may prefer an appeal to the National Company Law Appellate Tribunal/.

(2) Every appeal under sub-section (1) shall be filed within thirty days before the National Company Law Appellate Tribunal;

Provided that the National Company Law Appellate Tribunal may allow an appeal to be filed after the expiry of the said period of thirty days if it is satisfied that there was sufficient cause for not filing the appeal but such period shall not exceed fifteen days.

(3) An appeal against an order approving a resolution plan under section 31 may be filed on the following grounds, namely:-

(i) the approved resolution plan is in contravention of the provision of any law for the time being in force;

(ii) there has been material irregularity in exercise of the powers in the resolution professional during the corporate insolvency resolution period;

(iii) the debts owed to operational creditors of the corporate debtor have not been provided for in the resolution plan in the manner specified by the Board;

(iv) the insolvency resolution process costs have not been provided for repayment in priority to all other debts; or

(v) the resolution plan does not comply with any other criteria specified by the Board.

(4) An appeal against a liquidation order passed under Section 33 may be filed on grounds of material irregularity or fraud committed in relation to such a liquidation order.”

24. Although, an emphatic argument is projected on the side of the ‘Appellant’/‘Applicant’ that the ‘Appellant’/‘Applicant’ is empowered to prefer an ‘Application’ under Section 27 Read with Section 60 (5) of the I&B Code, 2016 this ‘Tribunal’ is of the considered view that the ‘Appellant’/‘Applicant’ is not showered with any ‘Locus’ to prefer an ‘Application’ praying for ‘Displacement’/‘Replacement’ of the ‘Resolution Professional’. In fact, Section 27 speaks of ‘Replacement’ of ‘Resolution Professional’ by the ‘Committee of Creditors’.

25. In reality, Section 60(5) deals with ‘Question of Priority’ or ‘Question of fact’ relating to the I&B Code. When there is an express Provision namely Section 27 of the Code, which unerringly deals with ‘Replacement of Resolution Professional by the Committee of Creditors’, then, the same is to be followed/adhered to by the ‘Litigant’/‘Stakeholders’ and others connected with the I&B Code. In this regard, this ‘Tribunal’ is not accepting the submission made on behalf of the ‘Appellant’/‘Applicant’ that the ‘Appellant’/‘Applicant’ is entitled to file an ‘Application under Section 27 read with 60(b) of the Code, because of the fact that Section 27 of Code does not speak of ‘any person’ other than the ‘Replacement’ of ‘Resolution Professional’ by the ‘Committee of Creditors’. Suffice, it for this ‘Tribunal’ to point out that the ingredients of Section 27(1) of the Code are ‘self-explanatory’ and admits of no exception.

26. Section 27 of the I&B Code deals with complaints against ‘Insolvency Professional Agency’ or its ‘Member’ or ‘Information Utility’. Section 218 of the Code concerns with ‘Investigation of Insolvency Professional Agency’ or its ‘Member’ or ‘Information Utility’. Section 220 of the I&B Code, 2016, pertains to ‘Appointment of Disciplinary Committee’.

27. In fact, as per Section 220 of the I&B Code, the IBBI shall constitute ‘Disciplinary Committee’ to consider the investigation to submit under Sub Section 6 of Section 218 of the Code, etc.

28. Even the saddling of penalty by the ‘Disciplinary Committee’ is permissible as per Section 220(3) of the I&B Code, 2016 and only when the said ‘Committee’ is subjectively satisfied there exists a sufficient cause in imposing a penalty upon the deviant. Looking at from any angle, the ‘Appeal’ sans merits.

RESULT:

In fine, the instant Company Appeal (AT) (CH) (INS) No.98 of 2022 is dismissed. No costs.

[Justice M. Venugopal]
Member (Judicial)

[Kanthi Narahari]
Member (Technical)

28.03.2022
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