NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 683 of 2022

(Arising out of Order dated 20.04.2022 passed by the Adjudicating Authority (National Company Law Tribunal), Kolkata Bench-I, Kolkata in IA (IB) No.1275/KB/2020 in CP (IB) No.1237/KB/2018)

IN THE MATTER OF:

Almas Global Opportunity Fund SPC
2nd Floor, Regatta Office Park,
Leeward 2, West Bay Road,
Grand Cayman, Cayman Island. .... Appellant

Vs

1. CA Kannan Triuvengadam,
Insolvency Professional
Netaji Subhas Villa,
18 Karunamotee Ghat Road,
Flat 3C, Kolkata 700082.

2. Dissenting Financial Creditor,
LIC Housing Financial Ltd. .... Respondents

Present:

For Appellant: **Mr. Sanjiv Sen, Sr. Advocate with Mr. Sakya Sen, Mr. Sarad Singhania, Mr. Kumar Anurag Singh, Mr. Zain A. Khan, Advocates**

For Respondents: **Mr. Abhijeet Sinha, Mr. Rishav Banerjee and Mr. Pratik Mukhopadhyay, Advocates**

Mr. Indranil Ghosh, Mr. Palzer Moktan, Advocates for R-2.

J U D G M E N T

ASHOK BHUSHAN, J.

This Appeal by Successful Resolution Applicant has been filed against the order dated 20.04.2022 passed in IA (IB) No.1275/KB/2020 by National Company Law Tribunal, Kolkata Bench, Kolkata, by which order

the Application filed by Chairman of the Monitoring Committee was allowed forfeiting entire Performance Bank Guarantee given by the Appellant with direction to exclude the time from the date of issuance of Form G till the date of passing of orders and issued certain further directions. The Appellant aggrieved by the said order has come up in this Appeal.

2. Brief facts of the case necessary for deciding this Appeal are:

(i) An Application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the "**Code**") was filed against the Corporate Debtor EMC Limited, which was admitted by order dated 12.11.2018. CA Kannan Tiruvengadam was appointed as Resolution Professional ("**RP**").

(ii) In pursuance of issuance of Form-G, four Expression of Interests were received. However, only two Resolution Applicants namely – the Appellant and KBC Aldini Capital Limited submitted their Resolution Plan. The Resolution Plan submitted by the Appellant was approved by the Committee of Creditors ("**CoC**") in its Meeting dated 01.10.2019 by 80.18% votes. The Adjudicating Authority vide order dated 21.10.2019 approved the Resolution Plan. In terms of the Resolution Plan, the Appellant was duty bound to make entire payment of INR 568 crores within a period of 60 days, i.e., by 20.12.2019.

(iii) In January 2020 payment of amount of only Rs.30 Crores, which was towards Earnest Money Deposit ("**EMD**") and

Performance Bank Guarantee were received from the Appellant. In the Second Meeting of the Monitoring Committee held on 26.11.2019, the Appellant asked for a document evidencing release of security interest on the assets of the Corporate Debtor, from the Members constituting the erstwhile CoC of the Corporate Debtor.

(iv) Although, two Financial Creditors had filed an Appeal before this Tribunal challenging the approved Resolution Plan, but this Tribunal did not stay the implementation of the Resolution Plan.

(v) In the Meeting of the Monitoring Committee, it was repeatedly stated on behalf of the Appellant that they shall be depositing the amount as per Resolution Plan.

(vi) The Chairman of the Monitoring Committee filed an IA No.1275 of 2020 stating about the subsequent events after the approval of the Resolution Plan and praying for forfeiture of Performance Bank Guarantee and praying for certain other reliefs. After filing the aforesaid Application, in the reply affidavit dated 27.01.2021, the Appellant requested that time be granted till 30.01.2021 to fulfill its obligation under the approved Resolution Plan owing to difficulty caused by Covid-19 pandemic.

(vii) The Adjudicating Authority on 25.02.2021 directed the Appellant to file an affidavit within two weeks clearly indicting

the detailed steps and time frame and stages within which payment envisaged under the approved Resolution Plan will be paid. In reply to it, an affidavit was filed again reiterating that all the payments under the Plan would be made on or before 30.06.2021. A further affidavit was filed taking a stand that now upfront payment under the Resolution Plan shall be made by 31.10.2021. The Appellant having not made any payment as per the approved Resolution Plan, the Adjudicating Authority passed the impugned order dated 20.04.2022 allowing the I.A. No.1275 of 2020. In paragraph 8.1, following orders have been passed:

> *"8.1 In these circumstances, the following orders are passed:*
>
> *(i) The entire Performance Bank Guarantee of Rs.30 crore submitted by the SRA on 08 January 2021, which was invoked by the Applicant/ Chairman of the Monitoring Committee, on 13 November, 2020 shall stand forfeited in favour of the Corporate Debtor immediately, since there is knowing and wilful contravention of the approved Resolution Plan.*
>
> *(ii) Additionally, the SRA and its officers responsible be proceeded against for contravention of the approved resolution plan in terms of Section 74(3) read with section 236 of the Insolvency and Bankruptcy Code, 2016. To facilitate this, a copy of this order shall be sent to the Insolvency & Bankruptcy Board of India (IBBI) and the Secretary, Ministry of Corporate Affairs, who are*

the agencies authorised in terms of section 236(2) ibid to initiate appropriate complaint before the Special Court as envisaged under Section 236(1) ibid.

(iii) The Corporate Debtor is a viable going concern with about 400 employees and workmen. There is every chance of a successful resolution of the Corporate Debtor. Therefore, to facilitate this, the entire period consumed in the CIRP commencing from the first date of issue of Form G inviting Expressions of Interest till the date of passing of orders in this application is excluded. This will grant sufficient time for a limited reboot of the CIRP from the stage of issue of Form G.

(iv) The Chairman of the Monitoring Committee shall discharge the functions of Resolution Professional of the Corporate Debtor with immediate effect and until further orders are passed by this Adjudicating Authority."

(viii) Aggrieved by the order dated 20.04.2022, this Appeal has been filed.

3. This Tribunal on 15.06.2022 granted time to Respondent No.1 to file reply, to which a rejoinder has also been filed by the Appellant.

4. We have heard Shri Sakya Sen and Shri Sanjiv Sen, learned Senior Counsel for the Appellant, Shri Abhijeet Sinha, learned Counsel for Respondent No.1 and Shri Indranil Ghosh, learned Counsel for Respondent No.2.

5. The learned Counsel for the Appellant challenging the impugned order contends that impugned order passed by the Adjudicating Authority is contrary to the Scheme of IBC. It is submitted that there is no power upon the Adjudicating Authority for issuing any order to restart the CIRP afresh in respect of the Corporate Debtor for which Resolution Plan has already been approved by the Adjudicating Authority. It is submitted that Respondent No.1, who is Chairman of the Monitoring Committee has no *locus* to file I.A. No.1275 of 2020. The Respondent No.1 being erstwhile RP of Corporate Debtor could not be prejudicially affected by the delay of non-implementation of the Resolution Plan and therefore, did not have *locus* to file an Application under Section 33, sub-section (3) of the Code. The Adjudicating Authority was required to try the Application as one under Section 33, sub-section (3) of the Code and only order, which could have been passed was an order of liquidation. The Adjudicating Authority was not empowered to pass any other order except the order of liquidation, on any consideration, including the consideration that Corporate Debtor is a going concern. There was no occasion to exercise the power under Section 12 to exclude the period already consumed in the CIRP. It is submitted that no case has been made out for forfeiture of the amount deposited by the Appellant. The Plan does not contain any stipulation for forfeiture of the amount paid by the Appellant. Respondent No.1 did not make out a case of loss or damages, which is essentially pre-condition for forfeiture of performance security. Lastly, it is submitted that direction issued by Adjudicating Authority under Section 74, sub-section (3) of the code is

beyond the power conferred upon the Adjudicating Authority. The observation of the Adjudicating Authority that conduct would amount to willful contravention as contemplated under Section 74, sub-section (3) is not within the scope of jurisdiction of Adjudicating Authority. The power under Section 74, sub-section (3) is an exclusive prerogative and jurisdiction of Special Courts and could not have been exercised by Adjudicating Authority. The Adjudicating Authority by issuing a mandate for proceeding to be instituted against the Appellant and its officers for contravention of the Resolution Plan has exceeded its authority inasmuch as the Code does not confer any power upon the Adjudicating Authority to direct the Board or the Central Government to initiate proceedings under Section 74, sub-section (3).

6. Shri Abhijeet Sinha, learned Counsel for Respondent No.1 refuting the submission of learned Counsel for the Appellant contends that Respondent No.1, who is a Chairman of the Monitoring Committee had every jurisdiction to file I.A. No.2175 of 2020. It is the Chairman of the Monitoring Committee, who is entrusted under the Resolution Plan to monitor the implementation of the Plan. The submission of Counsel for the Appellant that Application filed by Respondent No.1 was not maintainable is without any substance. It is submitted that Appellant failed to implement the approved Resolution Plan. Before the Monitoring Committee Meetings, Appellant falsely represented that it is making efforts to deposit the upfront amount. Various dates were taken by the Appellant to deposit the amount from time to time in which he utterly failed. The Appellant

having failed to implement the Plan, Performance Bank Guarantee was liable to be forfeited as per the Regulation 36-B(4-A) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (“**CIRP Regulations**”). The Appellant having failed to implement the approved Resolution Plan cannot be heard in saying that Corporate Debtor be put to liquidation. The Corporate Debtor is a going concern, which has been efficiently being run by the erstwhile Resolution Professional, who is now the Chairman of the Monitoring Committee. The Corporate Debtor, who is a going concern, cannot be sent to liquidation. The Appellant who failed to implement the Resolution Plan and has got forfeited its Performance Bank Guarantee deserves to be prosecuted under Section 74(3) of the Code and cannot be heard in saying as to how the Corporate Debtor should be run. It is submitted that in the facts of the present case where Corporate Debtor is being run as a going concern, no error has been committed by the Adjudicating Authority directing for restart of CIRP to revive the Corporate Debtor. It is submitted that in pursuance of subsequent orders of the Adjudicating Authority several Expression of Interests have been received and Resolution Plans are under consideration for reviving the Corporate Debtor. It is submitted that the liquidation is a last resort, which has to be adopted when all efforts for reviving the Corporate Debtor has failed. The order passed by the Adjudicating Authority is in furtherance of the object of the IBC and needs no interference by this Appellate Tribunal.

7. The learned Counsel for the Appellant has placed reliance on judgment of this Tribunal in ***Company Appeal (AT) (Insolvency) No. 219 of 2019 – Committee of Creditors of Amtek Auto Ltd. through Corporation Bank vs. Mr. Dinkar T. Venkatasubramanian & Ors.*** decided on 16.08.2019 and the judgment of the Hon'ble Supreme Court in ***Kailash Nath Associates vs. Delhi Development Authority and Ant. – (2015) 4 SCC 136.***

8. We have heard submission of learned Counsel for the parties and have perused the record.

9. The Resolution Plan submitted by the Appellant was approved by the Committee of Creditors with 80.18% vote shares on 01.10.2019. The Adjudicating Authority vide order dated 21.10.2019 approved the Resolution Plan. As per the Resolution Plan submitted by the Appellant, the Appellant was to make payment by way of upfront payment of INR 568 crores within 60 days from the Effective Date. Clause 8.3, deals with "*Payment to the financial creditor who are members of the CoC*". Clause 8.3 (c) (ii) is as follows:

> *"**8.3(c)(ii)** The aggregate amount which is proportionately payable to each of the Financial Creditors, as mentioned above, would be paid by way of upfront payment of INR 568 crs as reduced by the priority payments due on account of CIRP Cost, payments to workmen and amount due to Operational Creditors out of the proposed amount*

on an interest free basis within 60 days from the Effective Date."

10. Apart from above upfront payment, the Plan contained provisions regarding outstanding un-invoked Bank Guarantee issued to various entities towards diverse obligations amounting to INR 780.22 crores as on 04.09.2019. Effective date as per the Resolution Plan is the date on which the Resolution Plan is approved by the Adjudicating Authority under Section 31 of the Code, i.e. 21.10.2019. Only payments, which have been made by the Appellant are towards the Performance Bank Guarantee amounting to INR 30 crores. I.A. No.1275 of 2020 was filed by Respondent No.1 after the Resolution Applicant failed to make upfront payment as per the Resolution Plan within the time allowed in the Plan. Following were the reliefs sought in I.A. No.1275 of 2020:

"*(i) The Resolution Plan of the Resolution Applicant/ Respondent approved by the learned Adjudicating Authority by its order dated October 21, 2019 be cancelled, discharged, rescinded and abrogated;*

(ii) The bank guarantees furnished by the respondent as morefully described in paragraph 9 hereof be invoked and the amounts in respect thereof be forfeited;

(iii) Appropriate directions be given on the respondent and/ or the persons in the management and control thereof to ensure effective invocation and forfeiture of the bank guarantees described in paragraph 8 hereof furnished by respondent;

(iv) Notice of this application be served upon the officers and the persons in the management and control of the respondent as more fully and particularly described in paragraph 45 hereof;

(v) The officers and/ or the persons in the management and control of the respondent more fully and particularly described in paragraph 45 hereof be directed to disclose the names and particulars of the other persons and officers in the management and control of the respondent responsible for the violation and contravention of the approved resolution plan so that necessary notice of this application may be served upon such persons;

(vi) The officers and/ or the persons in the management and control of the respondent more fully and particularly described in paragraph 45 hereof be punished and fined in the manner as specified in section 74 (3) of the Code;

(vii) The entire period consumed in the corporate insolvency resolution process commencing from the date of admission being November 12, 2018 till the date of passing of orders in this application be excluded;

(viii) The corporate insolvency resolution process in respect of the corporate debtor be directed to commence afresh and the Applicant herein be once again appointed as Resolution Professional for the said purpose;

(ix) The period to complete the corporate insolvency resolution process be extended by 180 days from the date of the order to be passed herein;

(x) Appropriate directions be passed with regard to keeping the corporate debtor as going concern.

(xi) ALTERNATIVE TO PRAYERS (vii), (viii) and (ix) above, orders of liquidation be passed in respect of the corporate debtor in terms of Section 33 and 34 of the Insolvency and Bankruptcy Code, 2016;

(xii) Ad interim orders in terms of prayers above;

(xiii) Pass any other order or orders which this Hon'ble Tribunal may deem fit in the facts and circumstances of the case in the interest of equity, justice and good conscience."

11. Even during the pendency of the Application before the Adjudicating Authority, various affidavits were filed by the Appellant stating that entire upfront payment shall be made by 30.06.2021 and thereafter another date given as 31.10.2021, which affidavits proved to be a false representation on behalf of the Appellant. The sequence of events indicate that the Appellant failed to implement the Resolution Plan. One of the pleas, which was taken before the Adjudicating Authority by the Resolution Applicant regarding difficulties due to Covid-19 pandemic. The Hon'ble Supreme Court in ***Ebix Singapore vs. Committee of Creditors of Educomp Solutions Limited and Anr. (2022) 2 SCC 401*** has now categorically held that even on the ground of Covid-19, Resolution Applicant cannot be allowed to withdraw

from Resolution Plan. In paragraph 161 of the judgment, following has been held:

> *"**161.** In the wake of the COVID-19 Pandemic, several resolution plans remained pending before the adjudicating authorities due to the lockdown and significant barriers to securing a hearing. An Ordinance was swiftly promulgated on 5-6-2020 which imposed a temporary suspension of initiation of CIRP under Sections 7, 9 and 10 IBC for defaults arising for six months from 25-3-2020 (extendable by one year). This was followed by an amendment through the IBC (Second Amendment) Act, 2020 on 23-9-2020 which provided for a carve-out for the purpose of defaults arising during the suspended period. The delays on account of the lockdown were also mitigated by the IBBI (Insolvency Resolution Process for Corporate Persons) (Third Amendment) Regulations, 2020, which inserted Regulation 40-C on 20-4-2020, with effect from 29-3-2020, and excluded such delays for the purposes of adherence to the otherwise strict timeline. Recently, the IBC (Amendment) Ordinance, 2021 was promulgated with effect from 4-4-2021 providing certain directions to preserve businesses of MSMEs and a fast-track insolvency process. There has been a clamour on behalf of successful resolution applicants who no longer wish to abide by the terms of their submitted resolution plans that are pending approval under Section 31, on account of the economic slowdown that impacted every business in the country. However, no legislative relief for enabling withdrawals or renegotiations has been provided, in the last eighteen months. In the absence of any provision*

under IBC allowing for withdrawal of the resolution plan by a successful resolution applicant, vesting the resolution applicant with such a relief through a process of judicial interpretation would be impermissible. Such a judicial exercise would bring in the evils which IBC sought to obviate through the back door."

12. Now we come to the submission of the Appellant questioning the forfeiture of the Performance Bank Guarantee. Regulation 36-B of the CIRP Regulations was amended by Notification dated 24.01.2019 inserting Regulation (4-A), which is to the following effect:

> *"**36-B[(4A)** The request for resolution plans shall require the resolution applicant, in case its resolution plan is approved under sub-section (4) of section 30, to provide a performance security within the time specified therein and such performance security shall stand forfeited if the resolution applicant of such plan, after its approval by the Adjudicating Authority, fails to implement or contributes to the failure of implementation of that plan in accordance with the terms of the plan and its implementation schedule.*
>
> *Explanation I.– For the purposes of this sub-regulation, "performance security" shall mean security of such nature, value, duration and source, as may be specified in the request for resolution plans with the approval of the committee, having regard to the nature of resolution plan and business of the corporate debtor.*
>
> *Explanation II. – A performance security may be specified in absolute terms such as guarantee from a bank for Rs. X for Y years or in relation to one or more variables such*

as the term of the resolution plan, amount payable to creditors under the resolution plan, etc."

13. The above Regulation clearly indicates that if the Resolution Applicant after its Resolution Plan is approved by the Adjudicating Authority fails to implement or contributes to the failure in implementation of the Plan in accordance with the terms of the Plan, the performance security shall stand forfeited. The Hon'ble Supreme Court in ***Ebix Singapore****i* (supra) in paragraph 164 of the judgment has also laid down following:

> *".....the plan after acceptance by the CoC. Regulation 36-B(4-A) requires the furnishing of a performance security which will be forfeited if a resolution applicant fails to implement the plan. This is collected before the adjudicating authority approves the plan. Notably, the Regulations also direct forfeiture of the performance security in case the resolution applicant "contributes to the failure of implementation", which could potentially include any attempts at withdrawal of the plan."*

14. The learned Counsel for Respondent No.1 is right in his submission that the consequence of failure to implement is forfeiture of Performance Bank Guarantee as has been statutorily provided by CIRP Regulations 36-B(4-A). The Appellant cannot be heard in saying that the aforesaid amount of Performance Bank Guarantee be returned to him.

15. The learned Counsel for the Appellant relied on judgment of the Hon'ble Supreme Court in ***Kailash Nath Associates vs. Delhi Development Authority and Ant. – (2015) 4 SCC 136.*** In the above case,

the Hon'ble Supreme Court had occasion to consider Section 74 of the Contract Act, 1872, wherein it held that damage and loss is *sine-qua-non* for payment of compensation for breach of contract. The Hon'ble Supreme Court had also occasion to consider the issue of forfeiture of earnest money. The action of Delhi Development Authority (DDA) in forfeiting the earnest money was held to be arbitrary since there had been no breach on the part of the Appellant and DDA could not have been allowed to appropriate Rs.78 lakhs without any loss being caused. The judgment in ***Kailash Nath*** case was on entirely different facts and is related to auction by the DDA. Action of the DDA in forfeiting the earnest money was held to be arbitrary due to reasons as contained in the judgment. As per the judgment of Hon'ble Supreme Court, the DDA never issued any notice and the Appellant was never put to notice that it has to deposit the balance 75% of premium of the plot within certain period of time. In the absence of such notice, it was held that there was no breach of contract on the part of the Appellant. Paragraphs 24 and 25 of the judgment of the Hon'ble Supreme Court in this context is relevant, which are to the following effect:

> *"**24.** The aforesaid judgment would apply in a situation where a promisee accedes to the request of the promisor to extend time that is fixed for his own benefit. Thus, in Keshavlal Lallubhai Patel v. Lalbhai Trikumlal Mills Ltd. [1959 SCR 213 : AIR 1958 SC 512] , this Court held: (SCR pp. 219-20 : AIR p. 515, para 8)*
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> > *"The true legal position in regard to the extension of time for the performance of a contract is quite clear under Section 63 of the Contract Act. Every promisee, as the section provides, may extend time for the*

performance of the contract. The question as to how extension of time may be agreed upon by the parties has been the subject-matter of some argument at the Bar in the present appeal. There can be no doubt, we think, that both the buyer and the seller must agree to extend time for the delivery of goods. It would not be open to the promisee by his unilateral act to extend the time for performance of his own accord for his own benefit."

25. *However, such is not the position here. In the present case, the appellant is the promisor and DDA is the promisee. In such a situation, DDA can certainly unilaterally extend the time for payment under Section 63 of the Contract Act as the time for payment is not for DDA's own benefit but for the benefit of the appellant. The present case would be covered by two judgments of the Supreme Court. In Citi Bank N.A. v. Standard Chartered Bank [(2004) 1 SCC 12], this Court held: (SCC p. 35, para 50)*

"50. Under Section 63, unlike Section 62, a promisee can act unilaterally and may

(i) dispense with wholly or in part, or

(ii) remit wholly or in part,

the performance of the promise made to him, or

(iii) may extend the time for such performance, or

(iv) may accept instead of it any satisfaction which he thinks fit."

16. The present is a case where Performance Bank Guarantee was given by the Appellant to implement the Resolution Plan approved as per the

Code. The forfeiture of the Performance Bank Guarantee in the CIRP Regulations is statutory requirement. The judgment of ***Kailash Nath*** relied by the learned Counsel for the Appellant does not come to any aid to the Appellant in the facts of present case.

17. Now we come to the submission of learned Counsel for the Appellant that only option which was available for Adjudicating Authority was to pass an order of liquidation under Section 33. Section 33 of the Code provides as follows:

> "***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 1[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 purpose 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.

(3) Where the resolution plan approved by the Adjudicating Authority 3[under section 31 or under sub-section (1) of section 54L, is contravened by the concerned corporate debtor, any person other than the corporate debtor, whose interests are prejudicially affected by such contravention, may make an application to the Adjudicating Authority for a liquidation order as referred to in sub-clauses (i), (ii), (iii) of clause (b) sub-section (1).

(4) On receipt of an application under sub-section (3), if the Adjudicating Authority determines that the corporate debtor has contravened the provisions of the resolution plan, it shall pass a liquidation order as referred to in sub-clauses (i), (ii) and (iii) of clause (b)
of sub-section (1).”

18. The present is a case where Application, which was filed by Respondent No.1 being I.A. No.1275 of 2020 was not confine to Section 33 alone. The Memo of the Application itself mentions following:

> *"An Application under Sections 12, 60(5) and 74 of the Insolvency and Bankruptcy Code, 2016 read with Rule 11 of the National Company Law Tribunal Rules 2016 and in the alternative under Sections 33 and 34 of the Insolvency and Bankruptcy Code, 2016."*

19. The Application filed by Respondent No.1, thus, was a composite application invoking various provisions of the Code including Rule 11 of the NCLT Rules, 2016.

20. Section 33, sub-section (3) uses the expression "*may make an application to the Adjudicating Authority for liquidation order*". The Application which was filed by Respondent No.1 was as noted above not being confine to Section 33, sub-section (3), rather prayer for liquidation was an alternative prayer. The Adjudicating Authority was not prohibited from exercise of its powers as contained in other provisions of the Code referred in the Application. The reason why the Adjudicating Authority issued the impugned directions are clearly decipherable from order itself. Paragraph 7.5 to 7.6 of the order is as follows:

> *"7.5 What has really spared the blushes in the present case is the efficiency with which the Chairman of the Monitoring Committee has been running the Corporate Debtor. But this cannot go on for ever. A strong message needs to go to the SRA that the*

majesty of law needs to be respected at all costs, and that Indian Judicial processes cannot be taken for a ride like this. The SRA seems to think that other suitors will not come in to hold the hand of the Corporate Debtor and pull it out of insolvency. Therefore, we fully intend to call the bluff of the SRA that non-extension of time will put the Corporate Debtor and its stakeholders in serious jeopardy.

7.6. Since the Corporate Debtor has been kept as a going concern by the Chairman of the Monitoring Committee, every effort should be made to give one more chance at resolution before we order liquidation as a last resort."

21. When the Corporate Debtor was being run as a going concern by the RP and thereafter by the Chairman of the Monitoring Committee and there are 400 employees working with the Corporate Debtor, the Adjudicating Authority had not acted beyond its jurisdiction in issuing the impugned direction. Paragraphs 3.12 and 3.13 of the impugned order where it notices the case of the Appellant, is also relevant to be extracted, which is to the following effect:

"3.12. So far, the Chairman has successfully managed to ensure that the Bank Guarantees to the tune of Rs.458,09,65,460/- (Rupees four hundred fifty-eight crore nine lakh sixty-five thousand four hundred sixty only) issued on behalf of the Corporate Debtor remain uninvoked. Further, the fact that the Corporate Debtor has been kept as a

going concern till now reflects the revival potential of the Corporate Debtor.

3.13. Liquidation of the Corporate Debtor will not only jeopardise the employment of 400 employees associated with the Corporate Debtor but also will not fetch a sum of Rs.568 crore being the payment required to be made by the SRA. Further, from time to time, several potential applicants have expressed their interest in the Corporate Debtor."

22. In the facts of present case, we are not persuaded to accept the submission of the learned Counsel for the Appellant that only option available to the Adjudicating Authority was to direct for liquidation. Liquidation could have been one of the orders, which is contemplated in the facts of the present case, but it cannot be held that liquidation is the only option in the facts of the present case. It is well settled and reiterated from time to time by the Hon'ble Supreme Court that all steps shall be taken to revive the Corporate Debtor and the liquidation is always a last resort.

23. We may further notice that the Appellant, who has failed to implement the approved Resolution Plan and whose security has been forfeited has now no concern with the Corporate Debtor. The Adjudicating Authority having found the Resolution Plan failed to be implemented, Appellant cannot decide the further course of action of the Corporate Debtor and insist that Corporate Debtor must be liquidated. The Appellant is not a stakeholder of the Corporate Debtor. Hence, submission of learned

Counsel for the Appellant that only option available to the Adjudicating Authority was to direct the liquidation has to be rejected.

24. The learned Counsel for the Appellant has relied on judgment of this Tribunal in ***Committee of Creditors of Amtek Auto Ltd. through Corporation Bank vs. Mr. Dinkar T. Venkatasubramanian & Ors. – Company Appeal (AT) (Insolvency) No.219 of 2019***. In the above case, the Resolution Plan was approved, but the Successful Resolution Applicant failed to furnish Performance Bank Guarantee and failed to open Escrow Account. The Committee of Creditors/ Financial Creditors filed an application under Section 60(5) read with Section 74(3) with a prayer that the Resolution Applicant has knowingly contravened the terms of the Resolution Plan and has failed to implement the Plan. A prayer was also made to reinstate the Committee of Creditors and further to initiate proceedings under Section 74, sub-section (3). The Application filed by the Committee of Creditors was rejected, against which the Appeal was filed. In the above case, following observations were made by this Tribunal in paragraph 37, 38 and 39:

> *"**37.** In appropriate case, on receipt of an application under subsection (3), if the Adjudicating Authority determines that the 'Corporate Debtor' has contravened the provisions of the 'Resolution Plan', it requires to pass order of liquidation as provided under sub-clauses (i), (ii) and (iii) of clause (b) of sub-section (1) as laid down under Section 30(4).*
>
> ***38.** In the present case, it is argued that none of the persons' interests are prejudicially affected because of contravention, made any application to the Adjudicating*

Authority for liquidation order under sub-section (3) of Section 33, therefore, according to the counsel for the 'Committee of Creditors' and the 'Resolution Professional', no order could have been passed under Section 33(3) of the 'I&B Code'.

39. We have already observed that in case where the 'Resolution Plan' earlier approved within a reasonable period of 180 days or much before completion of 270 days, one may request the Adjudicating Authority to allow the 'Resolution Professional'/ 'Committee of Creditors' to consider the pending 'Resolution Plan (s)' or to call for fresh 'Resolution Plan'/ 'Revised Resolution Plan', in absence of any application under Section 33(3) filed by any person whose interest is prejudicially affected by contravention of the plan by the 'Corporate Debtor'.

However, as we have noted that more than 270 days have been completed much earlier and no case is made out to exclude any period, we hold that the Adjudicating Authority has no other option but to pass order of liquidation."

25. The observations made by this Tribunal in the above case can be said to be observation which were confined to the facts of that case. The observations made in paragraph 39 itself indicates that a request can be made to the Adjudicating Authority to allow the RP or Committee of Creditors to call for a fresh Resolution Plan. This Tribunal in paragraph 39 held that no case is made out to exclude any period, hence Adjudicating Authority had no option, but to pass order of liquidation. The observations made in paragraphs 38 and 39 itself indicate that in appropriate case, the

Adjudicating Authority can be approached for fresh/ revised Resolution Plan. The above judgment of this Tribunal cannot be held to lay down any proposition that when Resolution Plan has failed to be implemented, no other option is available except to direct the liquidation. The judgment cannot be read to lay down any such broad ratio. We have noticed the specific features in the facts of present case including the Corporate Debtor being run as a going concern and 400 employees are already working, thus, present was not a case where Adjudicating Authority ought to have necessarily directed for liquidation.

26. We may also notice one of the submissions of the learned Counsel for the Appellant that Respondent No.1 has no locus to file I.A. No.1275 of 2020. Under the Resolution Plan itself, the supervision is entrusted to the Monitoring Committee for monitoring and supervising the implementation of the Resolution Plan. Paragraphs 12.2 of the Resolution Plan is as follows:

> *"12.2 Supervision after the Effective Date and until expiry of the Term*
>
> *(a) After Effective Date, a committee ("Monitoring Committee") for monitoring and supervision the implementation of the Resolution Plan shall be appointed. Resolution Applicant purpose that the Monitoring Committee would comprise as follows:*
>
> *i. Four member to be nominated by the Resolution Applicant;*
>
> *ii. Four member to be nominated by the CoC;*
>
> *iii. Resolution Professional as Chairman*

(b) Monitoring Committee (MC) shall supervise the Resolution Plan until payment of the up-front consideration as contemplated under the Resolution Plan and on completion of such payment and completion of Closing Day Actions the Term of the MC shall expire."

27. The Respondent, who filed the Application as a Chairman of the Monitoring Committee was fully entrusted to supervise the implementation of the Resolution Plan. When the Plan has failed to be implemented by the Resolution Applicant, it is also the duty of the Monitoring Committee to bring it to the notice of the Adjudicating Authority, relevant facts including the failure of the Plan and ask for further directions from the Adjudicating Authority with regard to the Corporate Debtor. We, thus, do not find any substance in the submission of the learned Counsel for the Appellant that Respondent No.1 has no locus to file the Application.

28. Now we come to the last submission of learned Counsel for the Appellant, i.e., directions issued with regard to under Section 74, sub-section (3). Section 74, sub-section (3) is a provision contained in Chapter-VII – "Offences and Penalties". Section 74, sub-section (3) of the Code is as follows:

*"**74**(3) Where the corporate debtor, any of its officers or creditors or any person on whom the approved resolution plan is binding under section 31, knowingly and wilfully contravenes any of the terms of such resolution plan or abets such contravention, such corporate debtor, officer, creditor or person shall be punishable with imprisonment of not less than one year, but may extend to five years,*

or with fine which shall not be less than one lakh rupees, but may extend to one crore rupees, or with both."

29. The keywords in Section 74, sub-section (3) is that when "*the Corporate Debtor or any of its officers or creditors or any person on whom the approved Resolution Plan is binding under Section 31, knowingly and willfully, contravenes any of the terms of such Resolution Plan or abets such contravention, such persons shall be punishable.....*". Section 236 of the Code provides for 'Trial of offences by Special Court". Section 236, sub-section (2) provides as follows:

> *"236 (2) No Court shall take cognizance of any offence punishable under this Act, save on a complaint made by the Board or the Central Government or any person authorised by the Central Government in this behalf."*

30. The provision of the Code contemplates filing of a complaint by Board or the Central Government or any person authorized by the Government in this behalf. It is true that Adjudicating Authority while exercising jurisdiction under the Code is not required to return any finding of an offence within the meaning of Section 74, sub-section (3). It is a prerogative of the Special Court under Section 236 to try an office and award punishment if any. The Adjudicating Authority at best can draw attention of the Board or the Central Government to facts and features of a particular case to consider as to whether it is an appropriate case for filing a complaint within the meaning of Section 236, sub-section (2). The order passed by the Adjudicating Authority under paragraph 8.1(ii) has to be treated only a

direction to the effect that order of NCLT be forwarded to the Board and Central Government to consider as to whether present is a fit case for initiating/ filing any complaint under Section 236, sub-section (2) of the Code. It is necessary to clarify that any observations made by Adjudicating Authority in the impugned order regarding ingredients of offence under Section 74, sub-section (3) are neither binding nor determinative of any issue when the Special Court where a complaint is filed proceed with the trial of offence. The observations made by the Adjudicating Authority has to be read only for the purpose of sending the copy of the order to the Board for consideration for filing a complaint and order of the Adjudicating Authority cannot be treated to any direction to initiate action under Section 74, sub-section (3), which is in the domain of the Board and Central Government as per the statutory Scheme of the Code.

31. In view of the foregoing discussions, we uphold the order of the Adjudicating Authority issued under paragraph 8.1.(i), (iii) and (iv). However, directions issued in 8.1.(ii) are modified to the extent that a copy of the order passed by Adjudicating Authority shall be sent to the Insolvency and Bankruptcy Board of India and the Secretary, Ministry of Corporate Affairs to consider in terms of Section 236, sub-section (2) to initiate appropriate complaint before the Special Court as envisaged under Section 236(1). The direction cannot be read to be a direction to initiate complaint, rather it has to be treated to be a direction to consider for filing a complaint.

32. Subject to modification of direction under paragraph 8.1.(ii), the Appeal is disposed of with following direction:

(I) The order of the Adjudicating Authority in paragraphs 8.1.(i), (iii) and (iv) is upheld. The Appeal is dismissed in respect thereof.

(II) The direction issued in paragraph 8.1.(ii) are modified as indicated above.

No costs.

[Justice Ashok Bhushan]
Chairperson

[Dr. Alok Srivastava]
Member (Technical)

[Barun Mitra]
Member (Technical)

NEW DELHI

21st October, 2022

Ashwani