NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 224 of 2018

IN THE MATTER OF:

Y. Shivram Prasad ...Appellant

Vs.

S. Dhanapal & Ors. ...Respondents

Present: For Appellant: - Ms. Aditi Dani and Mr. Ashwin Kumar D.S, Advocates.

For Respondents: - Mr. Rahul Srivastava and Mr. Karan Khanna, Advocates for R2 and R5.

Mr. Tushar Mathur and Ms. Nehul Sharma, Advocates for Sun Paper Mills.

Mr. Vishnu Shriram, Advocate for R-5.

Mr. Goutham Shivshankar, Mr. Pawan Bhushan, Advocates for Atyant Capital.

Company Appeal (AT) (Insolvency) No. 286 of 2018

IN THE MATTER OF:

Asset Reconstruction Company (India) Ltd. ...Appellant

Vs.

Servalakshmi Paper Ltd. & Ors. ...Respondents

Present: For Appellant: - Mr. Vishnu Shriram, Advocate.

For Respondents: - Mr. Alok Dhir, Ms. Varsha Banerjee and Mr. Milan Singh Negi, Advocates for DELTA.

Mr. Tushar Mathur and Ms. Nehul Sharma, Advocates for Sun Paper Mills.

Mr. Rahul Srivastava and Mr. Karan Khanna, Advocates for R-3.

O R D E R

27.02.2019– In the 'Corporate Insolvency Resolution Process' against 'M/s. Servalakshmi Papers Ltd.'- ("SPL" for short) in absence of approved 'Resolution Plan' and 270 days having completed, the 'Adjudicating Authority (National Company Law Tribunal), Division Bench, Chennai, passed order of liquidation by impugned order dated 21st June, 2017.

2. The Appellant- Y. Shivram Prasad, Promoter/ Director and Shareholder of the 'SPL'- ('Corporate Debtor') has challenged the said order as arbitrary and unreasonable. According to the him, opportunity should have been given to the promoters to settle the matter.

3. The other appeal has been preferred by 'Asset Reconstruction Company (India) Limited'- ("ARCIL" for short). Apart from being 'Financial Creditor', it had also filed a 'Resolution Plan' thereby, the Appellant- 'ARCIL' was one of the 'Resolution Applicant'. The 5th Respondent- 'Sripathi Papers and Boards (P) Limited' ("Sripathi" for short) filed another 'Resolution Plan'. Subsequently, both of them revised their respective 'Resolution Plans' commonly termed as 'Modified ARCIL Resolution Plan' and 'Modified Sripathi Resolution Plan'. However, the 'Committee of Creditors' having not found any of them viable and feasible had not voted in their favour with its majority due to which the order of liquidation has been passed.

4. According to the Appellant- 'ARCIL', the 'Committee of Creditors' wrongly voted against their 'Revised Resolution Plan'.

5. The Appellant- Mr. Y. Shivram Prasad (Promoter) highlighted the following facts in its affidavit:

> *"7.4.2. SPL was incorporated in 2005. The project was implemented with an objective to start state-of-the-art manufacturing facilities to produce printing & Writing papers and News print. The promoters of the SPL had put their maximum effort and energy for 10 years to set-up this paper plant. The plant and machinery of the company is fully automated with advanced quality control system, and with a capacity to produce 300 tonnes per day (TPD) i.s. 90,000 MTPA, along with a 15 MW multi-fuel power plant, which is one of the largest single plants in India and ranks within fifteen major plants in India (Source- Paper Mart MAGAZINE Edition April-May 2010). Excess capacity of 5 MW of power is being sold to third parties. Due to the promoters expertise and knowledge in setting up paper plants, the company could achieve the project implementation within short span of 3 years (From 2007 to 2010) period using latest technology and*

rich experience personnel in the respective areas to complete project implementation and start production from April 2010. The paper manufacturing unit is providing livelihood directly for more than 300 employees and indirectly for 200 employees, in and around a 50 kilometer area of the village where the plant is situated. 120 ancillary industrial units are also dependent on the paper and power plant. After the plant commenced its commercial production from April 2010, it has provided economies of benefits in daily life to the local villagers where the local people are starving for their daily lives."

6. It was submitted that the Promoter should have been given opportunity to pay the dues. However, such submission cannot be accepted at this stage for the following reasons.

At what stage the parties can settle and with the application under Sections 7 or 9 or 10

7. Matter can be settled between the parties and an application(s) under Sections 7 or 9 or 10 can be withdrawn only at three stages:

i. Before admission of application under Sections 7 or 9 or 10

ii. After settlement if reached by Promoters / shareholders with the Applicant but before the constitution of the 'Committee of Creditors' in view of decision of the Hon'ble Supreme Court in ***"Swiss Ribbon Pvt. Ltd. & Anr. v. Union of India & Ors. Writ Petition (Civil) No. 99/2018 (2019 SCC OnLine SC 73)"*** *and* quoted below:

> *"52. It is clear that once the Code gets triggered by admission of a creditor's petition under Sections 7 to 9, the proceeding that is before the Adjudicating Authority, being a collective proceeding, is a proceeding in rem. Being a proceeding in rem, it is necessary that the body which is to oversee the resolution process must be consulted before any individual corporate debtor is allowed to settle its claim. A question arises as to what is to happen before a committee of creditors is constituted (as per the timelines that are specified, a committee of creditors can be appointed at any time within 30 days from the date of appointment of the interim resolution professional). We make it clear that at any stage where the committee of creditors is not yet constituted, a party can*

approach the NCLT directly, which Tribunal may, in exercise of its inherent powers under Rule11 of the NCLT Rules, 2016, allow or disallow an application for withdrawal or settlement. This will be decided after hearing all the concerned parties and considering all relevant factors on the facts of each case."

iii. In terms of Section 12 A, as quoted below:

*"**12A. Withdrawal of application admitted under section 7, 9 or 10.** — The Adjudicating Authority may allow the withdrawal of application admitted under section 7 or section 9 or section 10, on an application made by the applicant with the approval of ninety per cent. voting share of the committee of creditors, in such manner as may be specified."*

8. In absence of any settlement, if no withdrawal is made at the aforesaid three stages then 'Resolution Process' continues and if any 'Resolution Plan' is found to be viable, feasible and having financial matrix and qualifies in terms of sub-section (2) of Section 30 and approved by 66% of voting shares of the 'Committee of Creditors', the Adjudicating Authority may pass order approving the plan under Section 31. This is how the 'Corporate Debtor' can be saved from the liquidation.

9. In the present case, as more than 270 days having passed and in absence of any approved 'Resolution Plan', the Adjudicating Authority had to pass order of liquidation.

10. The question arises for consideration as to what step should be taken by the 'Liquidator' during the 'Liquidation'.

11. During the liquidation stage, 'Liquidator' required to take steps to ensure that the company remains a going concern and instead of liquidation and for revival of the 'Corporate Debtor' by taking certain measures.

12. The aforesaid issue fell for consideration before this Appellate Tribunal in ***"S.C. Sekaran v. Amit Gupta & Ors.— Company Appeal (AT) (Insolvency) Nos. 495 & 496 of 2018"*** wherein this Appellate Tribunal having noticed the decision of the Hon'ble Supreme Court in ***"Swiss Ribbon Pvt. Ltd. & Anr. v. Union of India & Ors.*** (Supra) and ***"Meghal Homes Pvt. Ltd."*** observed and held:

> *"5. We have heard the learned counsel for the parties and perused the record. The Hon'ble Supreme Court in* ***'Swiss Ribbons Pvt. Ltd. & Anr. vs. Union of India & Ors. – Writ Petition (Civil) No. 99 of 2018****' by its judgment dated 25th January, 2019, observed as follows:*
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> > *"11. .....What is interesting to note is that the Preamble does not, in any manner, refer to liquidation,*

which is only availed of as a last resort if there is either no resolution plan or the resolution plans submitted are not up to the mark. ***Even in liquidation, the liquidator can sell the business of the corporate debtor as a going concern.*** *[See* ***ArcelorMittal*** *(supra) at paragraph 83, footnote 3]. (Emphasis added)*

12. It can thus be seen that the primary focus of the legislation is to ensure revival and continuation of the corporate debtor by protecting the corporate debtor from its own management and from a corporate death by liquidation. The Code is thus a beneficial legislation which puts the corporate debtor back on its feet, not being a mere recovery legislation for creditors. The interests of the corporate debtor have, therefore, been bifurcated and separated from that of its promoters /those who are in management. Thus, the resolution process is not adversarial to the corporate debtor but, in fact, protective of its interests. The moratorium imposed by Section 14 is in the interest of the corporate debtor itself, thereby preserving the assets of the corporate debtor during the resolution process. The timelines within which the resolution process is to take place again protects the corporate debtor's assets from further

dilution, and also protects all its creditors and workers by seeing that the resolution process goes through as fast as possible so that another management can, through its entrepreneurial skills, resuscitate the corporate debtor to achieve all these ends."

In 'Arcelormittal India Pvt. Ltd. vs. Satish Kumar Gupta & Ors.' at paragraph 83, footnote 3 is mentioned. The Hon'ble Supreme Court noticed that :

> *"3. Regulation 32 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016, states that the liquidator may also sell the corporate debtor as a going concern."*

6. *In* ***'Meghal Homes Pvt. Ltd. vs. Shree Niwas Girni K.K. Samiti & Ors. – (2007) 7 SCC 753"*** *the Hon'ble Supreme Court observed and held as follows:*

> *"33. The argument that Section 391 would not apply to a company which has already been ordered to be wound up, cannot be accepted in view of the language of Section 391(1) of the Act, which speaks of a company which is being wound up. If we substitute the definition in Section 390(a) of the Act, this would mean a company liable to be wound up and which is being wound up. It also does not appear to be necessary to restrict the*

scope of that provision considering the purpose for which it is enacted, namely, the revival of a company including a company that is liable to be wound up or is being wound up and normally, the attempt must be to ensure that rather than dissolving a company it is allowed to revive. Moreover, Section 391(1)(b) gives a right to the liquidator in the case of a company which is being wound up, to propose a compromise or arrangement with creditors and members indicating that the provision would apply even in a case where an order of winding up has been made and a liquidator had been appointed. Equally, it does not appear to be necessary to go elaborately into the question whether in the case of a company in liquidation, only the Official Liquidator could propose a compromise or arrangement with the creditors and members as contemplated by Section 391 of the Act or any of the contributories or creditors also can come forward with such an application."

7. Section 391 of the Companies Act, 1956 has since been replaced by Section 230 of the Companies Act, 2013, which is as follows:

"230. Power to compromise or make arrangements with creditors and members

(1) Where a compromise or arrangement is proposed—

(a) between a company and its creditors or any class of them; or

(b) between a company and its members or any class of them,

the Tribunal may, on the application of the company or of any creditor or member of the company, or in the case of a company which is being wound up, of the liquidator appointed under this Act or under the Insolvency and Bankruptcy Code, 2016 as the case may be, order a meeting of the creditors or class of creditors, or of the members or class of members, as the case may be, to be called, held and conducted in such manner as the Tribunal directs.

Explanation.— For the purposes of this sub-section, arrangement includes a reorganisation of the company's share capital by the consolidation of shares of different classes or by the division of shares into shares of different classes, or by both of those methods.

(2) The company or any other person, by whom an application is made under subsection (1), shall disclose to the by affidavit—

(a) all material facts relating to the company, such as the latest financial position of the company, the latest auditor's report on the accounts of the company and the pendency of any investigation or proceedings against the company;

(b) reduction of share capital of the company, if any, included in the compromise or arrangement;

(c) any scheme of corporate debt restructuring consented to by not less than seventy-five per cent. of the secured creditors in value, including—

(i) a creditor's responsibility statement in the prescribed form;

(ii) safeguards for the protection of other secured and unsecured creditors;

(iii) report by the auditor that the fund requirements of the company after the corporate debt restructuring as approved shall conform to the liquidity test based upon the estimates provided to them by the Board;

(iv) where the company proposes to adopt the corporate debt restructuring guidelines specified by the Reserve Bank of India, a statement to that effect; and

(v) a valuation report in respect of the shares and the property and all assets, tangible and intangible, movable and immovable, of the company by a registered valuer.

(3) Where a meeting is proposed to be called in pursuance of an order of the Tribunal under sub-section (1), a notice of such meeting shall be sent to all the creditors or class of creditors and to all the members or class of members and the debenture-holders of the company, individually at the address registered with the company which shall be accompanied by a statement disclosing the details of the compromise or arrangement, a copy of the valuation report, if any, and explaining their effect on creditors, key managerial personnel, promoters and non-promoter members, and the debenture-holders and the effect of the compromise or arrangement on any material interests of the directors of the company or the debenture trustees, and such other matters as may be prescribed:

Provided that such notice and other documents shall also be placed on the website of the company, if any, and in case of a listed company, these documents shall be sent to the Securities and Exchange Board and stock exchange where the securities of the companies

are listed, for placing on their website and shall also be published in newspapers in such manner as may be prescribed:

Provided further that where the notice for the meeting is also issued by way of an advertisement, it shall indicate the time within which copies of the compromise or arrangement shall be made available to the concerned persons free of charge from the registered office of the company.

(4) A notice under sub-section (3)shall provide that the persons to whom the notice is sent may vote in the meeting either themselves or through proxies or by postal ballot to the adoption of the compromise or arrangement within one month from the date of receipt of such notice:

Provided that any objection to the compromise or arrangement shall be made only by persons holding not less than ten per cent. of the shareholding or having outstanding debt amounting to not less than five per cent. of the total outstanding debt as per the latest audited financial statement.

(5) A notice under sub-section (3) along with all the documents in such form as may be prescribed

shall also be sent to the Central Government, the income-tax authorities, the Reserve Bank of India, the Securities and Exchange Board, the Registrar, the respective stock exchanges, the Official Liquidator, the Competition Commission of India established under sub-section (1)of section 7 of the Competition Act, 2002, if necessary, and such other sectoral regulators or authorities which are likely to be affected by the compromise or arrangement and shall require that representations, if any, to be made by them shall be made within a period of thirty days from the date of receipt of such notice, failing which, it shall be presumed that they have no representations to make on the proposals.

(6) Where, at a meeting held in pursuance of sub-section (1), majority of persons representing three-fourths in value of the creditors, or class of creditors or members or class of members, as the case may be, voting in person or by proxy or by postal ballot, agree to any compromise or arrangement and if such compromise or arrangement is sanctioned by the Tribunal by an order, the same shall be binding on the company,

all the creditors, or class of creditors or members or class of members, as the case may be, or, in case of a company being wound up, on the liquidator appointed under this Act or under the Insolvency and Bankruptcy Code, 2016, as the case may be, and the contributories of the company.

(7) An order made by the Tribunal under sub-section (6) shall provide for all or any of the following matters, namely:—

(a) where the compromise or arrangement provides for conversion of preference shares into equity shares, such preference shareholders shall be given an option to either obtain arrears of dividend in cash or accept equity shares equal to the value of the dividend payable;

(b) the protection of any class of creditors;

(c) if the compromise or arrangement results in the variation of the shareholders' rights, it shall be given effect to under the provisions of section 48;

(d) if the compromise or arrangement is agreed to by the creditors under sub-section (6), any

proceedings pending before the Board for Industrial and Financial Reconstruction established under section 4 of the Sick Industrial Companies (Special Provisions) Act, 1985 shall abate;

(e) such other matters including exit offer to dissenting shareholders, if any, as are in the opinion of the Tribunal necessary to effectively implement the terms of the compromise or arrangement:

Provided that no compromise or arrangement shall be sanctioned by the Tribunal unless a certificate by the company's auditor has been filed with the Tribunal to the effect that the accounting treatment, if any, proposed in the scheme of compromise or arrangement is in conformity with the accounting standards prescribed under section 133.

(8) The order of the Tribunal shall be filed with the Registrar by the company within a period of thirty days of the receipt of the order.

(9) The Tribunal may dispense with calling of a meeting of creditor or class of creditors where such creditors or class of creditors, having at least

ninety per cent. value, agree and confirm, by way of affidavit, to the scheme of compromise or arrangement.

(10) No compromise or arrangement in respect of any buy-back of securities under this section shall be sanctioned by the Tribunal unless such buy-back is in accordance with the provisions of section 68.

(11) Any compromise or arrangement may include takeover offer made in such manner as may be prescribed: Provided that in case of listed companies, takeover offer shall be as per the regulations framed by the Securities and Exchange Board.

(12) An aggrieved party may make an application to the Tribunal in the event of any grievances with respect to the takeover offer of companies other than listed companies in such manner as may be prescribed and the Tribunal may, on application, pass such order as it may deem fit. Explanation.—For the removal of doubts, it is hereby declared that the provisions of section 66 shall not apply to the reduction of share capital

effected in pursuance of the order of the Tribunal under this section.

8. In view of the provision of Section 230 and the decision of the Hon'ble Supreme Court in 'Meghal Homes Pvt. Ltd.' and 'Swiss Ribbons Pvt. Ltd.', we direct the 'Liquidator' to proceed in accordance with law. He will verify claims of all the creditors; take into custody and control of all the assets, property, effects and actionable claims of the 'corporate debtor', ***carry on the business of the 'corporate debtor' for its beneficial liquidation*** *etc. as prescribed under Section 35 of the I&B Code. The Liquidator will access information under Section 33 and will consolidate the claim under Section 38 and after verification of claim in terms of Section 39 will either admit or reject the claim, as required under Section 40. Before taking steps to sell the assets of the 'corporate debtor(s)' (companies herein), the Liquidator will take steps in terms of Section 230 of the Companies Act, 2013. The Adjudicating Authority, if so required, will pass appropriate order. Only on failure of revival, the Adjudicating Authority and the Liquidator will first proceed with the sale of company's assets wholly and thereafter, if not possible to sell the company in part and in accordance with law."*

13. Therefore, it is clear that during the liquidation process, step required to be taken for its revival and continuance of the 'Corporate Debtor' by protecting the 'Corporate Debtor' from its management and from a death by liquidation. Thus, the steps which are required to be taken are as follows:

i. By compromise or arrangement with the creditors, or class of creditors or members or class of members in terms of Section 230 of the Companies Act, 2013.

ii. On failure, the liquidator is required to take step to sell the business of the 'Corporate Debtor' as going concern in its totality along with the employees.

14. The last stage will be death of the 'Corporate Debtor' by liquidation, which should be avoided.

15. Learned counsel appearing on behalf of the Appellant (Promoter) submitted that the provisions under Section 230 may not be completed within 90 days, as observed in ***"S.C. Sekaran v. Amit Gupta & Ors."*** (Supra).

16. It is further submitted that there will be objections by some of the creditors or members who may not allow the Tribunal to pass appropriate order under Section 230 of the Companies Act, 2013.

17. Normally, the total period for liquidation is to be completed preferably within two years. Therefore, in ***"S.C. Sekaran v. Amit Gupta***

& Ors." (Supra), this Appellate Tribunal allowed 90 days' time to take steps under Section 230 of the Companies Act, 2013. In case, for any reason the liquidation process under Section 230 takes more time, it is open to the Adjudicating Authority (Tribunal) to extend the period if there is a chance of approval of arrangement of the scheme.

18. During proceeding under Section 230, if any, objection is raised, it is open to the Adjudicating Authority (National Company Law Tribunal) which has power to pass order under Section 230 to overrule the objections, if the arrangement and scheme is beneficial for revival of the 'Corporate Debtor' (Company). While passing such order, the Adjudicating Authority is to play dual role, one as the Adjudicating Authority in the matter of liquidation and other as a Tribunal for passing order under Section 230 of the Companies Act, 2013. As the liquidation so taken up under the 'I&B Code', the arrangement of scheme should be in consonance with the statement and object of the 'I&B Code'. Meaning thereby, the scheme must ensure maximisation of the assets of the 'Corporate Debtor' and balance the stakeholders such as, the 'Financial Creditors', 'Operational Creditors', 'Secured Creditors' and 'Unsecured Creditors' without any discrimination. Before approval of an arrangement or Scheme, the Adjudicating Authority (National Company Law Tribunal) should follow the same principle and should allow the 'Liquidator' to constitute a 'Committee of Creditors' for its opinion to find out whether the arrangement of Scheme is viable, feasible and having appropriate financial matrix. It will be open for the Adjudicating Authority as a

Tribunal to approve the arrangement or Scheme in spite of some irrelevant objections as may be raised by one or other creditor or member keeping in mind the object of the Insolvency and Bankruptcy Code, 2016.

19. In view of the observations aforesaid, we hold that the liquidator is required to act in terms of the aforesaid directions of the Appellate Tribunal and take steps under Section 230 of the Companies Act. If the members or the 'Corporate Debtor' or the 'creditors' or a class of creditors like 'Financial Creditor' or 'Operational Creditor' approach the company through the liquidator for compromise or arrangement by making proposal of payment to all the creditor(s), the Liquidator on behalf of the company will move an application under Section 230 of the Companies Act, 2013 before the Adjudicating Authority i.e. National Company Law Tribunal, Chennai Bench, in terms of the observations as made in above. On failure, as observed above, steps should be taken for outright sale of the 'Corporate Debtor' so as to enable the employees to continue.

20. Both the appeals are disposed of with aforesaid observations and directions. No cost.

(Justice S.J. Mukhopadhaya)
Chairperson

(Justice Bansi Lal Bhat)
Member(Judicial)

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