

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI Company

Appeal (AT) (Insolvency) No. 917 of 2020

(Arising out of Impugned Order Dated 29.07.2020 passed by Hon'ble National Company Law Tribunal, Court -V, New Delhi in C.A 121/ND/2019 in Company Petition No. (IB) 323(ND)/2019)

In the matter of:

1.Ms. Ratna Singh

J-601, Som Vihar, R.K.Puram

Sector 10, South West Delhi – 110022

...Appellant No.1

2.Mr. Brijinder Singh

J-601, Som Vihar, R.K.Puram

Sector 10, South West Delhi – 110022

...Appellant No.2

Vs.

1.M/s.Theme Export Pvt. Ltd

Through

Mr.Vikram Bajaj

Resolution Professional

For Theme Exports Pvt. Ltd.

...Respondent No.1

2.Ms. Nandini Singh

F-105, Som Vihar, R.K.Puram

Sector 10, South West Delhi – 110022

...Respondent No.2

Present:

For Appellant: Mr.Sagar Rajiv Agnihotri, Advocate.

For Respondent: Mr. Abhishek Anand, Advocate.

JUDGMENT

DR. ASHOK KUMAR MISHRA, TECHNICAL MEMBER

1. The Appellants – Ms. Ratna Singh w/o Mr. Brijinder Singh and Mr. Brijinder Singh both Ex-Directors of M/s.Theme Export Pvt. Ltd., have filed this Appeal under Section 61 read with Section 33(2) of the Insolvency and Bankruptcy Code, 2016 (in short 'I&B Code, 2016') against the Impugned order dated 29.07.2020 passed by the Adjudicating Authority ('National Company Law Tribunal, New Delhi') in CA.121/ND/2019 in Company Petition No.(IB) 323(ND)/2019. The Adjudicating Authority has allowed the Petition and ordered the liquidation of the Corporate Debtor - and appointed 'Liquidator' Mr.Vikram Bajaj, Ex- Interim Resolution Professional (for short IRP) of the same company having registration No.IBBI/IPA-002/IP-N-00003/2016-17/10003.
2. The Adjudication Authority has passed the liquidation order primarily on the basis of the recommendation of Committee of Creditors (for short 'CoC') and the CoC has recommended liquidation with the strength of 98.5% voting shares. While passing liquidation order, the Adjudicating Authority has taken a conscious decision not to challenge the commercial wisdom of the Financial Creditor and has relied upon certain Hon'ble Apex Court judgments like Committee of Creditors of Essar Steel India Limited Through Authorized Signatory vs. Satish Kumar Gupta & Ors in Civil Appeal No. 8766-67 OF 2019 & K.Shashidhar Vs. Indian Overseas Bank and ors in Civil Appeal No. 10673/2018 etc. The

Adjudicating Authority has also observed that one Mr. Ratan Singh-Operational Creditor filed an application under Section 9 of the I&B Code, 2016 and the Adjudicating Authority has admitted the said application on 29.08.2019 initiating 'Corporate Insolvency Resolution Process' (for short CIRP) against the corporate debtor and appointed Mr. Vikram Bajaj as IRP. the First meeting of CoC was held on 28.09.2019 and the second meeting of CoC was held on 04.11.2019 confirming IRP as Resolution Professional (for short RP) and also deciding to liquidate the corporate debtor company.

3. Aggrieved by the order both Ex-Directors have filed the present Appeal for staying the liquidation proceedings and quashing the impugned liquidation order dated 29.07.2020 passed by the Adjudicating Authority; Apart from directing the IRP to continue CIRP and also to bring back the money belonging to the corporate debtor etc.

4. The Appellants submission reflects the following issues:-

a. The Respondent - Ms. Nandani Singh, a Director of Corporate Debtor (CD) has committed cheating and fraud and has diverted/syphoned off money elsewhere belonging to M/s. Theme Export Pvt. Ltd, Corporate Debtor and she has opened foreign bank accounts in the name of her daughters Ms. Nitya Vaishnavi Singh and Ms. Vanya Vaishnavi Singh in HSBC Bank and National Westminster bank, London United Kingdom. Material were supplied by the Corporate

Debtor and some payments were collected in the daughters foreign bank account and have furnished certain emails and certain other invoices., commercial export invoices etc., substantiating the same, which are available from page no. 201 to 210, page 239 to 286 in the Appeal Paper Book.

- b. The Corporate Debtor has availed Financial Credit facility from Bank of Baroda to the tune of Rs. 25 Crores mortgaging its plant, machinery and assets including accessories stock and fabric as primary security and the factory at Okhla along with personal/corporate guarantees of the three Directors and the same was getting renewed by the bank since 2005. The Corporate Debtor performance has started deteriorating from the Financial Year 2015-16 from Rs. 100 Crore approx. to Rs. 30 Crores approx. in the year 2018-19 on account of various frauds leading to operation and mismanagement by Mrs. Nandani Singh, Director of Corporate Debtor alongwith certain other related parties and employees. All these failures laid to nonpayment of statutory dues and also the Appellants perforce resigning from the Corporate Debtor from 12.03.2019. The Corporate Debtor's Bank was Bank of Baroda (BOB) 55 Madhuvan, Nehru Place Branch, New Delhi – 110020.
- c. Mr. Ravinder Rai- Ex-Accountant of the corporate debtor has provided to the IRP all the data of the illegal acts committed by Mrs. Nandani

Singh – a Director of the corporate debtor on 18.11.2019 prior to filing of liquidation proceedings by IRP.

- d. The Appellants have also written to Mrs. Nandani Singh demanding for explanation for the theft and the criminal breach of trust amounting to Oppression and Mismanagement apart from visiting Bank of Baroda and informing the Chief Manager Mr. Lalit Kumar Luthra about the theft etc., and demanded for stock statements and fixed assets register alongwith the list of machinery placed to the bank on 31.12.2018. As per the Appellant the official has not entertained them and asked to refrain from dealing such issues. The IRP and the Director- Mrs. Nanadani Singh Corporate Debtor visited Okhla Plant and it was observed that the available plant and machinery was lying completely dismantled and difficult to verify so was the case with the accessories stock and fabric also. IRP has neither conducted any physical verification of Accessories stock nor fabric and machinery lying dismantled in the factory premise of Corporate Debtor.

5. The Respondents have not filed the counter/objections, though the case was first heard on 20.10.2020 and thereafter was posted for admission on 28.10.2020. However, the Liquidator has submitted the Written Submission vide diary number 23082 dated 02.11.2020. As per the written submission and also oral submission made by the Respondent

counsel, it is hovering around section 61(4) of the I&B Code, 2016 which clearly states that an appeal against the liquidation order can be challenged only on the ground of material irregularities or fraud committed in relation to such liquidation order. He has also stated that the Appellants are not challenging the liquidation order per se but their grievance is against the act of Oppression and Mismanagement by other director of the Corporate Debtor. It is also stated that the various financial fraud was committed by the Director of the corporate debtor namely, Mrs. Nandani Singh in collusion with several accused persons which led to mismanagement and oppression. The IRP has failed to take steps with regard to the fraud committed by the ex-management of the Company prior to initiation of CIRP and has challenged the impugned order dated 29.07.2020 passed by Adjudicating Authority based on said allegations. However, the appellants have failed to initiate filing of petition under section 241-242 of the Companies Act, 2013 which deals with oppression and mismanagement. The Appellants have failed to file such application at appropriate stage and hence the Appellants cannot challenge the issue of Oppression and Mismanagement under section 61(4) of the Code and hence the Application needs to be dismissed.

6. The Counsel of the Liquidator has also stated that the documents are being reviewed by the Forensic Auditor M/s. K.R.A and Company Chartered Accountants to certain transactions under section 43, 45 and

66 of I&B Code 2016 and an appropriate application shall be filed by the liquidator based on findings. It is also submitted that no infirmity in the impugned order dated 29.07.2020 passed by the Adjudicating Authority. He is stretching the issue of commercial wisdom of the Committee of Creditors (CoC) who decided with over 98% voting to liquidate the Company and cited certain Hon'ble Apex Court Judgment like Committee of Creditors of Essar Steel India Limited Vs. Satish Kumar Gupta & Ors. Civil Appeal No. 8766-67/2019 and K.Sashidhar Vs. Indian Overseas Bank & Ors., Civil Appeal No. 10673 of 2018. After considering the fact that there are no chances of revival of the corporate Debtor and has resolved the liquidation of the Corporate Debtor and hence this Application needs to be dismissed.

7. We have carefully considered the pleadings of the parties and gone through certain documents and it observed the followings:

a. The CoC comprises of three financial creditors with voting shares as stated below:

SL No.	Name of Financial Creditor	Vote shares
1.	Bank of Baroda	98.10%
2.	IDFC First Bank Ltd.	1.48%
3.	Equitas Small Finance Bank Ltd	0.42%
Total		100.00%

b. The IRP has charged a fees @ of Rs. 2.50 lakhs per month + GST and other expenditure total amounting to Rs. 7,03,520/-.

- c. It also reflects that the Audited Financial Statement were available upto 31.03.2017.
- d. The Corporate Debtor was comprising of three directors - two appellants were the directors and other Director was Ms. Nandani Singh whereas shareholding in the Corporate debtor of Ms. Nandani Singh was 92% and of the Appellants were 8%.
- e. From the 2nd minutes of the CoC held on 04.11.2019 at 3:00 PM at Bank of Baroda building 14th Floor, 16 Sansad marg New Delhi as at page no.114 of the Appeal paper book, it is stated as follows:

“The IRP briefed the CoC members that the CoC in its last meeting decided that measures for revival of operations of TEPL may be discussed in the next CoC meeting. The representative of the BOB submitted that during the joint visit it was revealed by Ms. Nandini Singh that significant plant & machinery was shifted to NOIDA unit and since sold/adjusted against lease rentals, details of which have neither been provided to the Bank nor to the IRP. Further Ms. Nandani Singh had informed the available plant and machinery is also lying in completely dismantled form thus difficult to verify. Further the company was not carrying any stock and the directors have not provided any updated financial statements from which financial

position of the company and other asset could be verified. In the background, the bank was of the view that since the business operations are lying closed and its difficult to revive operations with limited plant and machinery (which is also dismantled), the company should be liquidated in accordance with the provisions of the IBC, 2016 supported in view of the BOB”.

- f. Chapter -III of Part -II of IBC, 2016 has mechanism even during liquidation process to initiate action for various wrong doings from Section 43 to Section 51 and Section 66, these are all related to undervalued transactions, avoidable transactions, defrauding creditor, fraudulent trading or wrongful trading etc. The Liquidator, who is also erstwhile IRP, is required to take necessary action and the Bank of Baroda is to provide appropriate assistance. Bank of Baroda was supposed to check flow of inventory, cash to cash cycle etc. as they have lent Rs. 25 Crores.
- g. The Appellants have cited the Hon'ble Apex court judgment S.P.Chengalvaraya Naiduvs Jagannath, 1994 SCC (1) 1/1994 AIR 853, it was held that “fraud avoids all judicial acts, ecclesiastical or temporal. It is a settled proposition of law that a judgment or decree obtained by playing fraud on the court is a nullity and non-est in the eyes of law.

8. We have also gone through Hon'ble Supreme court judgments in the case of K.Shasidhar Vs. Indian Overseas Bank in Civil Appeal No. 10673 of 2018 (at para 33 & 42) and in the case of CoC of Essar Steel Vs. Satish Kumar Gupta and ors. Civil Appeal No. 8766 -67 of 2019 (para 31). These citation confirms that commercial wisdom of the CoC cannot be looked into by either Adjudicating Authority or Appellate Authority.
9. Section 61 I&B Code, which reads as under:

"61. (1) Notwithstanding anything to the contrary contained under the Companies Act 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 provisions of any law for the time being in force;

- (ii) there has been material irregularity in exercise of the powers by 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.

10. An appeal against a liquidation order passed under Section 33 may be filed on the grounds of material irregularity or fraud committed in relation to liquidation order. We find no material irregularity or fraud committed in relation to impugned order.

11. The I&B Code, 2016 is not meant for initiating proceedings for prevention of oppression and mismanagement but is armed with provisions under part -II Chapter – III for initiation of actions against wrong doers/illegal transactions etc.

12. As stated supra, we find no reason to interfere with the liquidation order passed by the Adjudicating Authority dated 29.07.2020. We uphold

the order passed by the Adjudicating Authority dated 29.07.2020 with above observations. A copy of this order may be provided by Registry to the Chairman of Insolvency and Bankruptcy Board of India and Bank of Baroda.

13. The Appeal is dismissed. However, no order as to costs.

[Justice Jarat Kumar Jain]
Member (Judicial)

[Dr. Ashok Kumar Mishra]
Member (Technical)



18th November, 2020

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