

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI**

Company Appeal (AT) (Insolvency) No. 1423 of 2024

[Arising out of the Impugned Order dated 30.10.2023 passed by the Adjudicating Authority, National Company Law Tribunal, Ahmedabad Bench-I in I.A. No. 558/AHM/2022 in CP (IB) No. 559 of 2019]

In the matter of:

Sunil Surrendrakumar Kakkad

Shareholder & Suspended Director of
Sujoyot Infrastructure Pvt. Ltd.
Having his address at:
F/103, Satellite Center,
Cooperative Housing Society,
“C” Block, Ground Floor, Opp.
Management Enclave, Vastrapur,
Ahmedabad- 380 015.

...Appellant

Versus

1. Sujoyot Infrastructure Pvt. Ltd.

Through its Liquidator Ramakant Gupta
Reg. No.- IBBI/IPA-001/IP-P-02673/
2022-2023/14105
Having his address at
E-6B, Poddar Residency, Near
G D Goyanka School, Vesu, Surat,
Gujarat- 395 007.

...Respondent No.1

2. Parag Sheth

Erstwhile Resolution Professional of
Sujoyot Infrastructure Pvt. Ltd.
Having his address at
404, Sachet II, Opp. GLS University,
Maradia Plaza Lane, CG Road,
Ahmedabad- 380 006.

...Respondent No.2

Present:

For Appellant : Mr. Yash Singh Deora, Sr. Advocate with Mr. Keith Varghese, Mr. Mohit Gupta, Mr. Sonal K Chopra, Advocates.

For Respondent :

J U D G M E N T

(Hybrid Mode)

Per: Barun Mitra, Member (Technical)

The present appeal filed under Section 61 of Insolvency and Bankruptcy Code 2016 (**'IBC'** in short) by the Appellant arises out of the Order dated 30.10.2023 (hereinafter referred to as **'Impugned Order'**) passed by the Adjudicating Authority (National Company Law Tribunal, Ahmedabad, Bench-I) in I.A. No. 558/AHM/2022 in C.P. (IB) No. 559 of 2019. By the impugned order, the Adjudicating Authority has ordered liquidation of the Corporate Debtor as approved by the Committee of Creditors (**'CoC'** in short). Aggrieved by the impugned order, the present appeal has been preferred by the shareholder and Ex-Director of the Corporate Debtor.

2. Coming to the factual matrix of the present case, it is noticed that the Corporate Debtor-Sujyot Infrastructure Private Limited which was engaged in the business of construction of re-modelling of buildings was admitted into Corporate Insolvency Resolution Process (**'CIRP'** in short) on 22.12.2021. The Resolution Professional (**'RP'** in short) who was appointed following the CIRP admission constituted the CoC comprising of only two members viz. State Bank of India with 78.10% vote share and Bank of Baroda with 21.90% vote share. The CoC in its first meeting held on 28.01.2022 disapproved the agenda for issuance of Form-G and decided to consider the agenda of liquidation of the Corporate Debtor in their next meeting after the CoC members had obtained necessary approval of their competent authorities. The second CoC meeting was

held on 09.05.2022 wherein the CoC voted against extension of CIRP period for 90 days on completion of 180 days on 19.06.2022. The second CoC meeting also voted against issue of Form-G by 100% vote share besides ratifying the liquidation of Corporate Debtor with 100% vote share. The RP thereafter preferred an application before the Adjudicating Authority on 17.06.2022 under Section 33 of IBC for approval of the proposal to liquidate the Corporate Debtor. The Adjudicating Authority passed the impugned order on 30.10.2023 allowing the liquidation application preferred by RP for initiation of liquidation process against the Corporate Debtor. Aggrieved by the impugned order, the present appeal has been preferred by the former Director of the Corporate Debtor.

3. We have heard Shri Yash Singh Deora, Ld. Sr. Advocate for Appellant. The Ld. Sr. Counsel for the Appellant assailing the impugned order submitted that the RP and CoC committed an error in not finding resolution for the Corporate Debtor and resorting to liquidation in the first instance itself. Though the RP had submitted before the CoC that three prospective investors were interested in reviving the Corporate Debtor, the CoC without considering such revival proposals proceeded with liquidation of the Corporate Debtor without even bothering to issue Form-G. It was further submitted that though this decision of the CoC to liquidate was arbitrary but the Adjudicating Authority approved the same without application of mind. It was contended that Adjudicating Authority cannot rubber-stamp the decision of the CoC when the decision of the CoC violated the primary objective of IBC which is revival of the Corporate Debtor. Pointing out that though the CIRP ran for a period of five

months yet only two CoC meetings were held, it was asserted that there was a long gap between the two CoC meetings and had it met in a more timely manner they could have easily published Form-G and invited resolution plans instead of arbitrarily embarking upon liquidation of the Corporate Debtor. It was also asserted that the ground taken by the CoC to liquidate the Corporate Debtor was that the company was not a going concern but the CoC has decided to sell the Corporate Debtor as a going concern which shows the arbitrary decision making by the CoC. In support of their contention, the Ld. Sr. Counsel for the Appellant submitted that the Hon'ble Supreme Court in ***Swiss Ribbons Private Limited V/s UoI, Writ Petition (Civil) No. 99 of 2018*** has clearly held that the primary objective of IBC is reviving the Corporate Debtor and liquidation is available only as last resort. It was also contended that the decision of CoC is subject to judicial review as has been held by this Tribunal in ***Hero Fincorp Ltd. v/s M/s Hema Automotive Pvt. Ltd. in CA(AT)(Ins) No. 1540 of 2022***. Attention was also adverted to the judgment of the Hon'ble Supreme Court in ***Vallal Rck v/s M/s Siva Industries & Holdings Ltd. and Ors. in Civil Appeal Nos. 1811-1812 of 2022*** wherein it was held that if the decision of CoC is ex-facie arbitrary, the decision of CoC can be set aside. In the present case, when the decision of the CoC was not to accord primacy to resolution, the decision of the CoC was ex facie arbitrary and should have been set aside by the Adjudicating Authority.

4. We have duly considered the arguments advanced by the Learned Sr. Counsel for the Appellant and perused the records carefully.

5. The primary issue for our consideration is whether the CoC with 100% vote share could have directly proceeded for liquidation of the Corporate Debtor without taking any steps for resolution of the Corporate Debtor and, if so, whether in the given factual matrix there were good reasons for the CoC to initiate liquidation of the Corporate Debtor in the exercise of its commercial wisdom and whether the Adjudicating Authority had failed to apply its mind in passing the impugned order approving the proposal of the CoC to initiate liquidation.

6. Before we find our bearings on the above delineated issues which are closely inter-linked and therefore being dealt conjointly, it may be useful to glance at Section 33(2) of the IBC which deals with the initiation of liquidation which is as extracted below:

“Section 33. Initiation of liquidation

*(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 IM.”*

(Emphasis added)

7. A plain reading of the aforementioned Section 33(2) of the IBC unambiguously shows that it is not incumbent upon the CoC to complete the steps for resolution of the Corporate Debtor before exercise of its jurisdiction

to pass an order of liquidation of the Corporate Debtor. Such a decision can be taken “any time” during the CIRP as long as it precedes confirmation of the resolution plan. Significantly, the phrase “any time” has been used again in the Explanation clause under Section 33(2) which was inserted later by an amendment vide Act No. 26 of 2019. This use of the phrase “any time” twice clearly reinforces the legislative intent to empower the CoC to take decision to liquidate the Corporate Debtor any time after its constitution even prior to the preparation of the Information Memorandum (“**IM**” in short) but before confirmation of the resolution plan. The power given to the CoC to take decision for liquidation is of a wide amplitude which can be exercised immediately after constitution of the CoC. In terms of the statutory construct of IBC, it is therefore not required for the CoC to complete all the steps relating to resolution of the Corporate Debtor prior to the liquidation of the Corporate Debtor and any interpretation to the contrary would clearly be antithetical to the spirit of Section 33(2) and Explanation appended to it wherein the legislature has consciously used the words “any time” for liquidation even before inviting resolution plans.

8. We are therefore of the considered view that the legislative fiat of Section 33(2) read with the explanation clause empowers the CoC for deciding to initiating liquidation even before inviting resolution plans.

9. This brings us to the contention of the Appellant that it is a well settled proposition of law as laid down in ***Swiss Ribbons (P) Ltd Vs Union of India (2019) 4 SCC17*** that IBC is first and foremost a code for reorganisation and

insolvency resolution of Corporate Debtor and liquidation should be the last resort. It has also been the contention of the Appellant that judicial review of the decision of the CoC to proceed with liquidation is not precluded since any such decision of the CoC has to be in conformity with the provisions of IBC as has been held by this Tribunal in ***Hero Fincorp Ltd. v/s M/s Hema Automotive Pvt. Ltd. in CA(AT)(Ins) No. 1540 of 2022***. In other words, it depends on the facts of each case as to whether the decision to liquidate the Corporate Debtor was in accordance with the IBC or not.

10. We now proceed to study the facts of the present case to analyse whether there were good and cogent grounds noticed by the CoC to recommend liquidation or whether their reasoning was flawed and ex-facie arbitrary.

11. For this purpose, we feel that it would be constructive and worthwhile to first of all run our eyes through the minutes of the two CoC meetings to find out the underpinning rationale behind the decision for liquidation of the Corporate Debtor. The relevant minutes of the relevant CoC meetings are as extracted below:

Minutes of the first meeting of CoC held on 28.01.2022

“At this juncture, representative from BoB inquired about the operational, compliance part of the Company and whether financials tally/data etc had been provide by the Management to IRP or not. RP replied that no data has been received from the promoters even though an email sent to the promoters on 05.01.2022 (which was duly acknowledged by the Promoter during the meeting) and even promoter has shown his inability to provide data at present as he does not have any data with him but Mr. Kakkad assured IRP to co-operate in the matter..... Mr. Kakkad informed that as data is not available with him

and he needs to be dependent on someone else, he cannot assure about any timeline at present but will try to provide data at the earliest possible. At this, RP inquired with Mr. Kakkad whether he has received the list of required documents, which was positively confirmed by Mr. Kakkad. He further informed that he is out on temporary bail and has to surrender himself on coming Monday but whenever he is available, he can be contacted on the cordials given by him during meeting.

Representative from Bank of Baroda inquired whether there are any valid contracts at present in the Company and in reply to that Mr. Kakkad confirmed that as Sujoyot was an asset based company, there is no subsisting contact, license, etc. at present. Representative from Bank of Baroda inquired whether there is any possibility of revival of this Company and Mr. Kakkad replied that infact he has some investor who can revive company and he is trying to do the same since 2015. He further informed that the property at Gota is of all the three companies and it is a customized property which cannot be sold in bits and pieces. Bank of Baroda once again stated that no proposal has been received by CoC in regard to consideration, etc. for revival of the Company even though considerable time of more than 6/7 years has been lapsed and as CIRP being time bound process, CoC cannot wait further for unreasonable/undefined time.....

At this stage, Mr. Kakkad, Director Suspended, stating that although he does not have voting right, he expressed his views to explore the opportunities to review the company rather than go for liquidation initially. But SBI and BoB were of the view that since there was no resolution plan received in other two companies also and as there is no operational activity since more than 5/7 years, upon exercising their commercial wisdom decided that liquidation will be the best possible way. Even Bank of Baroda stated that while taking CD into Liquidation. It will give an added advantage to sell the combined assets of all three companies situated @ Gota.

Minutes of 2nd phase of the 1st CoC meeting held on 29.01.2022

Discussions of Liquidation

RP recalled the discussions held in the 1st phase of this meeting held on 28.01.2022 wherein discussions held at length on various aspects; the point of view of majority of member of CoC Resolved that as there is no chance to review and restart the Corporate Person in view of the following observations not limited to:

- Company is not going concern since more than 5/7 years
- Corporate Debtor is out of business since about more than 5/7 years
- There is no Key Managerial Person available in the Company
- There is no employee in the Company since more than 5/7 years
- Asset v/s liability and claims are not favorable for restart and revive of Corporate Debtor

.....

Mr. Modi from Bank of Baroda clearly stated that although promoter is talking about revival of company, there is no positive sign of revival since 2015 and hence, there is no meaning to prolong the process of CIRP.

Mr. Pankhania from Bank of Baroda also expressed his views that if the ex-promoters are so much curious and eager to revive the Company, why they have not complied with laws and compliances anything since 2015 and even the operational part is closed since 2015.”

Minutes of the 2nd meeting of CoC held on 09.05.2022

“5. To discuss & approve filing of suitable application before the Hon’ble NCLT, Ahmedabad Bench for extension of CIRP period for 90 days in view of completion of 180 days on 19.06.2022

At this juncture, RP invited views of the CoC members in regard to publication of Form G especially in the situation when three letters from prospective investors has been received. He further informed that in case the CoC decides to publish Form G than an application for extension of CIRP period needs to be filed with the Hon’ble NCLT, Ahmedabad Bench because 180 days of the CIRP will get completed during the timeline given in the proposed Form-G.

Mr. Nitin Chauhan, from State Bank of India, one of the CoC member, expressed his opinion that as there is no information/ documents/ details available from the Corporate Debtor/ Board of Directors (suspended) so far, the IM cannot be prepared completely which in turn will not render any help to any prospective investor. He, further, opined that as the business of the Corporate Debtor is not running since many years, there is no question of revival of the Company.

RP, thereafter, requested the Officers of the Bank of Baroda to give view to which Mr. Bhavesh Modi from Bank of Baroda expressed same concerned which Mr. Nitin Chauhan expressed. Mr. Modi further added

that when possession of the property is not with the RP and if the incomplete IM will be provided to the prospective investor and if he acts upon the same, the same may lead to very serious complications in future and hence, they also of the opinion to proceed with the liquidation.”

(Emphasis supplied)

Thereafter voting was conducted and with 100% of voting share it was resolved that Form-G and its publication is not approved/rejected by the Committee of Creditors. Further with 100% of voting share it was also resolved the liquidation process for M/s Sujyot Infrastructure Private Limited be initiated and the RP was authorised to file an application with NCLT for initiation of liquidation.

12. Against this backdrop of the minutes recorded in the first and second CoC deliberations, it is clear that the CoC members in the very first meeting had taken notice of the fact that the Corporate Debtor was not a going concern and was closed for last past 5-7 years and therefore revival was not possible. The CoC had also noticed that there was no employee in the Company and that there were no records available of the Corporate Debtor including their financials. It had also noted that if a comparative analysis was made of assets against liability, the balance was not in favour of the revival of the Corporate Debtor. It therefore found that the health of the Company was not favourable for revival. In such circumstances, the CoC had come to the conclusion that there were no positive signs for revival and that there were no good grounds to prolong the process of CIRP. This decision of the CoC was taken keeping in view

the financial position of the Corporate Debtor and does not reflect any arbitrariness.

13. It was also noticed by the CoC that the RP had furnished a long list of documents required to comply with the various formalities for conducting CIRP and in particular to prepare the IM. Though the RP had sent several communications to the suspended management of the Corporate Debtor for handing over the records including custody of assets, no reply had been received from the suspended management. However, the suspended management could only provide the Pan Card details only. It is pertinent to note that the suspended Director was under arrest and out on temporary bail during the 1st CoC meeting and hence the CoC committed no mistake in concluding that he would not be always available for giving the information for preparation of IM. The first CoC meeting had categorically enquired from him as to when he would be able to provide the data required for preparation of IM to which he had indicated that he would have to depend on others to provide the data and therefore could not assure about any timeline by which he could provide the requisite data. Thus, the IRP did not have requisite and certain information to draw up proper IM. It was therefore concluded by CoC members that in the absence of documents of the Corporate Debtor, the IM could not be prepared in a wholesome manner as it would be bereft of all details of the Corporate Debtor. Given the non-availability of documents of the Corporate Debtor, the RP could prepare only an IM based upon limited information available in the public domain basis which it would not have been possible to

secure realistic resolution plans which would maximise the value of the assets of the Corporate Debtor besides causing future complications. Clearly the scenario was dim for coming up with a holistic and comprehensive IM sans which the issue of Form-G becomes a meaningless exercise. Accordingly, the second CoC meeting after due deliberations had decided not to publish Form-G.

14. We also notice that the CoC has taken note of the fact that even the asset of the Corporate Debtor was under the attachment of Enforcement Directorate. It is also relevant to note that the CoC had taken cognizance of the fact that no resolution plan was received in the case of other two sister companies of the Corporate Debtor leading to their liquidation and by taking up liquidation of the present Corporate Debtor too, it would give an added advantage to sell combined assets of all three companies located at Gota. It is clear that the CoC had considered at length whether there was any chance to revive and restart the Corporate Debtor. Even though the decision for liquidation of the Corporate Debtor was taken after holding only two meetings, this decision was taken by the CoC after holding well considered deliberations with 100% vote share.

15. Given the conspectus of facts in the present case, CoC's decision to liquidate cannot be looked upon as abrupt and hasty or arbitrary. The contention of the Appellant that the decision of the CoC to liquidate the Corporate Debtor as arbitrary therefore lacks merit. The only grounds on which a liquidation order passed under Section 33 can be challenged are on grounds

of material irregularity or fraud as provided under Section 61(4) of the IBC. As both these grounds do not arise in the facts in this case, hence the objections of the Appellants to set aside the resolution passed by the CoC to initiate liquidation has no merit. The decision of the CoC to liquidate having been approved by the Adjudicating Authority, the same is not open to judicial review when no grounds have been made out as provided under Section 61(4) of the IBC of material irregularity or fraud committed in relation to such an order.

16. We have no doubt in our mind that the object and purpose of IBC is to revive the Corporate Debtor and save it from corporate death. Be that as it may, the commercial wisdom of the CoC in deciding whether an entity can be revived or the debtor can be restructured or the Corporate Debtor needs to be liquidated being a business decision of the CoC needs to be accorded primacy. We find that the Adjudicating Authority had noted the deliberations of the CoC and only on being satisfied that the decision of the CoC to liquidate conformed to the requirements laid down in terms of Section 33(2) of the IBC that it concurred in the recommendations of the CoC to proceed with liquidation proceedings. The Adjudicating Authority has therefore not committed any error in approving the recommendation of the CoC to liquidate the Corporate Debtor in the given circumstances. Furthermore, the decision of the CoC to liquidate could not have been interfered with by the Adjudicating Authority because of the limited powers of judicial review. It is a well settled proposition of law that the Adjudicating Authority has been bestowed with limited jurisdiction as specified in the IBC while dealing with matters relating to resolution and liquidation of

the Corporate Debtor and cannot enter upon adjudicating into the merits of a decision taken by the CoC with requisite majority in its commercial wisdom to liquidate a corporate debtor. However, we make it clear that the decision taken by the CoC was in the facts of the present case and it cannot be said that whenever decision is taken for liquidation the same is not open to judicial review.

17. In the given facts of the case, no infirmity is found in the order of the Adjudicating Authority approving the decision of the CoC to liquidate the Corporate Debtor. We do not find any good ground to interfere with the impugned order passed by the Adjudicating Authority at the instance of the Appellant. There is no merit in the appeal. The Appeal is dismissed. No costs.

**[Justice Ashok Bhushan]
Chairperson**

**[Barun Mitra]
Member (Technical)**

**[Arun Baroka]
Member (Technical)**

Place: New Delhi

Date: 14.11.2024

Abdul/ Harleen