

Rakesh Kumar Agarwal & Ors vs Devendra P Jain Liquidator Of Asis ... on 1 June, 2021

National Company Law Appellate Tribunal,
Principal Bench, New Delhi
Company Appeal (AT) (Insolvency) No. 1034 of 2020

(Arising out of order dated 15th October, 2020 passed by National Company Law Tribunal, Ahmedabad Bench(AA)in IA No. 496 of 2020 in CP (IB)No.148/NCLT/AHM/2017)

IN THE MATTER OF:

1. Mr. Rakesh Kumar Agarwal
3rd Floor Plot No. 326,
Matrusmruti Linking Road, Khar (W),
Mumbai - 400052
2. Mr. Mukesh Bansal
4th Floor Plot No. 326,
Matrusmruti Linking Road, Khar (W),
Mumbai - 400052
3. Mr. Sarvesh Agarwal
3rd Floor Plot No. 326,
Matrusmruti Linking Road, Khar (W),
Mumbai - 400052
4. M/s Asis Industries Limited
A Wing, 2nd Floor,
Mhatrre Pen Building Senapti
BaaptMarg,Dadar West,
Mumbai - 400028

...Appellants

Versus

Mr. Devendra P. Jain
Liquidator of M/s Asis Logistics Limited
1109 & 1112, Regus Centre,
11th Floor, Peninsula Business Park,
S.B. Road, Lower Parel,
Mumbai - 400013

...Respondent

Present:

For Appellants: Mr. Rajesh Bohra, Advocate.

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For Respondent: Mr. Kunal Godhwani, Advocate.
Mr. Abhishek Anand (For Liquidator)

JUDGMENT

(01.06.2021) KANTHI NARAHARI, MEMBER (TECHNICAL) Preamble:

The Present Appeal filed challenging the order dated 15.10.2020, passed by the Adjudicating Authority (NCLT Ahmedabad) Ahmedabad Bench Court No.

-II whereby the Adjudicating Authority rejected the I.A No. 496 of 2020 filed by the Appellants hearing.

Brief Facts:

2. Learned Counsel for the Appellants submitted that the Hon'ble Adjudicating Authority rejected the I.A purely on Law point and had no issues whatsoever as far as merit and facts of the above I.A are concerned.

3. Learned Counsel for the Appellant submitted that the Corporate Debtor filed Application under Section 10 of Insolvency and Bankruptcy Code (IBC) and the Application was admitted by the Adjudicating Authority on 11.01.2018.

4. By virtue of admission the Adjudicating Authority appointed IRP and the IRP taken over the charge and conducted the proceedings. While so the IRP issued Expression of Interest (EOI) on 15.02.2018 and only one application Company Appeal (AT) (Insolvency) No. 1034 of 2020 received from M/s Growfast Global. However, they have not filed any Resolution Plan to the EOI. Thereupon the Second EOI was issued on 09.08.2018 and in pursuance thereof one M/s Indsur Gears Ltd. filed application along with other applicants. However, none of the Prospective Resolution Applicant(PRA) submitted a Resolution Plan. In view of the situation in 7th CoC held on 26.10.2018 a Resolution was passed for Liquidation of the Corporate Debtor by approving 97.37% of the Voting Share.

5. The RP filed I.A No. 461 of 2018 for liquidation of the Corporate Debtor and the Adjudicating Authority passed order liquidating the Corporate Debtor on 28.08.2019.

6. The Learned Counsel submitted that the RP appointed as Liquidator and issued form -B inviting Applications. The Appellant submitted a scheme under Section 230 of the Companies Act, 2013. The Scheme submitted by the Appellant was approved by stakeholders of the Corporate Debtor and an Application bearing I. A No. 66 of 2020 for approval of this scheme of arrangement was filed before the Adjudicating Authority. While so, the I. A No. 66 of 2020 was dismissed as withdrawn in view of notification dated 06.01.2020 issued by Government of India whereby an amendment was made in Regulation 2B of Insolvency and Bankruptcy Board of India (IBBI) (Liquidation Process) Regulations 2016, by virtue of which the Appellants

Company Appeal (AT) (Insolvency) No. 1034 of 2020 became ineligible to submit a scheme in the liquidation process of the Corporate Debtor.

7. It is further submitted that by way of an amendment to MSME Act and certain changes were made in the criteria for classifying entities as Micro, Small & Medium Enterprises. In view of the amendment the Appellants became eligible to submit a scheme in the liquidation process. Hence, the Appellant filed I.A No. 496 of 2020 was filed before the Adjudicating Authority seeking permission to propose a scheme and a direction to consider the said scheme in view of the amendment.

8. Learned Counsel further submitted that the Adjudicating Authority passed the above impugned order on 15.10.2020 dismissing the said I.A.

9. Learned Counsel submitted that the notification issued by the Government of India dated 01.06.2020 notifying the criteria for classification of MSME shall come into effect from 01.07.2020. Even on plain reading though the notification was issued on 01.06.2020. However, same shall come into force with effect from 01.07.2020 i.e. prospectively.

10. Learned Counsel submitted that the Hon'ble Adjudicating Authority held that the Corporate Debtor at this stage cannot claim to be fall under the classification of MSME and take the benefit of MSME in view of amendment vide notification on 01.06.2020 with effect from 01.07.2020 by having its Company Appeal (AT) (Insolvency) No. 1034 of 2020 retrospective effect when admittedly on the date of filing of Application under Section 10 of the I&B Code, the Corporate Debtor does not fall under the criteria of MSME, in view of aforesaid reasons, the Application is bad in the eye of law, hence rejected.

11. Learned Counsel admitted that in the present case when the Application under Section 10 was filed and CIRP initiated the Corporate Debtor was not falling in the criteria/classification of MSME. The amendment came during the liquidation process.

12. Learned Counsel submitted that the Hon'ble NCLT, grossly misunderstood the entire Application on the presumption that the Appellants have sought any relief on the basis of retrospective implementation of the notification dated 01.06.2020. On the contrary, the Appellants have sought implementation of the notification only prospectively knowing very well that the notification dated 01.06.2020 is effective prospectively and not retrospectively.

13. Learned Counsel submitted that the Hon'ble Adjudicating Authority failed to take into notice the Written Submissions dated 28.09.2020 in which the Appellants had very much clarified its case precisely and also given the gist of the arguments in its concluding portion of the Written Submissions.

14. Learned Counsel further submitted that the case of the Appellants is simple that at the time of filing the Application by the Corporate Debtor under Company Appeal (AT) (Insolvency) No. 1034 of 2020 Section 10 of the IBC on 11.01.2018 there was no restriction on the promoter to give the Resolution Plan and there is no restriction under Section 230 of the Companies Act, 2013. Since Section 29A of the IBC was not introduced and not in its existence at the time of filing of Application under Section 10. The notification of Section 29A of the IBC was issued by the Government of India only on 19.01.2018 whereby the restriction was imposed on the Promoter of the Corporate Debtor submitting the Resolution Plan. The Present case of the liquidation order of the Corporate Debtor was passed on 28.08.2019 and on which date also there was no restriction on the promoters to submit the scheme in terms of Section 230 of the Companies Act, 2013.

15. However, as stated above the Government of India had issued the notification dated 01.06.2020 revising the limit of MSME and on the basis of such revival limits the Corporate Debtor is eligible to be considered as MSME and fall into the category of MSME. The Hon'ble Adjudicating Authority was of the view that as per the notification dated 01.06.2020 the Corporate Debtor fall under the category of MSME and thereby the promoters are eligible to submit the scheme. However, the Corporate Debtor was not MSME at the time of filing of Section 10 Application. Therefore, the Hon'ble Adjudicating Authority rejected the I.A No. 496 of 2020 by passing the impugned order.

16. Learned Counsel submitted that for filing scheme under Section 230 of the Companies Act, 2013 the Corporate Debtor is not required to be MSME.

Company Appeal (AT) (Insolvency) No. 1034 of 2020 The scheme under Section 230 of the Companies Act, 2013 can be filed at any stage of liquidation and if the promoters filing the scheme the relaxation is given, if it is MSME. As per the latest notification issued by the Government of India the Appellants being the promoters are eligible and there is no bar on the promoters at this stage for filing this scheme under Section 230 of the Companies Act, 2013 before the liquidator.

17. Learned Counsel submitted that the promoters had earlier complied the 90 day's limit when the liquidation order was passed.

18. Learned Counsel for the Appellant relied on the Judgment of the Hon'ble Supreme Court in the matter of 'Swiss Ribbons Pvt. Ltd. vs Union of India' dated 25.01.2019, at para 26,27.

19. Learned Counsel also relied upon the Judgment of the Hon'ble Supreme Court in the matter of 'Committee of Creditors of Essar Steel India Limited vs Satish Kumar Gupta & Ors.' dated 15.11.2019.

20. Learned Counsel submitted that the Hon'ble Supreme Court in both the Judgments held that "Preamble of the Code provide that liquidation is the last resort and it is duty of the RP/liquidator to

explore all possibilities to keep the unit as going concern and take steps for revival within the ambit of the Code and liquidation of assets per- se would only be resorted if these steps are not possible."

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21. Learned Counsel relied upon the Judgment of this Tribunal in the matter of 'S.C. Sekaran vs Amit Gupta & Ors.', Appeal No. 495 & 496 of 2018' and in the matter of 'Siva Rama Krishna Prasad vs S Rajendra, Official Liquidator of M/s Krishna Industrial Corporation Ltd. & Ors.', Appeal No. 751 & 752 of 2020' and in the matter of 'Y Shivram Prasad vs S. Dhanapal & Ors.' Company Appeal (AT) (Ins) No. 224 of 2018 dated 27.02.2019 has observed that even after pushing the Corporate Debtor into liquidation, Promoter/Ex- Director of the Corporate Debtor can take recourse to Section 230 of the Companies Act, 2013 by submitting a scheme for revival of the Corporate Debtor, subject of course to eligibility of the applicant.

22. In view of the facts of law the Learned Counsel prayed this Bench to allow the Appeal by setting aside the impugned order dated 15.10.2020 passed by the Hon'ble Adjudicating Authority in I. A No. 496 of 2020. The Learned Counsel also sought a relief that the Appellants be allowed to propose the scheme of arrangement and the same may be considered by the liquidator.

23. Learned Counsel for the Respondent liquidator filed Reply to this Appeal and submitted that he did not deny the facts as stated above. However, the Learned Counsel submitted that none of the Prospective Resolution Applicants (PRA) submitted a Resolution Plan in the CIRP of the Corporate Debtor and being left with no option, the CoC in the 7th Meeting dated 26.10.2018 passed a Company Appeal (AT) (Insolvency) No. 1034 of 2020 Resolution for liquidation of the Corporate Debtor and the same was approved by CoC with 97.37% voting rights. Accordingly, I.A No. 461 of 2018 was filed by the RP before the Adjudicating Authority and the Hon'ble Adjudicating Authority allowed the I.A vide order dated 28.08.2019 and appointed RP as liquidator of the Corporate Debtor.

24. Pursuant to the liquidation order, public announcement inviting claim from the Creditors of the Corporate Debtor was published in form B. In response thereof the Creditors submitted their claims which were duly verified by the liquidator. The Appellant/ Promoters of the Corporate Debtor submitted their scheme under Section 230 of the Companies Act, 2013 for sale of the Corporate Debtor as a going concern. The scheme submitted by the Appellant was approved by stakeholders of the Corporate Debtor and accordingly an Application bearing I. A No. 66 of 2020 was filed before the Adjudicating Authority.

25. However, the said I.A was dismissed as withdrawn in view of notification dated 06.01.2020 issued by the Government of India whereby an amendment was made in Regulation 2B of the IBBI, Regulations 2016, by virtue of which the Appellants became eligible to submit a scheme of the liquidation process of the Corporate Debtor.

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26. Subsequently an amendment was made by the Government of India to MSME Act and changes were made in the criteria for classifying entities as MSME.

27. After rejecting the Application filed by the Appellants bearing I.A No. 496 of 2020, the liquidator on 25.11.2020 published auction notice for sale of vehicles of the Corporate Debtor being only asset of the Corporate Debtor. The Auction was conducted on 29.12.2020 wherein 20 bids were received and the bid of Mr. Rakesh Kumar Agarwal of Rs. 1,54,50,000/- (One crore fifty four lakh and fifty thousand) being highest amongst all the bidders and the same was accepted and approved by the liquidator. The Successful Bidder has paid 25% of the bid amount and the balance amount is to be paid on or before 30.03.2021 and after receipt of total sale consideration, the sale certificate shall be issued in favour of the Successful bidder.

28. Heard the Learned Counsel appearing for the Respective parties, perused the pleadings, documents and Citations relied upon by them.

29. The Learned Adjudicating Authority vide its impugned order dated 15.10.2020 observed that the Appellant was not an MSME as on the date of filing of Application under Section 10 of the IBC and does not fall under the criteria MSME. The relevant Paragraph 21 of the impugned order is reproduced here under:

Company Appeal (AT) (Insolvency) No. 1034 of 2020 "21) Under the facts and circumstances, as discussed herein above, the Corporate Debtor at this stage cannot claim to be fall under the classification of MSME and take the benefit of MSME, in view of amendment vide notification issued on 01.06.2020, w.e.f. 01.07.2020, by having its retrospective effect when admittedly on the date of filing application under Section 10 of the Insolvency and Bankruptcy Code Corporate Debtor does not fall under the criteria of MSME, therefore, the Application is bad in the eye of law, hence, rejected."

30. It is an admitted fact that Section 10 Application which was filed by the Appellant/Corporate Debtor was admitted on 11.01.2018. The Adjudicating Authority appointed as Resolution Professional and declared moratorium.

31. The RP issued Public announcement on 12.01.2018 invited claims from the creditors of the Corporate Debtor/Appellant. The meeting of the CoC was also convened by the RP. As per the decision taken by the CoC the RP made a public announcement inviting Expression of Interest (EOI) on 15.02.2018 for submitting a Resolution Plan. The RP received EOI from one Growfast Global Management. And also a proposal from the promoters of the Corporate Debtor that is the Appellants herein Expressing their interest for submitting a Resolution Plan in the CIRP. However, by virtue of an amendment to Section 29 of the IBC an amendment was made by inserting Section 29(A) by Act 8 of 2018 w.e.f. 23.11.2017. By virtue of above amendment a Promoter of the Corporate Debtor is not eligible to be Resolution Applicant. In view of the aforesaid Company Appeal (AT) (Insolvency) No. 1034 of 2020 reasons the Appellant/Promoter did not submit the Resolution Plan. Since, there were no Plan received pursuant to the public announcement inviting EOI dated

15.02.2018 a fresh EOI was issued on 09.08.2019. However, no Resolution Plans have been submitted despite receiving EOI.

32. Having not received any Prospective Resolution Applicants by submitting their Resolution Plan. The CoC in their 7th Meeting convened on 26.10.2018 passed a Resolution for liquidation of the Corporate Debtor. The Resolution Professional filed Application before the Adjudicating Authority and the Adjudicating Authority allowed the Application vide its order dated 28.08.2019 and the liquidation proceedings were initiated against the Corporate Debtor. Pursuant to the liquidation proceedings against the Corporate Debtor. While so the Appellant/Promoter submitted scheme under Section 230 of the Companies Act, 2013 for sale of the Corporate Debtor as a going concern. It is seen that the scheme of the Appellant was approved by the stakeholders of the Corporate Debtor and Application bearing I.A No. 66 of 2020 for approval of the scheme of arrangement was filed before the Adjudicating Authority.

33. However, the Government of India, issued notification dated 06.01.2020. Whereby an amendment was made in Regulation 2B of IBBI Regulations, 2016 by virtue of which the Appellant became eligible to submit a scheme in the liquidation process of the Corporate Debtor.

34. It is an admitted fact that the Appellant/Promoters are not eligible to file even a scheme of arrangement under Section 230 of the Companies Act, 2013 Company Appeal (AT) (Insolvency) No. 1034 of 2020 by virtue of above notification issued by the Government of India. It is also an admitted fact that the Corporate Debtor do not fall under the category of MSME and therefore, the promoter cannot file Resolution Plan in the CIRP Process.

35. Subsequently, the Government of India vide notification dated 01.06.2020 has carried out certain changes in criteria for classification of Micro, Small and Medium Enterprises.

36. As per Section 7 of Micro, Small and Medium Enterprises Development Act, 2006 the classification was as under:

"7. Classification of enterprises.-

(1) "Notwithstanding anything contained in section 11B of the Industries (Development and Regulation) Act, 1951 (65 of 1951), the Central Government may, for the purposes of this Act, by notification and having regard to the provisions of sub-sections (4) and (5), classify any class or classes of enterprises, whether proprietorship, Hindu undivided family, association of persons, co-operative society, partnership firm, company or undertaking, by whatever name called,-

(a) in the case of the enterprises engaged in the manufacture or production of goods pertaining to any industry specified in the First Schedule to the Industries (Development and Regulation) Act, 1951 (65 of 1951), as -

(i) a micro enterprise, where the investment in plant and machinery does not exceed twenty- five lakh rupees;

(ii) a small enterprise, where the investment in plant and machinery is more than twenty - five lakh rupees but does not exceed five crore rupees; or Company Appeal (AT) (Insolvency) No. 1034 of 2020

(iii) a medium enterprise, where the investment in plant and machinery is more than five crore rupees but does not exceed ten crore rupees;

(b) in the case of the enterprises engaged in providing or rendering of services, as-

(i) a micro enterprise, where the investment in equipment does not exceed ten lakh rupees;

(ii) a small enterprise, where the investment in equipment is more than ten lakh rupees but does not exceed two crore rupees; or

(iii) a medium enterprise, where the investment in equipment is more than two crore rupees but does not exceed five crore rupees. Explanation 1.- For the removal of doubts, it is hereby clarified that in calculating the investment in plant and machinery, the cost of pollution control, research and development, industrial safety devices and such other items as may be specified, by notification, shall be excluded.

Explanation 2. - It is clarified that the provisions of section 29B of the Industries (Development and Regulation) Act, 1951 (65 of 1951), shall be applicable to the enterprises specified in sub- clauses (i) and (ii) of clause (a) of sub- section (1) of this section."

37. As per the notification dated 01.06.2020 (S.O. 1702 (E)). The Section 7 of Micro, Small and Medium Enterprises, Development Act 2006 notifies certain changes and enhanced the limit thereby making eligible the enterprises under the classification of MSME. The Said notification dated 01.06.2020 is re produced here under:

"Ministry of Micro, Small and Medium Enterprises Company Appeal (AT) (Insolvency) No. 1034 of 2020 Notification New Delhi, the 1st June,2020 S.O. 1702 (E). - In exercise of the powers conferred by sub- section (1) read with sub-section (9) of section 7 of the Micro, Small and Medium Enterprises Development Act, 2006 (27 of 2006) and in supersession of the notification of the Government of India, Ministry of Small Scale Industries, dated the 29th September, 2006, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub- section (ii), vide S.O. 1642 (E), dated the 30th September 2006 except as respects things done or omitted to be done before such supersession, the Central Government, hereby notifies the following criteria for classification of micro, small and medium enterprises, namely:-

- (i) a micro enterprise, where the investment in Plant and Machinery or Equipment does not exceed one crore rupees and turnover does not exceed five crore rupees;
- (ii) a small enterprise, where the investment in Plant and Machinery or Equipment does not exceed ten crore rupees and turnover does not exceed fifty crore rupees;
- (iii) a medium enterprise, where the investment in Plant and Machinery or Equipment does not exceed fifty crore rupees and turn over does not exceed two hundred and fifty crore rupees.

This notification shall come into effect from 01.07.2020."

38. The contention of the Appellants that pursuant to the said notification the Corporate Debtor fall under the category of the MSME and as per Section Company Appeal (AT) (Insolvency) No. 1034 of 2020 240 A of the IBC they are eligible to participate and submit a scheme, to avoid liquidation of the Corporate Debtor. We have perused the notification dated 01.06.2020 and Section 240A of the IBC and in terms of above notification the Corporate Debtor falls into the category of MSME. The Appellants vehemently contend that being existing promoters now they are eligible to submit a scheme.

39. It is also seen that the Appellants vide e-mail dated 25.07.2020, requested the liquidator to allow them for submission of scheme. The said e- mail is annexed at page 467 as (Annexure -6). From the records it is also seen that the matter was discussed in the 4th Meeting of stakeholders of the Corporate Debtor dated 17.08.2020.

40. From the perusal of the extracts of minutes it is seen that the Financial Creditors and the Appellant, the liquidator have participated in the meeting and resolved that the Promoters may submit the scheme and the scheme should be preferred over liquidation. The relevant operative part is extracted here under:

"After due discussions, the stakeholders were of the view that earlier also they had allowed scheme submitted by promoters and any such scheme should be preferred over liquidation as it is permissible now due to change in definition of MSME. Stakeholders allowed a period of 15 days for the outcome of the Application before Hon'ble NCLT. If there is no development in NCLT during the above given Company Appeal (AT) (Insolvency) No. 1034 of 2020 period, then auction notice for selling of the vehicles (which only assets available for sale) will be processed as per liquidation process under Insolvency and Bankruptcy Code, 2016.

The meeting concluded with a vote of thanks."

41. In view of the discussions in the fourth Stakeholders meeting, the liquidator filed I.A. No. 496 of 2020, before the Learned Adjudicating Authority seeking the permission of the Authority to allow this scheme of the Appellant. However, the Learned Adjudicating Authority passed the impugned

order.

42. The Learned Counsel for the Appellant contend that the Hon'ble Adjudicating Authority was of the view that the notification dated 01.06.2020 cannot be given a retrospective effect and in the said notification the implementation of the said notification is with effect from 01.07.2020. It is an admitted fact that the Corporate Debtor pursuant to the said notification dated 01.06.2020 is eligible to file a scheme since it has qualified to be an MSME. We are of the view that since the liquidation process is still pending and during the pendency of the liquidation the Government of India issued notification dated 01.06.2020 by amending Section 7 of the MSME Development Act, 2006 by enhancing the criteria. Therefore, the Company which is still under liquidation and the said notification is very well applicable to the Corporate Debtor and they are eligible to file a scheme.

43. The Learned Counsel for the Appellant relied upon the Judgments of the Hon'ble Supreme Court and this Tribunal. The Hon'ble Supreme Court in the Company Appeal (AT) (Insolvency) No. 1034 of 2020 matter of "Swiss Ribbons Pvt. Ltd. & Anr. Vs. Union of India & Ors.- Writ Petition (Civil) No. 99 of 2018 dated 25th January, 2019" held as under:

"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 Arcelor Mittal (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 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 Company Appeal (AT) (Insolvency) No. 1034 of 2020 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."

44. Further, the Hon'ble Supreme Court in the matter of "Kridhan Infrastructure Pvt. Ltd.(Now Known as Krish Steel and Trading Pvt. Ltd) vs. Venkatesan Sankaranarayan & Ors." in Civil Appeal No. 3299/2020 dated 09th October, 2020" held as under:

"9. Liquidation of the Corporate Debtor should be a matter of last resort. The IBC recognizes a wider public interest in resolving corporate insolvencies and its object is not mere recovery of monies due and outstanding. The Appellant has indicated its bona fides, at least prima facie at the present stage, by unconditionally agreeing to subject itself to the forfeiture of an amount of Rs. 20 crores, which has been deposited by it, in the event that it fails to comply with the requirement of depositing an additional amount of Rs. 60 crores within a period of three months in terms of the understanding that was arrived at on 25th February, 2020. In order to enable the appellant to have one final opportunity to do so, we direct that the appellant shall, in order to Company Appeal (AT) (Insolvency) No. 1034 of 2020 demonstrate its bona fides deposit an amount of Rs. 50 crores upfront in terms of the understanding which was arrived at on 25th February, 2020. The appellant is specifically placed on notice of the fact that should it fail to do so in whole or in part, the entire amount of Rs. 20 crores which has been deposited thus far, shall stand forfeited without any further recourse to the appellant. Accordingly, the following interim directions are issued:

(i) The operation of the impugned order of the NCLAT dated 8 th September, 2020 is stayed;

(ii) The appellant shall, in order to demonstrate its ability to implement the Resolution Plan and in compliance with the understanding arrived at on 25th February, 2020 deposit an amount of Rs. 50 crores, on or before 10th January, 2021; and

(iii) The auction of the properties of the Corporate Debtor shall remain stayed in the meantime."

45. This Tribunal in the matter of "S.C.Sekaran vs. Amit Gupta & Ors." in Company Appeal (AT) (Insolvency) No. 495 and 496 of 2018 dated 29th January, 2019. By referring the Judgment of Hon'ble Supreme Court in the matter of "Swiss Ribbons Pvt. Ltd. & Anr."vs Union of India & Ors.", "Arcelormittal India Pvt. Ltd.vs Satish Kumar Gupta & Ors." and in "Meghal Homes Pvt. Ltd. vs. Shree Niwas Girni K.K. Samiti & Ors.- (2007)7 SCC 753"held as under:

"8. In view of the provision of Section 230 and the decision of the Hon'ble Supreme Court in 'Meghal Homes Pvt. Ltd.' Company Appeal (AT) (Insolvency) No. 1034 of 2020 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.

9. The 'Liquidator' if initiates, will complete the process under Section 230 of the Companies Act within 90 days. For the purpose of counting the period of liquidation, the pendency of the appeal(s) preferred by the 'Eight Finance Pvt. Ltd.' that is from 12th July, 2018 and till date should be excluded. In the circumstances, while we are not inclined to interfere with the impugned order(s) both dated 25th June, 2018 direct the Liquidator to act in accordance with law and as observe above."

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46. Further, this Tribunal in the matter of "Ajay Agarwal & Anr. Vs. Ashok Magnetic Ltd. & Ors. in Company Appeal (AT) (Insolvency) No. 792 and 793 of 2018 dated 22nd February, 2019" observed as under:

"12. In view of the aforesaid decision and stand taken by the Appellants and the liquidator, the liquidator is directed to act in accordance with law and observations of this Appellate Tribunal in " S.C. Sekaran vs. Amit Gupta & Ors." (Supra). It will be open to the members of 'M/s. Ashok Magnetics Limited' or the creditors to contact the liquidator for compromise or Arrangements in terms of Section 230. If it is found that the scheme is viable, feasible and maximise the assets of the 'Corporate Debtor' and balance the creditors, the liquidator will move application under Section 230 before the National Company Law Tribunal for appropriate order and directions. On failure, the liquidator will ensure to sell the 'Corporate Debtor' as a going concern in its totality, taking into consideration the interest of the employees of the 'Corporate Debtor'."

47. Further, this Tribunal in the matter of "Siva Rama Krishna Prasad vs. S. Rajendran" in Company Appeal(AT) (Insolvency) No. 751 and 752 of 2020 dated 04th September, 2020 observed as under:

"The Adjudicating Authority has rightly observed that even after pushing the Corporate Debtor into liquidation, Promoter/Ex- Director of the Corporate Debtor can take recourse to Section 230 of the Companies Act, 2013 by submitting a

Company Appeal (AT) (Insolvency) No. 1034 of 2020 scheme for revival of the Corporate Debtor, subject of course to eligibility of the applicant."

48. Further, this Tribunal in the matter of "Arokiasamy Joseb Raj vs. Pathukasahasram Raghunathan Raman & Ors." in Company Appeal (AT) (Insolvency) No. 116 and 117 of 2019 dated 17th July, 2019 observed as under:

"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 Company Appeal (AT) (Insolvency) No. 1034 of 2020 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."

Conclusion:

49. In view of the aforesaid reasons and it is settled law as per the decisions of the Hon'ble Supreme Court that the liquidation is only the last resort and as per the preamble of the IBC the main object

of the Code is in resolving corporate insolvencies and not the mere recovery of monies due and outstanding.

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50. For the foregoing reasons and relied upon the Judgments of the Hon'ble Supreme Court and this Tribunal we are of the view that the Appellant being eligible to submit a scheme by virtue of an amendment to Section 7 of Micro, Small and Medium Enterprises Development Act, 2006 vide notification dated 01.06.2020. Accordingly, we set aside the impugned order dated 15.10.2020 passed by the Adjudicating Authority in I.A. No. 496 of 2020 in CP (IB) No. 148/NCLT/AHM/2017.

51. We passed the following order:

The Appellants are allowed to submit a scheme of arrangement to the liquidator of the Corporate Debtor and the liquidator shall consider the scheme of arrangement in accordance with the law.

52. The Appellant/ Promoter to submit the scheme within the period of one week from the receipt of copy of this order and the same shall be considered by the liquidator in accordance with the law.

53. With the aforesaid directions the Appeal is allowed. No order as to costs.

[Justice Jarat Kumar Jain] Member (Judicial) [Kanthi Narahari] Member (Technical) New Delhi sr
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