

Jindal Steel And Power Ltd vs Arun Kumar Jagatramka & Anr on 24 October, 2019

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) No. 221 of 2018

[Arising out of Order dated 15th May, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), Kolkata Bench in C.A. (CAA) No.198/KB/2018]

IN THE MATTER OF:

Jindal Steel and Power Limited
Having its Registered Office at:
O.P. Jindal Marg,
Hisar - 125005, Haryana

Also At:

Jindal Steel and Power Limited
Having its Corporate Office at:
Jindal Centre,
12 Bhikaji Cama Place,
New Delhi-110 066.

.... Appellant

Versus

1. Arun Kumar Jagatramka,
(Erstwhile Promoter and Member
Gujarat NRE Coke Limited)
1, Clyde Row, Hastings,
Kolkata - 700 022.
2. Gujarat NRE Coke Limited
(In liquidation under the Insolvency
and Bankruptcy Code, 2016)
Through the Liquidator
Mr. Sumit Binani
Having its Registered office at:
22, Camac Street, Block C, 5th Floor,
Kolkata - 700 016.

.... Respondents

Present:

For Appellant: Mr. Karan Batura, Advocate

For Respondents: Mr. Abhijeet Sinha, Mr. Sandeep Bajaj,
Mr. Soayib Qureshi, Mr. Deepanjan Dutta,
Ms. Shrivalli Kajaria, Mr. Aditya Shukla,
Advocates for Respondent No.1.

Mr. Nakul Mohta, Advocate for Respondent
No.2.

Company Appeal (AT) No. 221 of 2018

JUDGMENT

Page 1 of 17

SUDHANSU JYOTI MUKHOPADHAYA, J.

Jindal Steel and Power Limited (Appellant), an unsecured creditor of Gujarat NRE Coke Limited ('Corporate Debtor') has preferred this Appeal under Section 421 of the Companies Act, 2013 (hereinafter referred as the 'Companies Act') against order dated 15th May, 2018 passed by National Company Law Tribunal, Kolkata Bench in C.A. (CAA) No.198/KB/2018. By the impugned order, the Tribunal in an application under Section 230 to 232 of the Companies Act, preferred by Promoter - Arun Kumar Jagatramka ordered for taking steps for Financial Scheme of Compromise and Arrangement between Applicant - Arun Kumar Jagatramka (Promoter) and the Company ('Corporate Debtor') through the 'Liquidator', after holding the debts of shareholders, creditors etc. in terms of Section 230 of the Companies Act.

2. The Appellant has challenged the same on following grounds:-

(i) Whether in a liquidation proceeding under Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the 'I&B Code') the Scheme for Compromise and Arrangement can be made in terms of Sections 230 to 232 of the Companies Act?

(ii) If so permissible, whether the Promoter is eligible to file application for Compromise and Arrangement, while he is ineligible under Section 29A of the I&B Code to submit a 'Resolution Plan'?

3. Gujarat NRE Coke Limited ('Corporate Debtor' / 'Corporate Applicant') moved an application under Section 7 of the I&B Code before the Adjudicating Authority (National Company Law Tribunal), Kolkata for initiation of 'Corporate Insolvency Resolution Process' on account of various defaults committed by it. It was admitted by the Adjudicating Authority on 7th April, 2017 and 'Corporate Insolvency Resolution Process' was initiated.

4. In absence of any 'Resolution Plan', the Adjudicating Authority passed order of 'Liquidation' on 11th January, 2018 after the expiry of 270 days.

First Respondent-Mr. Arun Kumar Jagatramka (Promoter) filed Appeal before this Appellate Tribunal against the order of 'Liquidation' in Company Appeal (AT) (Insolvency) No.55-56 of 2018, challenging the ineligibility under Section 29A of the I&B Code as 'Resolution Plan' submitted by him was not accepted.

This Appellate Tribunal allowed the liquidation proceeding to continue.

5. In the meantime, 1st Respondent-Mr. Arun Kumar Jagatramka (Promoter) moved an application under Sections 230 to 232 of the Companies Act before the National Company Law Tribunal, Kolkata for Compromise and Arrangement between erstwhile Promoters and the Creditors. In the said case, the impugned order dated 15th May, 2018 was passed.

6. The question as to whether in a Liquidation proceeding under I&B Code, an application under Sections 230 to 232 of the Companies Act can be entertained by the Tribunal or not, fell for consideration before this Appellate Tribunal in "S.C. Sekaran v. Amit Gupta & Ors. - Company Appeal (AT) (Insolvency) Nos.495 & 496 of 2019". In the said case, this Appellate Tribunal passed certain orders, which were noticed by this Appellate Tribunal in "Y. Shivram Prasad vs. S. Dhanapal & Ors. -

Company Appeal (AT) (Insolvency) No.224 of 2018" disposed of on 27th February, 2019.

7. In Y Shivram Prasad having noticed the decision in S.C. Sekaran, this Appellate Tribunal observed and held as follows: -

"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:

"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 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."

8. In view of the aforesaid decision of this Appellate Tribunal in Y. Shivram Prasad and S.C. Sekaran, we answer the first question in affirmative, i.e., to say that in a Liquidation proceeding under I&B Code, a petition under Section 230 to 232 of the Companies Act is maintainable.

9. The next question arises for consideration is as to whether 1st Respondent-Arun Kumar Jagatramka (Promoter), can be said to be ineligible under Section 29A of the I&B Code and can ask for Financial Scheme of Comprise and Arrangement for itself in terms of Section 230 and 232 of the Companies Act of the I&B Code.

10. As noticed above, the Hon'ble Supreme Court in Swiss Ribbons Pvt.

Ltd. & Anr. Vs. Union of India & Ors. - Writ Petition (Civil) No.99 of 2019 held 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'.

11. The aforesaid judgment makes it clear that even during the period of Liquidation, for the purpose of Section 230 to 232 of the Companies Act, the 'Corporate Debtor' is to be saved from its own management, meaning thereby the Promoters, who are ineligible under Section 29A, are not

entitled to file application for Compromise and Arrangement in their favour under Section 230 to 232 of the Companies Act. Proviso to Section 35(f) prohibits the Liquidator to sell the immovable and movable property or actionable claims of the 'Corporate Debtor' in Liquidation to any person who is not eligible to be a Resolution Applicant, quoted below: -

"35. Powers and duties of Liquidator.--(1) Subject to the directions of the Adjudicating Authority, the liquidator shall have the following powers and duties, namely:--

xxx xxx xxx

(f) subject to section 52, to sell the immovable and movable property and actionable claims of the corporate debtor in liquidation by public auction or private contract, with power to transfer such property to any person or body corporate, or to sell the same in parcels in such manner as may be specified:

Provided that the liquidator shall not sell the immovable and movable property or actionable claims of the corporate debtor in liquidation to any person who is not eligible to be a resolution applicant."

12. From the aforesaid provision, it is clear that the Promoter, if ineligible under Section 29A cannot make an application for Compromise and Arrangement for taking back the immovable and movable property or actionable claims of the 'Corporate Debtor'.

13. The National Company Law Tribunal by impugned order dated 15th May, 2018, though ordered to proceed under Section 230 to 232 of the Companies Act, failed to notice that such application was not maintainable at the instance of 1st Respondent-Arun Kumar Jagatramka (Promoter), who was ineligible under Section 29A to be a 'Resolution Applicant'.

14. For the reasons aforesaid, we set-aside the impugned order dated 15th May, 2018 and remit the case to 'Liquidator'/ Adjudicating Authority to proceed in terms of the decision of this Appellate Tribunal in Y. Shivram Prasad (supra). The Appeal is allowed with the aforesaid observations and directions. No costs.

[Justice S. J. Mukhopadhaya] Chairperson [Justice Bansi Lal Bhat] Member (Judicial) NEW DELHI
24th October, 2019 Ash