

Radico Khaitan Ltd vs Bt & Fc Pvt Ltd And Ors on 26 March, 2021

1

NATIONAL COMPANY LAW APPELLATE TRIBUNAL PRINCIPAL BENCH
NEW DELHI
COMPANY APPEAL (AT)(Insolvency) No.919/2020

IN THE MATTER OF:

Radico Khaitan Ltd

A Company registered under the
Provisions of the Companies Act, 1956
Having its registered office at:
Bareilly Road, Rampur, Uttar Pradesh
244 901

Email : info@radico.co.in

...Appellant

Vs.

1. BT & FC Pvt Ltd.

Reg. Off. 15, 1st Phase, Peenya,
Bengaluru 560058

Email: rpal@paisri.com

...Respondent No. 1

2. Bangalore Dehydration and
Drying Equipment Company Pvt. Ltd.

Reg. Off: 15, 1st Phase, Peenya,
Bengaluru 560058

Email bhoona.bhuvan@gmail.com

...Respondent No. 2

3. State Bank of India

Stressed Assets Recovery Branch
11/90, 3rd Floor, Near Old Shivaji Theatre,
JC Road, Bengaluru 560002

Email sbi.05173@sbi.co.in

... Respondent No. 3

4. Ugro Capital Ltd.

Reg. Off. Equinox Business Park
Tower 3, 4th Floor, LBS Road, Kurla (West)
Mumbai 400001

Email krishnan@parijatha.co.in

... Respondent No. 4

5. State of Karnataka
Department of Excise

COMPANY APPEAL (AT)(Insolvency) No.919/2020

2

2nd Floor, TTMC Building, 'A' Block
BMTc, Shantinagar, Bengaluru
560027
Email ecexcise@gmail.com

... Respondent No. 5

6. Mr. Pankaj Srivastava
Resolution Professional
BT & FC Pvt. Ltd.
5, 5th Cross, Navya Nagar, Jakkur,
Bengaluru - 560064
Email rpal@paisri.com

... Respondent No. 6

7. Ms. Ramanathan Bhuvaneshwari
Interim Resolution Professional
Bangalore Dehydration and Drying
Equipment Company Pvt. Ltd.
C-006, Pioneer Paradise, 24th Main
7th Phase, J.P. Nagar, Bengaluru
560078
Email bhoona.bhuvan@gmail.com

... Respondent No. 7

Present:

For Appellant:- Mr. Gopal Jain, Sr. Advocate, Ms WarmikaTrehan, Mr.
Ajay Bhargava, Mr AvinashBalakrishna, Ms Maithili
Moondra and Ms Vanita Bhargava, Advocates

For Respondent:-Mr. Abhishek Singh, Ms Aayushi Mishra, Advocates
for R3 and R4.
Mr. Pankaj Srivastava, Advocate for R1.
Ms BhuvaneshwariRamanathan, Advocate for R2.

JUDGMENT

Jarat Kumar Jain: J.

The Appellant 'Radico Khaitan Ltd.' (Operational Creditor) filed this Appeal against Impugned Order dated 02.09.2020 passed by Ld. Adjudicating Authority (National Company Law Tribunal, Bengaluru Bench). Whereby rejected the application (I.A No. 212 of 2020 in C.P. (IB) No. COMPANY APPEAL (AT)(Insolvency) No.919/2020 165/BB/2018) filed by the Appellant, for consolidation of two Corporate Insolvency Resolution Process (CIRP).

2. Brief and relevant facts for this Appeal are that the 'Operational Creditor' (Appellant) has filed an application C.P. (IB) No. 165/BB/2018 under Section 9 of Insolvency and Bankruptcy Code, 2016 (in short 'I&B Code') for seeking to initiate CIRP in respect of BT & FC Pvt. Ltd. Corporate Debtor (Respondent No. 1) on the ground that it has committed default for an amount of Rs. 05,72,49,000/-. Ld. Adjudicating Authority has admitted the application vide order dated

27.09.2019 and initiated CIRP appointing Mr. Pankaj Srivastava as IRP, imposing moratorium. The Committee of Creditors (CoC) of Corporate Debtor (Respondent No. 1) consist of State Bank of India Financial Creditor (Respondent No. 3) and Ugro Capital Ltd. Financial Creditor (Respondent No. 4). The Financial Creditors have filed their claims before Resolution Professional (RP) (Respondent No. 6) in respect of the financial debts owned by the Corporate Debtor (Respondent No. 1).

3. The Ugro Capital Ltd. (Respondent No. 4) filed an application CP(IB) No. 135/BB/2018 under Section 7 of the I&B Code, seeking initiation of CIRP in respect of Bengaluru Dehydration and Drying Equipment Company Pvt. Ltd. (Respondent No. 2) on the ground that it had committed default of a total outstanding amount of Rs. 25,81,85,297/-. Ld. Adjudicating Authority admitted the application on 27.01.2020 by initiating CIRP, appointing Ms. R. Bhuvaneshwari as IRP. The Ugro Capital Ltd. (Respondent No. 4) made a claim against Respondent No. 1 for committing default as borrower and Respondent No. 2 for committing default as guarantor. The COMPANY APPEAL (AT)(Insolvency) No.919/2020 CoC consist of State Bank of India (Respondent No. 3) and Ugro Capital Ltd. (Respondent No. 4).

4. The Appellant filed an Application I.A. No. 212 of 2020 in CP(IB) No. 165 of 2018 under Section 60(5) (a) of the I&B Code read with Rule 11 of NCLT Rules, 2016 by inter alia seeking an order for the consolidation of CIRP of Respondent Nos. 1 and 2. It is stated that the Respondent No. 2 only operates as the land holding Company of Respondent No. 1 without carrying on any business activity. The Respondent No. 2 owns immovable property bearing 15, first phase, Peenya Bengaluru and Respondent No. 1 set up its bottling unit thereon to undertake the activity of the blending and bottling for the Company. Therefore, the business of Corporate Debtors is inextricably interlinked and intertwined. The shareholding pattern of the Corporate Debtor shows that the Corporate Debtors are promoted, owned and controlled by one Mr. M.V. Murlidher alongwith his family. They hold 65% and 71% of the shareholding in Respondent Nos. 1 and 2 respectively. The Board of the Corporate Debtors consist of common Directors i.e Mr. M.V Murlidher and Mrs. Padma Murlidher. Thus, the Corporate Debtors had common shareholders and directors and the control of both the companies was in the hand of the same persons. The claims of Respondent Nos. 3 and 4 show that the Respondent No. 2 stood as a guarantor for the financial debt of Respondent No. 1. Therefore, the assets and liabilities of the Corporate Debtors are also interlinked. Therefore, CIRP of the Corporate Debtors ought to be consolidated.

5. The Respondent No. 1 & 6 i.e. BT and FC Pvt. Ltd. and Mr. Pankaj Srivastava (RP) have filed their Reply by supporting the application. COMPANY APPEAL (AT)(Insolvency) No.919/2020

6. The Respondent Nos. 2 and 7 i.e. Bengaluru Dehydration and Drying Equipment Company and its RP Ms. R. Bhuvaneshwari have opposed the application and stated that merely having few common shareholders in Respondent Nos. 1 and 2 cannot be ground for consolidation of CIRP of both the Companies into a single entity. There is no provision under the I&B Code to justify such consolidation.

7. The Respondent Nos. 3 and 4 in their common Reply have opposed the prayer and stated that the CoC have already resolved to liquidate the Respondent No. 1 company and same has been endorsed

and submitted by the Resolution Professional on 03.03.2020 before the Adjudicating Authority. Thus, the present application has become infructuous. Therefore, there is no ground made out for consolidating the CIRP of the Respondent Nos. 1 and 2.

8. After hearing Ld. Counsel for the parties, Ld. Adjudicating Authority held that the Appellant (Applicant) being an Operational Creditor has no locus standi to file the application, the Appellant (Applicant) has suppressed the facts of earlier filing of I.A No. 59 of 2019 seeking to club the other CP(IB) No. 135/BB/2018 by inter alia contending that both companies are controlled and managed by the family of Mr. M.V. Murlidher and other. The Appellant (Applicant) knowing well about the rights and status of Operational Creditor under CIRP has filed the Company Petition even though arbitration award was passed in its favour. It is also held that the CoC of Respondent No. 1 in sixth meeting unanimously decided to go for liquidation by proposing to appoint Ms. R. Bhuvaneshwari in place of Mr. Pankaj Srivastava, ultimately, Ld. Adjudicating Authority has rejected the COMPANY APPEAL (AT)(Insolvency) No.919/2020 application on the ground that the application is filed on mis-conception of facts and law and the Appellant too has no locus to interfere in the CIRP of Respondent No. 2 by filing the application.

9. Being aggrieved with this order, the Appellant has filed this Appeal.

10. Learned Senior Counsel for the Appellant submitted that Ld. Adjudicating Authority, Mumbai Bench, in the case of State Bank of India Vs. Videocon Industries Ltd. (2018) SCC Online NCLT 13182 decided on 08.08.2019 laid down certain parameters while ordering for consolidation of CIRP. The Present case fulfilled the parameters, however, Ld. Adjudicating Authority without considering the parameters rejected the application of the Appellant.

11. Ld. Senior Counsel for the Appellant further submitted that the CoC for the Respondent Nos. 1 and 2 in their meeting held on 25th February 2020 and 19th October 2020 resolved to liquidate both the companies i.e. Respondent Nos. 1 and 2. The object of the I&B Code is resolution and rehabilitation of the Corporate Debtors as a going concern as opposed to liquidation. Both the Corporate Debtors have not got a resolution plan and the CoCs have resolved to liquidate. Therefore, consolidation will help to achieve the object of the I&B Code. The only option available to revive the Companies is to consolidate them and offer them as a single unit for CIRP.

12. Per contra Ld. Counsel for the Respondent Nos. 3 and 4 submitted that the Appellant being an Operational Creditor has no locus standi to seek consolidation of CIPR of the Respondent Nos. 1 and 2 because the Appellant cannot form part of CoC. For this purpose, he placed reliance on the Judgment of Hon'ble Supreme Court in the case of Swiss Ribbons (P) Ltd. COMPANY APPEAL (AT)(Insolvency) No.919/2020 Vs. Union of India (2019) 4 SCC 17 (Para 75) followed by COC Essar Steel India Ltd. Vs. Satish Kr. Gupta 2019 SCC Online SC 1478.

13. It is also submitted that the Respondent No. 1 has had no business relationship whatsoever with Respondent No. 2 and has no direct nexus with the Respondent No. 2.

14. Learned Counsel for the Respondent Nos. 3 and 4 submitted that the Respondent No. 2 possesses an immovable property (Mortgaged with Respondent Nos. 3 and 4 having a pari passu charge). Therefore, Appellant malafidely seeking consolidation of CIRP of the Respondent Nos. 1 and 2.

15. It is also submitted that in the Judgments relied on by the Appellant, the consolidation of CIRP was ordered for the sole reason that the Corporate Debtors constituted to be group Companies whereas, respondent Nos. 1 and 2 are two separate and distinct legal entities and apart from the common directors there is no commonality in terms of shareholding, nature of business, Operational Creditors, investments and borrowing/landing. There is no cross shareholding or inter-se landing/borrowing between the Respondent Nos. 1 and 2 company, which is one the essential ingredients for the said Respondent Companies to be deemed as group companies. Thus, Ld. Adjudicating Authority has rightly rejected the application for consolidation of CIRP.

16. The Respondent Nos. 2 and 7 supports the impugned order.

17. After hearing Ld. Counsel for the parties, we have minutely examined the record.

18. We are of the view that Ld. Adjudicating Authority Mumbai Bench in the case of SBI Vs Videocon Industries Ltd. (Supra) rightly laid down certain COMPANY APPEAL (AT)(Insolvency) No.919/2020 parameters while ordering for consolidation of CIRP. The said order was cited before Ld. Adjudicating Authority Bengaluru Bench, However, while passing the impugned order there is no finding whether these parameters are fulfilled or not in this case. Now, we are considering whether Respondent Nos. 1 and 2 have fulfilled the criteria of consolidation of CIRP.

(i) Common Control: (a) The Respondent Nos. 1 and 2, both the companies are promoted by Mr. M.V Murlidher and his wife Padma Murlidher.

Murlidhers family holds approximately 77% of total shareholding and 78% of total shareholding in Respondent Nos. 1 and 2 Company respectively, the shareholder of the Respondent No. 2 company together holds approximately 85% of the shareholding in the Respondent No. 1 Company. Thus, both Companies are promoted by the same family and there is unity of ownership and interest. (Please See Page 423 and 431 of Appeal Paper Book)

(b) The Respondent No. 1 is controlling company of Respondent No. 2 (Please See Page 432 and 433 of Appeal Paper Book: Note to Accounts of M/s Bangalore Dehydration and Drying Equipment Company, forming part of and annexed to the accounts for the year ended 31st March 2012. 5. Related party discloser (i) Controlling Company M/s BT and FC Pvt. Ltd.)

(ii) Common Directors: Mr. M.V. Murlidher and Padma Murlidher both are Directors in Respondent Nos. 1 and 2 Company. Thus, the Directors of the both Companies are Common and there is common control of companies. (Please See Company Master Data of R-1 and R-2 at Page 528 and 529 of Appeal Paper Book)

(iii) Common Assets: The Respondent No. 2 Company owns a partial of land admeasuring 2 acres 36 gundas situated at No. 15, First Phase, Peenya COMPANY APPEAL (AT)(Insolvency) No.919/2020 Bengaluru and has constructed warehouse on the land. The Respondent No. 1 Company runs a bottling plant unit in the warehouse and owns the plant and machinery therein, therefore, there is inter-dependency between two Companies and the assets are common to such an extent that the Respondent No. 2 Company has provided its land and warehouse to the Respondent No. 1 Company to carry on its business activity.

(iv) Common Liabilities: (a) The Respondent No. 3 has made a claim of Rs. 13,45,11,636/- against the Respondent No. 1 Company as a borrower and the Respondent No. 2 Company has a guarantor as a collateral for the loan obtained by the Respondent No. 1 Company and the Respondent No. 2 Company has mortgaged Peenya land and warehouse situated therein. Further Respondent No. 2 has provided a corporate guarantee as security for the loan obtained by the Respondent No. 1 Company.

(b) In so far as the loan obtained by the Respondent No. 1 Company from the Respondent No. 4 is concerned, the Respondent No. 2 as security had created paripasu charge over the Peenya land, placed 67% of its shares and provided a corporate guarantee. Therefore, the liabilities of the Companies are also common and Companies had made themselves jointly and severally liable for the loans. Respondent No. 1 and 2 have common creditors i.e. Respondent Nos. 3 and 4. Directors of both the Companies have given personal guarantees for the loans.

(v). Inter-dependence: The Respondent No. 1 Company was running a Distillery Unit in the Peenya land and warehouse building belonging to the Respondent No. 2 Company as stated by Respondent No. 6 (RP) in its Status COMPANY APPEAL (AT)(Insolvency) No.919/2020 Report filed before this Appellate Tribunal. Thus, the Respondent Nos. 1 and 2 are interdependence.

(vi) Pooling of Resources: Undisputedly the Directors are common using their contacts and relationship to run both the Companies. For the sanction of the loan facility for the Respondent No. 1 Company. The Respondent No. 2 Company has mortgaged Peenya land and warehouse and also stood as guarantor for the Respondent No. 1 Company.

(vii) Intricate links between the Companies: (a) The Respondent No. 2 is associated Company of the Respondent No. 1, this fact is admitted by the Respondent No. 3 while submitting its claim form before the RP (Please See Page 527 of Appeal Paper Book) and this fact is also mentioned in the Status Report (See First Line of Page 6) filed by Respondent No. 7. Thus, it is clear that the Respondent No. 2 Company is associated company of Respondent No. 1. In the I&B Code, the word associate company has not been defined. Section 3 (37) of the I&B Code, provides that word and expressions used but not defined in this Code but defined in the Companies Act, 2013 shall have the meaning assigned in the Companies Act, 2013. Section 2 (6) of Companies Act, 2013 defines Associate Company as under:

"Associate Company" in relation to another company, means a company in which that other company has a significant influence but which is not a subsidiary company

of the company having such influence and includes a joint venture company.

Explanation: for this purpose of this clause -

(a) The expression significant influence means control of at least 20% of total voting power or control of or participation in business decisions under an agreement.

(b) Xxx

xxx

xxx"

COMPANY APPEAL (AT)(Insolvency) No.919/2020

(c) As aforesaid Mr. M.V Murlidher family has significant influence over

both the Companies i.e. Respondent Nos. 1 and 2. Thus, the Respondent No. 2 Company is associated company of the Respondent No. 1 Company.

(viii) Common Financial Creditors: The Respondent Nos. 1 and 2 have Common Financial Creditors i.e. the Respondent Nos. 3 and 4.

19. It can be clearly seen from the above that eight parameters are fully met and satisfied in this case.

20. Apart from this Financial Creditors i.e. Respondent Nos. 3 and 4 in their written submissions have not pointed out that how the consolidated CIRP shall prejudice their rights. Even if the combined CIRP is ordered the balance of convenience is squarely on Respondent Nos. 3 and 4 herein who are secured Financial Creditors and whose interest will remain protected even during the combined Insolvency as secured Financial Creditors. The Appellant being an Operational Creditor is placed sixth in hierarchy for the liquidation process in the I&B Code, (See Section 53 (1) (f) of I&B Code)

21. With the aforesaid, we are of the view that the Respondent Nos. 1 and 2 fulfilled the criteria of consolidation. Ld. Adjudicating Authority has not appreciated the facts of this case in right perspective. Thus, the impugned order is hereby set aside and I.A.No.212 of 2020 filed by the Appellant for consolidation of two CIRP's is hereby allowed.

22. We allow the Appeal and direct the Ld. Adjudicating Authority to appoint a single common Resolution Professional/Liquidator who will carry on the duties and perform the function of the Resolution Professional/Liquidator in accordance with the I&B Code for the consolidated CIRP.

COMPANY APPEAL (AT)(Insolvency) No.919/2020 Thus, the Appeal is allowed, however, no order as to costs.

(Justice Jarat Kumar Jain) Member (Judicial) (Kanthi Narahari) Member (Technical) New Delhi
26th March, 2021 SC COMPANY APPEAL (AT)(Insolvency) No.919/2020