

Srei Multiple Asset Investment Trust vs Idbi Bank Limited & Ors on 18 January, 2022

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
Principal Bench, New Delhi
Company Appeal (AT) (Ins) No. 593 of 2020
(Under Section 61 of Insolvency & Bankruptcy Code, 2016)
(Arising from the Order dated 02.03.2020 in CP (IB) No.352/KB/2018 passed by
the 'Adjudicating Authority', National Company Law Tribunal, Cuttack
Bench)

IN THE MATTER OF:

Srei Multiple Asset Investment Trust
Having its Registered Office at
"Vishwakarma" 86 C,
Topsia Road, Kolkata - 700046
Vs.

Appellant

1. IDBI Bank Ltd.
Having its Registered Office at
IDBI Tower,
World Trade Centre
Cuff Parade, Colaba
Mumbai - 400005

....Respondent No.1

2. Odisha Slurry Pipe
Line Infrastructure Limited
Having its office at House No.119,
Ward No.11, Badahal Road,
NH-6 behind Indian Bank,
Keonjhar,
Odisha - 758 001

... Respondent No.2

3. Arcelor Mittal India Private Limited
Uppal Plaza, M-6, 6th Floor, Unit C & D
Jasola District Centre,
New Delhi 110 025

Respondent No.3

4. Committee of Creditors of Odisha Slurry
Pipeline Infrastructure Limited,
Through IDBI Bank Ltd.
Having its registered office at
IDBI Tower, NMG, 7th Floor,
WTC Complex, Cuffe Parade,
Mumbai - 400 005.

Respondent No.4

1

Comp App (AT) (INS) No. 593 of 2020
Present:

For Appellant:

Mr. Arijit Mazumdar, Mr. Shambo Nandy and
Akanksha Kaushik, Advocates

For Respondents:

Mr. Ramji Srinivasan, Sr. Advocate with Mr. Deep Roy and Mr. Rony O John, Mr. Piyush Swami, Mr. Dhaval Savla, Mr. Arshdeep Singh, Advocates for R-1.

Mr. Arun Kathpalia, Sr. Advocate with Mr. Suommo Biswas, Ms. Prabh Simran Kaur, Mr. Parth Gokhale, Mr. Siddhant Kant, Advocates for R-2 (CoC).
Ms. Shrishti Agnihotri, RP

Mr. Neeraj K Kaul, Sr. Advocate with Mr. Vishal Gehrana, Mr. Naman Singh Bagga, Advocates for R-3.

JUDGMENT

(VIRTUAL MODE) CA (AT) (INS) 593 of 2020 Coram: Mr. Justice Jarat Kumar Jain Member (J) Mr. Kanthi Narahari Member (T) Per: Kanthi Narahari Member (T) The present Appeal is filed against the order dated 02.03.2020 in CA No.188 of 2019 in TP No.41 of 2019 in CP No.352 of 2018 passed by the Adjudicating Authority (NCLT, Cuttack Bench) whereby the Adjudicating Authority allowed the above CA and approved the Resolution Plan of the 3rd Respondent herein as per Section 31(1) of the I&B Code, 2016. Aggrieved by the same, the Appellant preferred the present Appeal.

Appellant's Submissions Comp App (AT) (INS) No. 593 of 2020

1. Mr. Arijit Mazumdar, Learned Counsel appeared for the Appellant submitted the brief facts.
2. The Learned Counsel appearing for the Appellant submitted that the Appellant is a Trust registered under the Indian Trusts Act, 1882 and registered as category-II Alternative Investment Fund under the SEBI Regulations, 2016. It is a privately pooled investment vehicle which collects funds from its investors and invest such funds in accordance with the defined Investment Policy for the benefit of all its Investors. The investments are made through various schemes floated by the Appellant from time to time. The IGOF India Growth Opportunity Fund is one of such schemes which is a shareholder of the 2nd Respondent Corporate Debtor. The Appellant is a Financial Service Provider within the meaning of Section 3(17) of I&B Code, 2016.
3. It is submitted that the Appellant invested an amount of Rs.60 Crore for acquiring 60 lakhs equity shares of the Respondent No.2 Company and accordingly Shares Subscription Agreements dated 28.03.2015 and 15.05.2016 were executed by and between the Appellant and the 2nd Respondent. The Essar is another shareholder of the Corporate Debtor, which has subscribed to Compulsorily Convertible Debentures (CCDs) the Principal value of which was Rs.50.01 Crores.
4. It is submitted that CIRP was initiated against the 2nd Respondent vide Order dated 14.05.2019 and declared moratorium, at the instance of the 1st Comp App (AT) (INS) No. 593 of 2020 Respondent who is a Financial Creditor of the 2nd Respondent.
5. It is submitted that the main Asset of the Corporate Debtor is Pipeline and as per the Business Transfer Agreement the sale of Pipeline transferred from Essar to the 2nd Respondent herein.

Subsequent to Business Transfer Agreement the parties have entered a Right to Use Agreement dated 30.03.2015 executed by and between the 2nd Respondent and Essar under which Essar undertook to pay usage charge of Rs.600/MT for an allocated capacity of 10 Million tons per annum for use of the Pipeline, thereby yielding a revenue of Rs.600 Crores per annum.

6. It is submitted that based on the aforesaid representation the appellant agreed to invest an amount of Rs.60 crore for acquiring 60 lakhs equity shares of the 2nd Respondent and accordingly a Share Subscription Agreements dated 15.03.2015 and 28.05.2015 was executed by and between the Appellant and the 2nd Respondent.

7. While so, the said Business Transfer Agreement dated 27.02.2015 executed by and between Essar and OSPIL for sale of Business undertaking was cancelled vide Deed of Cancellation dated 24.06.2016 and un-winded. The said cancellation of Business Transfer Agreement has been challenged by the SREI Finance Investment Ltd. (SFIL) by filing suit being T.S.No.177 of 2016 in the Court of Learned Civil Judge, Senior Division, Sealdah (Title Suit) praying for decree for declaration that the Deed of Cancellation dated 24.06.2016 is null and void and sought perpetual injunction restraining 2nd Respondent and Essar from giving any Comp App (AT) (INS) No. 593 of 2020 effect to instrument unwinding the sale of the pipeline contained in the Business Transfer Agreement.

8. It is submitted that the 3rd Respondent (AMIPL) herein is the Successful Resolution Applicant for Essar Steel India Ltd. and the Resolution Plan of the 3rd Respondent has been approved on 08.03.2019 by the Learned Adjudicating Authority, Ahmedabad. It is submitted that after the Judgment of the Hon'ble Supreme Court in Essar Insolvency matter on 15.11.2019, the 3rd Respondent concluded the complete acquisition of Essar on 16.12.2019 by extinguishing the existing Share Capital of Essar. As per Essar's own statement in the recently filed Financial Statement, the 3rd Respondent in its nominee now hold 100% of its shareholding thus, making it a wholly owned subsidiary of 3rd Respondent (AMIPL).

9. It is submitted that Essar is also a shareholder of 2nd Respondent (OSPIL) the Corporate Debtor holding 30.2% shareholding and the 2nd Respondent being under CIRP is an undischarged insolvent. Therefore, the 3rd Respondent is ineligible to be a Resolution applicant of OSPIL as it is barred under Section 29A (a) read with 29A (j) of the Code read with explanation 1 (iii) thereof thereby making 3rd Respondent a connected person to Essar.

10. It is submitted that the 3rd Respondent is also a Successful Resolution Applicant of the Corporate Debtor i.e. 2nd Respondent herein. However, the Learned Adjudicating Authority approved the resolution plan of 3rd Respondent relying only Comp App (AT) (INS) No. 593 of 2020 on the basis of 3rd Respondent's Affidavit dated 29.11.2019 wherein it has affirmed that it is eligible under Section 29A of the Code to submit the Resolution Plan for 2nd Respondent. It is submitted that neither Resolution Professional nor the Resolution applicant disclosed to the Learned Adjudicating Authority about the ineligibility of 3rd Respondent when the application filed by the Resolution Professional under Section 30(6) of the Code.

11. As stated supra, the shares of the 2nd Respondent are held by the Appellant constituting 69.8% and Essar constituting 30.2%. However, the Resolution Plan discriminates between the two shareholders as it pays NIL amount to the Appellant whereas it proposes to pay Essar 100% of its amount invested in Compulsory Convertible Debentures (CCD's) by treating it as Financial Debt, whereas the settled law is that CCD's are equity.

12. It is submitted that from 08.03.2019, the Essar is effectively under the management of 3rd Respondent and it has become its wholly owned subsidiary. Under the Resolution Plan the 3rd Respondent seeks to pay an amount of Rs. 501.01 Crores to Essar which signifies that the 3rd Respondent is in effect paying Rs.501.01 Crores to itself.

13. In view of Business Transfer Agreement and Right to Use Agreement the Corporate Debtor ought to have yielded a Revenue in excess of Rs.600 Crores per annum to it. Basing on promising income potential the Corporate Debtor mobilized Comp App (AT) (INS) No. 593 of 2020 funds including from the Appellant for funding the purchase consideration. The Corporate Debtor is entitled to recover over Rs.1800 Crores under RTU Agreement from Essar and the 3rd Respondent is obligated to make such payments being CIRP costs under insolvency process of Essar.

14. The Learned Counsel in the Grounds of Appeal submitted that the Learned Adjudicating Authority ignored the fact that the 3rd Respondent is a connected person of Essar which is a shareholder of OSPIL and undischarged insolvent. The Learned Adjudicating Authority approved the resolution plan of 3rd Respondent relying on the basis of its affidavit dated 29.11.2019, wherein it has affirmed that it is eligible under Section 29A of the Code to submit the Resolution Plan for 2nd Respondent.

15. In view of the reasons as stated above, the Learned Counsel prayed this Bench to quash and set aside the Impugned Order dated 02.03.2020 passed by the Adjudicating Authority, Cuttack Bench.

SUBMISSIONS OF RESPONDENTS 1 AND 4:

16. The Learned Senior Counsel appearing for the Respondent submitted that the CIR process of the Corporate Debtor was initiated pursuant to the Order dated 14.05.2019 passed by the Adjudicating Authority in CP/352/2018. After completion of the process as envisaged under law, in terms of Section 25(2)(h) of the Code after having discussions, held the Resolution Plan submitted by the 3rd Comp App (AT) (INS) No. 593 of 2020 Respondent came to be approved by 100% positive vote of COC at its 8th meeting held on 06.12.2019. The Plan provided for payment of 100% of the verified and admitted Principal amount due to each financial Creditor of the Corporate Debtor as admitted by the RP.

17. It is submitted that the Appellant had at no point raised any objection to the approved Resolution Plan before the Learned Adjudicating Authority during the proceedings under Section 31 of the Code.

18. On the point of ineligibility of the 3rd Respondent to be a Resolution Applicant for the 2nd Respondent in terms of Section 29A (a) (j) of the Code owing to its purported relationship with the Corporate Debtor through Arcerol Mittal Nippon Steel India Ltd. (formerly ESIL). It is submitted that the above ineligibility criteria under Section 29A (a) applies only in reference to natural persons and not Corporate persons as there is no concept of an undischarged insolvent in reference to a Corporate person. Insolvency and Liquidation of Corporate persons is dealt with under the provisions of the Code and/or the Companies Act, 2013 (for Liquidation on grounds other than default/commercial grounds). Neither the code nor the Companies Act, 2013 provide for the concept of undischarged insolvent. Therefore, even under the I&B Code, 2016 only an individual can be considered as an undischarged insolvent and therefore, for the said reason, the code specifically uses the terminology Corporate Insolvency Resolution and Liquidation for the purposes of a Corporate Comp App (AT) (INS) No. 593 of 2020 person and at no point of time uses the term 'undischarged insolvent' with respect to a Corporate person under the Code.

19. The Learned Counsel appearing for the Respondent submitted that even assuming without admitting that the test of an undischarged insolvent provided under Section 29A (a) can apply to Corporate persons, it could only be those corporate persons whose insolvency Resolution Process has failed resulting in Liquidation of the Corporate Debtor under Section 33 of the Code, prior to liquidation of the Corporate Debtor there is no question of a Corporate being termed as an undischarged insolvent. Therefore, Section 29A (a) does not apply to the facts of present case.

20. The Learned Counsel relied upon the Judgement of the Hon'ble Supreme Court *Thampanoor Ravi v Charupara Ravi and Ors.* (1999) 8 SCC 74, and the Judgment of this Tribunal in *Binani Cements* to support his argument.

21. The Learned Counsel further submitted that the 3rd Respondent did not own and or control ESIL at the time of submission of the approved Resolution Plan of 2nd Respondent. It is submitted that the Hon'ble Supreme Court vide its Judgment dated 15.11.2019 in *Committee of Creditors of Essar Steel India Ltd. v Satish Kumar Gupta and Ors.* (2019) 16 SCALE 319 disposed of the Appeal and the implementation of Resolution Plan of ESIL and handover of ownership and control Comp App (AT) (INS) No. 593 of 2020 of ESIL to 3rd Respondent (AM IPL) occurred only on 16.12.2019. Therefore, it is submitted that the allegation that the 3rd Respondent was a connected person of Corporate Debtor owing to its purported ownership control of ESIL since 08.03.2019 has no basis. As stated supra, the 3rd Respondent took over the management and control of ESIL on 16.12.2019 whereas the approved Resolution Plan was submitted by the 3rd Respondent in respect of Corporate Debtor on 30.11.2019 and approved by the COC by 100% positive vote on 06.12.2019. Therefore, it is submitted that prior to taking over the ESIL the 3rd Respondent plan was approved.

22. It is submitted that the entire purpose of Section 29A of the Code is to preclude undesirable persons from participating in the resolution process and not to punish bona fide resolution applicants who are genuinely attempting to revive certain Corporate Debtors. It is submitted that keeping in view the text and object of introducing Section 29A within the four corners of the Code, the 3rd Respondent not being an undesirable person who contributed towards the Corporate Debtor would in no manner fall within the ambit of Section 29A of the Code. It is submitted that the

intent of this legislation not to penalize genuine resolution applicants only on account of having taken over the distressed debtor under the framework of the code can be deciphered from the 2nd Proviso to Section 29A (c) introduced vide the Insolvency and Bankruptcy Code, (2nd Amendment) Act, 2018 whereby the legislature has clarified that the ineligibility under Section 29A (c) would not be applicable to Comp App (AT) (INS) No. 593 of 2020 Resolution Applicants who acquired a debtor pursuant to a prior Resolution Plan approved under the Code.

23. With regard to the RTU charges the Learned Counsel submitted that the RTU charges had remained due and pending from ESIL to the Corporate Debtor for a substantial period of time prior to the commencement of the CIR Process. During such period the Appellant being the majority shareholder of the Corporate Debtor failed to take any steps whatsoever to ensure that appropriate efforts were made to secure the recovery of the RTU charges due to the Corporate Debtor. Even subsequent to commencement of the CIR process of ESIL on 02.08.2017, the Corporate Debtor in which the Appellant being its majority shareholder failed to file any claim as an Operational Creditor under the statutory Form 'B' with the Resolution Professional of ESIL.

24. It is submitted that the question of the pending RTU charges has no effect whatsoever on the legality or the validity of the approved Resolution Plan.

25. With regard to payment of approximately Rs.501 Crores to ESIL is in accordance with equal treatment accorded to all Financial Creditors. It is submitted that the Resolution Plan has ensured equal treatment to all admitted Financial Debts of the Corporate Debtor by ensuring payment of 100% principal admitted debt of each of the institutional Financial Creditors (Secured and Unsecured), ESIL, PSCL and SIFL.

Comp App (AT) (INS) No. 593 of 2020

26. It is submitted that each company is a separate legal entity and therefore, a separate person in law from its shareholders. Therefore, the contention that by virtue of the approved Resolution Plan the 3rd Respondent has sought to make payment to itself is contrary to the Principle of Law.

27. It is submitted that the RP has duly admitted the claim of ESIL arising out of the compulsorily convertible debentures held by it as a Financial Debt and the payment of approximately Rs.501 Crores made to ESIL in terms of the approved Resolution Plan is towards the full and final satisfaction of such Financial Debt held by ESIL.

28. It is submitted that the provisions of the Code do not mandate that a Resolution Plan is required to provide for return for the equity shareholders of the Corporate Debtor.

29. In view of the reasons as stated above the Learned Counsel prayed this Tribunal to dismiss the Appeal.

3RD RESPONDENT'S SUBMISSIONS:

30. The Learned Counsel appearing for the 3rd Respondent submitted that the appellant has no *loco standi* in its capacity as an erstwhile shareholder of Corporate Debtor to intervene in and challenge the Plan. It is a settled law that shareholders have no role to play in either the initiation of the CIRP or in the Comp App (AT) (INS) No. 593 of 2020 Resolution Process. Shareholders have no right to take part in the proceedings of the COC. Furthermore, they are ineligible to participate as Resolution Applicants by virtue of the bar under Section 29A of the I&B Code. Further the shareholders are not entitled to receive any payments under Section 30 of the I&B Code. Therefore, the Appellant cannot be considered to be an aggrieved person within the meaning of section 61 and has no *loco standi* to challenge the Plan.

31. It is submitted that the Appellant has chosen to challenge the order belatedly on 13.07.2020 after the 3rd Respondent has already disbursed payments in excess of Rs.2358 Crores under the Resolution Plan and discharged the debts of Corporate Debtor. The Appellant was fully aware of the Plan approval proceedings before the Adjudicating Authority.

32. With regard to the ineligibility of 3rd Respondent under Section 29A (a) and 29A (j) of the I & B Code, it is submitted that the said reliance is incorrect and unsustainable. The Appellant sought to invoke Section 29A (a) on the ground that the Corporate Debtor was an undischarged insolvent. The phrase "undischarged insolvent" has a specific connotation in law when it is used by the legislature, and means individuals who are adjudged insolvent under the prevailing insolvency laws and not yet discharged by the Court. The Corporate persons do not even come within the purview of the Insolvency Law such as the Precedency Terms Insolvency Act 1909 and the Provincial Insolvency Act, 1902.

Comp App (AT) (INS) No. 593 of 2020

33. It is submitted that the term "bankrupt" under Section 79(3) of the I&B Code, is defined to include any person adjudged as an undischarged insolvent. Section 79 is placed under part III which only applies to Individuals and Partnership Firms. Therefore, the undischarged insolvent under Section 29A cannot be the Corporate Debtor itself. Further, the contention of the Appellant that the ESIL to be a connected party to 3rd Respondent under Section 29A (j) is concerned, under the scheme of Section 29A(a) read with Section 29A (j), the so-called connected party and the undischarged insolvent cannot be two separate entities.

34. The Learned Counsel submitted that Section 29A was introduced with the specific purpose of precluding undesirable persons from participating in the Resolution Process and not to punish Resolution Applicants who are genuinely attempting to revive certain Corporate Debtors.

35. It is submitted that on the date of submission of the Resolution Plan in respect of 2nd Respondent, the 3rd Respondent had no control over ESIL. As stated supra, the Resolution Plan for the Corporate Debtor was submitted on 30.11.2019 by the 3rd Respondent much prior to the acquisition of ESIL by the 3rd Respondent. The ineligibility claimed by the appellant arises from the 3rd Respondent's control of ESIL which occurred on 16.12.2019 when the 3rd Respondent came to acquire 100% shares of ESIL i.e. after the date on which ineligibility attaches. The said fact was

admitted by the Appellant also. Therefore, as on the date of submitting the Resolution Comp App (AT) (INS) No. 593 of 2020 Plan, the 3rd Respondent was eligible.

36. In view of the reasons as stated above, the Learned Counsel prayed this Bench to dismiss the Appeal.

37. Heard the Learned Counsel appeared for the respective parties, perused the Pleadings and documents filed in their support. After analyzing the pleadings, the issue that arises for consideration is whether the 3rd Respondent is ineligible under Section 29A(a) read with Section 29A(j) of the Code, 2016 read with explanation I

(iii) thereof to submit a Resolution Plan or not?

38. Before answering the issue we would like to refer to a few facts. The present Appeal filed challenging the approval of the Resolution Plan of the 3rd Respondent herein in respect of the Corporate Debtor i.e. 2nd Respondent by the Adjudicating Authority vide Order dated 2nd March 2019. The Resolution Professional of the Corporate filed IA/188/2019 before the Adjudicating Authority under Section 30(6) read with Section 31(1) of the I & B Code, 2016 for seeking approval of the Resolution Plan. While so, the SFIL filed two applications being CA No.12 of 2020 and CA No.194 of 2019. CA 194 of 2019 the applicant therein sought relief to allow the said applicant as intervener to be impleaded in the proceedings and sought some more directions as prayed in the said Application. However, CA 12 of 2020 the Applicant i.e. SIFL sought declaration that the Resolution Plan submitted by 3rd Respondent herein be declared as illegal.

Comp App (AT) (INS) No. 593 of 2020

39. However, the Learned Adjudicating Authority dealt those two applications and gave a finding in respect thereof. However, this Tribunal is not concerned with those issues. Having considered the application filed by the Resolution Applicant, being CA No.188 of 2019 the Learned Adjudicating Authority approved the Resolution Plan submitted by the 3rd Respondent herein as per Section 31(1) of the I&B Code, 2016. It is an admitted fact that the plan of the R3 was approved by 100% of voting in the 8th COC meeting held on 06.12.2019.

40. It is seen that the Appellant has not challenged nor filed any application when CA/188/2019 filed by the RP seeking approval of the Resolution Plan. However, the Appellant filed the present appeal on 13.07.2020 whereas the order passed by the Adjudicating Authority in IA/188/2019 on 02.03.2020. We are of the view that there is no challenge with regard to the ineligibility of the Respondent No.3 before the Learned Adjudicating Authority and there is no occasion for the Adjudicating Authority to deal with the same. It is also an admitted fact that the Appellant is a shareholder of the Corporate Debtor (holding 69.8% and the other Shareholder of the Corporate Debtor is Essar who holds 30.2%). One of the grounds raised by the Respondent is that the Appellant is not an aggrieved party to file the present Appeal, since the appellant is not a aggrieved party as contemplated under Section 61 of the I&B Code, 2016. However, we are not going into those issues at this point of time.

Comp App (AT) (INS) No. 593 of 2020

41. Now, we classify to address the issues i.e. a. whether the 3rd Respondent is ineligible under Section 29A b. whether the plan discriminates between two shareholders i.e. Appellant and Essar.

42. In this regard, we refer to Section 29A which read as under:

"29A 'persons' not eligible to be Resolution Applicant. A person shall not be eligible to submit a Resolution Plan if such person, are any other person acting jointly or in concert with such person.

a) Is an undischarged insolvent

b) A willful defaulter in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulations Act, 1949

c) at the time of submission of the Resolution Plan has an account or an account of the Corporate Debtor under the management or control of such person or of whom such person is a promoter, classified as non-

performing asset in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulations Act, 1949 (10 of 1949) or the guidelines of a Financial Sector Regulator issued under any other law for the time being in force and at least a period of one year has lapsed from the date of such classification till the date of commencement of the Corporate Insolvency Resolution Process of the Corporate Debtor Provided that the person shall be eligible to submit a resolution plan if such person makes payment of all overdue amounts with interest thereon and charges relating to non-performing asset accounts Comp App (AT) (INS) No. 593 of 2020 before submission of resolution plan.

j) has a connected person not eligible under Clauses (a) and (i). Explanation I: For the purposes of this clause, the expression 'connected person' means

(i) any person who is the promoter or in the management or control of the Resolution Applicant or,

(ii) any person who shall be the promoter or in the management or control of the business of the Corporate Debtor during the implementation of the Resolution Plan, or

(iii) the holding company, subsidiary company, associate company or related party of a referred to in clauses (i) and (ii) provided that nothing in clause (iii) of explanation 1 shall apply to a Resolution Applicant where such applicant is a financial entity and is not a related party of the Corporate Debtor."

43. From the plain reading of the Section 29A Sub clause (a) which referred to as 'is an undischarged insolvent'. The undischarged insolvent has not defined in the IBC, however, the word 'insolvent' has

been defined under Section 79 Sub Section 3 which falls under part III of the I&B Code. The said Part III applicable to individuals and partnership firms. As per the above sub section 3, the Bankrupt means (a) a debtor who has been adjudged as Bankrupt by a Bankruptcy Order under Section 126, (b) each of the partners of a firm, where a Bankruptcy order under Section 126 has been made against a firm or (c) any person adjudged as an 'undischarged insolvent'. Therefore, from the plain reading of the above provisions Comp App (AT) (INS) No. 593 of 2020 the undischarged insolvent is applicable to individuals and partnership firms.

44. The Appellant cannot take the above stand that the 3rd Respondent is an 'undischarged insolvent'. Section 29A was inserted by Act 8 of 2018 with effect from 23.11.2017 with a purpose precluding undesirable persons from participating in the Resolution Process.

45. The issue relating to Section 29A came up for consideration before the Hon'ble Supreme Court and the Hon'ble Supreme Court in Arcerol Mittal India Pvt. Ltd. v Satish Kumar Gupta and Ors. reported in (2019) 2 SCC, the Hon'ble Supreme Court reproduced the amendment bill placed before the Parliament and one of the Statement and objects of the Bill of the Hon'ble Minister extracted as under:

"28. The Statement of objects and reasons of the aforesaid bill lays down

2. the Provisions for Insolvency Resolution and Liquidation of a Corporate person in the Code, did not restrict or bar any person from submitting a resolution plan or participating in the acquisition process of the assets of the company at the time of liquidation. Concerns have been raised that persons who, with their misconduct contributed to defaults of companies or are otherwise undesirable, may misuse this situation due to lack of prohibition or restrictions to participate in the resolution or liquidation process, and gain or regain control of the corporate debtor. This may undermine the processes laid down in the Code as the unscrupulous persons would be seen to be rewarded at the expense of the creditors. In addition, in order to check that the undesirable persons who may have submitted their resolution plans in the absence of such a provision, responsibility is also being entrusted on the Comp App (AT) (INS) No. 593 of 2020 committee of creditors, to give a reasonable period to repay overdue amounts and become eligible."

46. From the reading of the above statement and objects by incorporating Section 29A by way of amendment is to preclude undesirable persons from participating in the resolution process. Further the Hon'ble Supreme Court held that the Courts must take recourse to the purpose, object, text and context of a particular provision before arriving at a judicial conclusion. Having considered the legal position as explained hereinabove, we consider it and hold that the 3rd Respondent is not ineligible to be a Resolution Applicant.

47. One of the grounds raised regarding ineligibility of the 3rd Respondent who is a connected person to the Corporate Debtor by virtue of taking over the ESIL as a Successful Resolution Applicant thereof. Admittedly, the ESIL is one of the Shareholder of the Corporate Debtor. In

accordance with Section 29A (J) of the I&B Code which refers to connected person.

48. The 3rd Respondent is a Successful Resolution Applicant of ESIL and ESIL is one of the Shareholder of the Corporate Debtor. While so, it is an admitted fact that the Successful Resolution Applicant has not stepped into shoe of the Corporate Debtor i.e. ESIL in view of the reason that the matter has been pending before the Hon'ble Supreme Court and the Hon'ble Supreme Court vide its order dated 12.04.2019 directed the non-implementation of the order of the Ahmedabad Comp App (AT) (INS) No. 593 of 2020 Bench of Adjudicating Authority until the appeal before the Hon'ble Supreme Court was finally decided. The Hon'ble Supreme Court on 22.07.2019 directed a status quo to be maintained by the parties in civil Appeal No.24417 of 2019. Further, the Hon'ble Supreme Court finally disposed of the Appeals on 15.11.2019 and till such time, there was no occasion of implementing the resolution plan of ESIL. It is on record that the 3rd Respondent took over the management and control of ESIL on 16.12.2019. It is borne out from the facts that the 3rd Respondent submitted expression of interest on 28.08.2019 and thereafter submitted the Resolution Plan in November 2019 and approved by the COC on 06.12.2019 i.e. prior to taking over the Management and Control of ESIL.

49. To elaborate further, with regard to undischarged insolvent means a person declared by the relevant court to be insolvent. As per the I&B Code, 2016 the CIR process is a process undertaken for Resolution of the Corporate Debtor as a going concern to save it from Corporate Death i.e. Liquidation. In our view, the Successful Resolution Applicant who takes over the company as the going concern unless and otherwise, declared as ineligible under the Provisions of I&B Code, 2016, cannot be treated as ineligible.

50. In view of the aforesaid fact, the 3rd Respondent was not in the control and management of ESIL until the disposal of the Appeals by the Hon'ble Supreme Court. Therefore, the Appellant cannot be treated or classified as a connected person. Comp App (AT) (INS) No. 593 of 2020 Till the time the Appellant finally took the company into its control and management, the company was managed and was under the control of the Resolution Professional of ESIL.

51. As on the date of submission of Resolution Plan to this Corporate Debtor by the 3rd Respondent, the 3rd Respondent was not the shareholder of the Corporate Debtor i.e. OSPIL. Therefore, the stand that it is the connected party is rejected.

52. Further, Section 29A(c) would not be applicable to Resolution Applicants who acquire a Corporate Debtor pursuant to a prior Resolution Plan approved under the Code. Therefore, we hold that the 3rd Respondent is not ineligible for the submission of Resolution Plan as a Successful Resolution Applicant.

53. The other contention of the Appellant is that the ESIL who is a 32% shareholder paid a sum of RS.501.01 Crore and the Appellant was not made any payment. It is to state that the ESIL who is a shareholder of the Corporate Debtor and having Compulsorily convertible Debentures and the ESIL was categorized as Financial Creditor of the Corporate Debtor. As per the approved Resolution Plan the 3rd Respondent proposed a payout based on the admitted principal amount due to all Financial

Creditors and would be paid in full in accordance with the List of Creditors. Further the Plan has ensured equal treatment of all admitted Financial Debtors of the Corporate Debtor by ensuring payment of Rupees 100% Principal admitted debt. It is Comp App (AT) (INS) No. 593 of 2020 also on record that the Resolution Professional in the present case admitted the claim of ESIL arising out of CCD's held by it as a Financial Debt and the payment of Rs.501 Crores made to ESIL in terms of the approved Resolution Plan. Therefore, the ESIL was treated as a Financial Creditor not only as a shareholder. Therefore, the stand of the appellant that the plan discriminating between the two similarly situated shareholders is far from truth and cannot be accepted.

54. It is not out of place to mention that the debentures being treated as the Debt under the IBC and not as equity. Therefore, the payment made to the ESIL for the CCDs which was classified as a Financial Debt, cannot be equated as a payment made to ESIL in the capacity as an equity shareholder.

CONCLUSION:

55. All the issues answered against the Appellant. In view of the aforesaid reasons, the Appellant has not made out any case and a futile exercise in filing this Appeal. The Appeal is devoid of merit and liable to be dismissed. Accordingly, the same is dismissed. No orders as to cost.

[Kanthi Narahari]
Member (Technical)

18.01.2022
SE

[Justice Jarat Kumar Jain]
Member (Judicial)

Comp App (AT) (INS) No. 593 of 2020