

Liberty House Group Pte Ltd vs The Committee Of Creditors Of Amtek Auto ... on 16 August, 2019

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 219 of 2019

IN THE MATTER OF:

Committee of Creditors of Amtek Auto Ltd.
through Corporation Bank

.....Appellant

Vs.

Mr. Dinkar T.Venkatasubramanian & Ors.

.....Respondents

Present:

For Appellant:

Mr. Raju Ramachandran, Sr. Advocate with
Ms. Misha, Mr. Siddhant Kant, Ms. Charu
Bansal, Mr. Ishwar, Mr. Soumabho Ghose,
Mr. Raza Abbas, Advocates
Mr. A.S. Chandhiok, Mr. K. Datta, Ms. Prachi
Johri, Ms. Shweta Kakkar, Ms. Priya for
Liberty House Group Pte Ltd.

For Respondents:

Mr. Amit Singh Chadha, Sr. Advocate with
Mr. Gyanendra Kumar, Ms. Shikha Tandon,
Ms. Pallavi, Ms. Srishti Govil, Mr.
Shivanshu Bhardwaj, Advocates for DVI
Mr. Sumant Batra, Ms. Srishti Kapoor,
Advocates for RP
Mr. Sumesh Dhawan, Ms. Vatsala Kak,
Advocates for shareholders
For Intervenor:
Mr. Rajiv Nayar, Sr. Advocate, Mr. Abhishek
Swaroop, Ms. Manjira Dasgupta, Mr. Naman
Singh Bagga, Advocates

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With

Company Appeal (AT) (Insolvency)No. 442 of 2019

IN THE MATTER OF:

Liberty House Group Pte Ltd.

.....Appellant

Vs.

Mr. Dinkar T.Venkatasubramanian & Ors.

.....Respondents

Present:

For Appellant:

Mr. A.S. Chandhiok, Sr. Advocate with Mr. K.Datta, Ms. Prachi Johri, Ms. Shweta Kakkar, Ms. Priya, Mr. Siddharth, Advocates for Liberty House Group Pte Ltd.

For Respondents:

Mr. Raju Ramachandran, Sr. Advocate with Ms. Misha, Mr. Siddhant Kant, Ms. Charu Bansal, Advocates for R-2

Mr. Sumesh Dhawan, Advocate for shareholders

Mr. Ishwar, Mr. Sumant Batra, Ms. Srishti Kapoor, Mr. Akshit Kapoor, Advocates for RP

Mr. Amit Singh Chadha, Sr. Advocate with Mr. Gyanendra Kumar, Ms. Shikha Tandon, Ms. Pallavi, Ms. Srishti Govil, Mr. Shivanshu Bhardwaj, Advocates for DVI

With

Company Appeal (AT) (Insolvency)No. 443 of 2019

IN THE MATTER OF:

Liberty House Group Pte Ltd.

.....Appellant

Company Appeal (AT) (Insolvency) Nos.219, 442 & 443 of 2019

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Vs.

The Committee of Creditors of
Amtek Auto Ltd. & Anr.

.....Response

Present:

For Appellant:

Mr. Soumabho Ghose, Mr. Raza Advocates.

Mr. A.S. Chandhiok, Mr. K. Datta, Ms. Prachi Johri, Ms. Shweta Kakkar, Ms. Priya for Liberty House Group Pte Ltd.

For Respondents:

Mr. Raju Ramachandran, Sr. Advocate with Ms. Misha, Mr. Siddhant Kant, Ms. Charu Bansal, Mr. Ishwar, Advocates for R-1

Mr. Sumant Batra,
Advocates for RP

Ms. Srishti Kap

Mr. Sumesh Dhawan, Ms.
Advocates for shareholders

Vatsala

J U D G M E N T

SUDHANU JYOTI MUKHOPADHAYA, J.

Pursuant to an application under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("I&B Code" for short), the 'Corporate Insolvency Resolution Process' was initiated against 'Amtek Auto Limited'- ('Corporate Debtor') on 24th July, 2017.

2. Subsequently, the 'Resolution Professional' published advertisement inviting prospective 'Resolution Applicants' to submit a Company Appeal (AT) (Insolvency) Nos.219, 442 & 443 of 2019 'Resolution Plan' by 31st August, 2017. On receipt of 'Resolution Plans' followed by improved 'Resolution Plan'/ revised 'Resolution Plan', the 'Resolution Plan' filed by one 'M/s. Liberty House Group Pte Ltd.' and another 'Deccan Value Investors LP' were considered by the 'Committee of Creditors'.

3. On 6th March, 2018, 'Deccan Value Investors LP' withdrew its 'Resolution Plan', so the revised plan of "M/s. Liberty House Group Pte Ltd." was considered by the 'Committee of Creditors' which approved the plan on 2nd April, 2018 with majority voting shares of 94.20%.

4. Thereafter, the 'Resolution Professional' filed application under Section 31 before the Adjudicating Authority (National Company Law Tribunal), Chandigarh Bench, Chandigarh on 16th April, 2018 and the Adjudicating Authority by order dated 25th July, 2018 approved the 'Resolution Plan' of 'M/s. Liberty House Group Pte Ltd.'.

5. When the question of implementation of the approved 'Resolution Plan' of 'M/s. Liberty House Group Pte Ltd.' was taken up by the 'Resolution Professional', it has noticed that in spite of e-mail sent on 5th September, 2018 and detailed e-mail sent on 12th September, 2018, no favourable response was received from 'M/s. Liberty House Group Pte Ltd.'. Even the Performance Guarantee and the escrow account and Company Appeal (AT) (Insolvency) Nos.219, 442 & 443 of 2019 other terms and conditions which were approved pursuant to the 'Resolution Plan' were not acted upon.

6. The 'Successful Resolution Applicant'- 'Liberty House Group' through its counsel sent a Letter of Intent on 14th September, 2018 to the 'Committee of Creditors' seeking to delete material conditions under the Process Note including the furnishing of Performance Guarantee, which was rejected by the 'Committee of Creditors'. It is alleged that in spite of repeated reminders given by the 'Resolution Professional', 'M/s. Liberty House Group Pte Ltd.' failed to furnish the performance guarantee in terms of the Process Note and also failed to open escrow account with 15% of the upfront amount of Rs. 528.75 crores.

7. 'M/s. Liberty House Group Pte Ltd.' on 24th September, 2018 sent a letter assuring that an escrow account would be set up but finally on one or other ground 'M/s. Liberty House Group Pte Ltd.' refused to give effect to the 'Resolution Plan'. In the meantime, 'M/s. Liberty House Group Pte Ltd.' filed a suit for injunction on 26th November, 2018 before the Hon'ble Delhi High Court seeking encashment of the Bid Bond Guarantee. The 'Committee of Creditors' invoked the Bid Bond Guarantee of Rs.50 Crores but the Barclays Bank on 27th November, 2018 rejected the invocation of Bid Bond Guarantee of Rs.50 Crores on the ground that the invocation was not as per the prescribed format. Company Appeal (AT) (Insolvency) Nos.219, 442 & 443 of 2019

8. In the meantime, one or other order was passed by the Hon'ble Delhi High Court in a suit filed by 'M/s. Liberty House Group Pte Ltd.'.

9. At this stage, the 'Committee of Creditors' / 'Financial Creditors' filed an application under Section 60(5) read with Section 74(3) of the 'I&B Code' before the Adjudicating Authority with prayer to declare that 'Resolution Applicant'- 'M/s. Liberty House Group Pte Ltd.' and its Promoters upon whom the 'Resolution Plan' is binding under Section 31 of the 'I&B Code', have knowingly contravened the terms of the 'Resolution Plan' having failed to implement the same. Further prayer was made to reinstate the 'Committee of Creditors' and the 'Resolution Professional' to ensure that the 'Corporate Debtor' remain as a going concern. Further prayer was made to grant 90 days to the 'Resolution Professional' to make another attempt for a fresh process rather than forcing the 'Corporate Debtor' into liquidation on account of fraud committed by 'M/s. Liberty House Group Pte Ltd.'. Prayer was also made to debar 'M/s. Liberty House Group Pte Ltd.' from applying for a fresh 'Resolution Plan' and further direction to the Insolvency and Bankruptcy Board of India to take steps for initiation of proceeding under Section 74(3) of the 'I&B Code' for trial and punishment under the said provisions.

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10. The Adjudicating Authority (National Company Law Tribunal), Chandigarh Bench, by impugned order dated 13th February, 2019, noticed the principle laid down by this Appellate Tribunal in "Quinn Logistics India Pvt. Ltd. vs. Mack Soft Tech Pvt. Ltd.□SCC OnLine NCLAT 243" and the order passed by the Hon'ble Supreme Court in "Arcelormittal India Private Limited v. Satish Kumar Gupta and Ors.□(2018) SCC OnLine SC 1733".

11. The Adjudicating Authority held that in view of the principle laid down by the Hon'ble Supreme Court in "Arcelormittal India Private Limited" (Supra), certain period can be excluded from the total period of 270 days but there is no scope of granting extension beyond 270 days under any circumstances.

12. The Adjudicating Authority further held that there were only two 'Resolution Plans' one submitted by 'M/s. Liberty House Group Pte Ltd.', and other by 'Deccan Value Investors LP' which backtracked because there was some better amount of bid offered by 'M/s. Liberty House Group Pte Ltd.', whose 'Resolution Plan' was approved. Since the approved 'Resolution Plan' cannot be implemented because of the default in making payment as per the terms of the 'Resolution Plan', the

period when the 'Resolution Plan' was submitted by 'Deccan Value Investors LP' till the disposal of the application can only be reconsidered Company Appeal (AT) (Insolvency) Nos.219, 442 & 443 of 2019 by the 'Committee of Creditors' by reconstituting it and not by initiating fresh process, which would defeat the fresh binding timelines provided under the 'I&B Code' to complete the process'. The Adjudicating Authority observed that no matter if the 'Corporate Debtor' ultimately has to face liquidation, but the permission to restart the process to publish re-advertisement and invite fresh plans etc. would defeat the very mandate of Section 12 of the 'I&B Code'.

13. The Adjudicating Authority noticed the submissions made on behalf of 'M/s. Liberty House Group Pte Ltd.'. According to whom, it discovered blatant discrepancies in the condition of machineries, valuations and representations made in the Information Memorandum and Valuation Reports, from which the 'M/s. Liberty House Group Pte Ltd.', became aware that the information contained in the Information Memorandum was incorrect, false and reflecting inflated values and information.

14. However, the application filed by 'Successful Resolution Applicant' namely-- 'M/s. Liberty House Group Pte Ltd.' for declaration that the 'Corporate Insolvency Resolution Process' in respect of 'Amtech Auto Limited' commencing on 24th April, 2017 and culminating into order of approval of 'Resolution Plan' on 25th July, 2018 is vitiated by misrepresentation/fraud/mistake of fact has also been disallowed by Company Appeal (AT) (Insolvency) Nos.219, 442 & 443 of 2019 the Adjudicating Authority by common impugned order dated 13th February, 2019.

However, certain observation has been made with regard to the manner in which Information Memorandum was prepared based on which the 'Resolution Plan' filed by the 'Successful Resolution Applicant'.

15. The contentions raised by learned counsel for 'M/s. Liberty House Group Pte Ltd.', learned counsel for the 'Financial Creditors' and the learned counsel for the 'Resolution Professional' at the time of hearing application being CA No. 567/2018 were disposed of in which the right has been kept open to the 'M/s. Liberty House Group Pte Ltd.' to defend any action. The prayer made by 'M/s. Liberty House Group Pte Ltd.' to lay down the guidelines for compliance by the 'Resolution Professionals' in such cases has not been answered by the Adjudicating Authority and the 'Financial Creditors' have been given liberty to file a complaint before the Insolvency and Bankruptcy Board of India or the Central Government, claiming that the 'M/s. Liberty House Group Pte Ltd.' intentionally and wilfully contravened the terms of the plan.

16. Similar plea has been taken by 'M/s. Liberty House Group Pte Ltd.' before this Appellate Tribunal in its appeal (Company Appeal (AT) (Insolvency) No. 442 of 2019) wherein it is alleged that on knowing the Company Appeal (AT) (Insolvency) Nos.219, 442 & 443 of 2019 aforesaid fact 'M/s. Liberty House Group Pte Ltd.' immediately wrote a letter on 6th November, 2018 stating that in view of the developments regarding discovery of serious irregularities in the information shared with the Appellant during the bidding process it was necessary that a meeting be held with the 'Committee of Creditors', to find a way to discuss and agree to a suitable 'Resolution Plan' where the true valuation of 'Corporate Debtor' is reflected.

17. The stand of 'M/s. Liberty House Group Pte Ltd.' is that the 'Resolution Professional' under Section 25(2)(g) read with Section 29 of the 'I&B Code' was required to prepare an Information Memorandum with the relevant information, including the liquidation value of the 'Corporate Debtor' as per Regulation 36 of the un-amended 'Corporate Insolvency Resolution Process Regulations'. Reference has also been made to the paragraph 5.3.2 of the 'Bankruptcy Law Reforms Committee Report 2015', which requires the 'Resolution Professional' to provide most updated information about the entity as accurately as is reasonably possible to this range of solution providers.

18. It was submitted that what has been discovered by the 'Resolution Applicant' that the financial statements of the 'Corporate Debtor' for the quarter and half year ending September 2017 was unaudited and standalone. It was discovered that the investment of the Company Appeal (AT) (Insolvency) Nos.219, 442 & 443 of 2019 'Corporate Debtor' was overvalued in the Liquidation Reports, as a result, the 'Resolution Applicant' ('M/s. Liberty House Group Pte Ltd.') in good faith acted upon by relying on such information set out in the Liquidation Reports. Subsequently having come to know of the discrepancies, 'M/s. Liberty House Group Pte Ltd.' wanted to have a meeting with the 'Committee of Creditors' to file fresh plan.

19. The Adjudicating Authority taking into consideration all the aforesaid facts and submissions made by the parties, rejected the prayer made by the 'Committee of Creditors'/ 'Financial Creditors' and disposed of their CA No. 567 of 2018.

20. Learned counsel for the 'Committee of Creditors' made similar prayer for exclusion of the period for the purpose of counting total period of 270 days of 'Corporate Insolvency Resolution Process'.

21. It is informed that on account of an informal feedback received by the 'Resolution Professional', various prospective investors have shown interest in participating in the 'Corporate Insolvency Resolution Process' of the 'Corporate Debtor', in the event an opportunity is granted by this Appellate Tribunal.

22. It is also informed by the 'Committee of Creditors' that the following entities who have expressed an informal interest for Company Appeal (AT) (Insolvency) Nos.219, 442 & 443 of 2019 participating the 'Corporate Insolvency Resolution Process' of the 'Corporate Debtor':

S.No.	Organisation	Relevant Contact Person
1.	SSG Capital Management (Singapore) Pte. Ltd.	Lath Ranjan
2.	Cerebrus UK	Indranil Ghosh
3.	AION	Aditya Gupta
4.	Kotak	Prudhvi Raj
5.	Gateway Fund	Rahul Goswami
6.	Laurel Investments Ltd. (Mauritius)	Transaction Group- IQEQ
7.	Amtek Auto Limited- Promoter	Arvind Dham

23. Similar plea has been taken by the 'Resolution Professional' who has referred Section 74(3) of the 'I&B Code' and also Section 213(b) of the Companies Act, 2013 for taking action against the 'Successful Resolution Applicants' / 'Corporate Debtor' and its members.

24. Learned counsel for 'M/s. Liberty House Group Pte Ltd.' has taken plea as noticed above that they discovered inflated valuation of plant and machinery in the Information Memorandum and Liquidation valuation reports. The following plea has been taken.

a) In August 2018, the 'Resolution Professional' appointed two liquidation valuers [as per Regulation 27 of the CIRP Regulations], namely RBSA and BDO, who valued the 'Corporate Debtor' as follows:

i. Average Liquidation Value of Rs. 4,129 crores. Company Appeal (AT) (Insolvency) Nos.219, 442 & 443 of 2019 ii. Liquidation Value of Fixed Assets (PPE) 1636 crores, [average of Rs. 1,746 crores (RBSA) and Rs. 1,506 (BDO)]

b) Out of Fixed Assets/PPE, plant and machinery (P&M) installed across 21 plants was valued at Rs. 1,128 crores (average of RBSA, BDO):

i. RBSA P&M liquidation value: Rs. 1,284 crores ii. BDO P&M liquidation value: Rs. 973 crores 'M/s. Liberty House Group Pte Ltd.' relied on aforesaid valuation in good faith at the time of preparing its 'Resolution Plan', because of the following:

i. Limited time available to LHG making physical verification of individual machines at 21 plants not practical (only 1 visit allowed prior to submission of first 'Resolution Plan') ii. Liquidation Value was considered for the purpose of assessing a valuation floor by 'Committee of Creditors' and 'Resolution Professional' and actively used for negotiation with resolution applicants. iii. Regulation 27 and 35 of the CIRP Regulations the valuers have to conduct the exercise of valuation as per 'internationally accepted valuation standards'. Company Appeal (AT) (Insolvency) Nos.219, 442 & 443 of 2019

d) Post approval of 'Resolution Plan', 'M/s. Liberty House Group Pte Ltd.'s authorised representative started attending operational reviews/site visits such as on 6th August 2018, 29th August 2018 and 18th September 2018. This is when it was discovered that ground condition did not reflect the values as per the Valuation Reports.

e) Thus, 'M/s. Liberty House Group Pte Ltd.' conducted independent verification after being granted access to plants as an observer on the 'Monitoring Committee', by procuring quotations of new machines from vendors.

f) As time is the essence, 'M/s. Liberty House Group Pte Ltd.' shortlisted nine (9) key plants of Amtek, whose liquidation value of plant and machinery constitute about sixty percent (60%) of the total liquidation value of plant and machinery of Amtek as per the RBSA report. Accordingly, 'M/s. Liberty House Group Pte Ltd.' reached out to the same machinery suppliers and sought quotations for the specific machines as stated in liquidation value reports. In an ideal situation, the new quotations from the machinery suppliers, after discounting for age of the equipment, should have been significantly higher than the Liquidation Value attributed to the specific machines. However, to 'M/s. Liberty House Group Pte Ltd.' surprise, the quotes for same new Company Appeal (AT) (Insolvency) Nos.219, 442 & 443 of 2019 machines were in fact lower than the Liquidation Value.

g) The liquidation value of the plant and machinery of Amtek, on the basis of the quotations provided by the machinery suppliers was in the range of Rs.400-500 Crores, being an amount significantly lower than the liquidation value of Rs. 1,284 Crores attributed to the plant and machinery in the RBSA Valuation Report.

25. Discrepancies in projected capacity of the plants has been shown as under:

"The 'Resolution Professional' had as part of the VDR, shared projections for the business of the 'Corporate Debtor' wherein inter alia, the projected capacity of the plants of the 'Corporate Debtor' was implicit with respect to revenue generation from sales as projected in the VDR. However, pursuant to discussions in the Monitoring Committee/ review meetings, to 'M/s. Liberty House Group Pte Ltd.' surprise it discovered that the projected capacity as disclosed in VDR was an impossibility, and the actual estimations of the capacity of the plants based on H1 for FY 2019 was far lower. The details of the projected capacity of the plants as disclosed in VDR and the actual estimations (based on H1 for FY 2019) as disclosed in the 'Monitoring Committee' meetings is set out below:

Company Appeal (AT) (Insolvency) Nos.219, 442 & 443 of 2019 FY 2019 Consolidated (Rs. VDR Reality Gap Crore) Sales 2,447 1,250 -49% EBITDA 299 90 -70% FY 2019 Unit wise VDR Reality Gap (Rs. Crore) Unit2 361 234 -35% Bhopal 178 93 -48% Ace 1&2 168 88 -47% Vision 270 137 -49% Sanswari 147 93 -37% Atal 212 122 -42% Ranjangaon 123 44 -64% Hosur 183 89 -51% FY 2019 Unit wise VDR Reality Gap (Rs. Crore) Chennai 51 0 -100% Nalagarh 12 6 -47% Gear Div 12 10 -22% Ace3 123 66 -46% Ace 4 & 5 133 63 -53% Unit3 533 345 -35% Metal 170 0 -100% Division Interunit sale -228 -140 -38% Total 2,447 1,250 -49% On further review and assessment, 'M/s. Liberty House Group Pte Ltd.' found that several of the plants were already running at near full capacity and therefore it was impossible to meet the projected sales with the existing capacities."

26. Learned counsel for 'M/s. Liberty House Group Pte Ltd.' highlighted the irregularities in relation to information about the extent Company Appeal (AT) (Insolvency) Nos.219, 442 & 443 of 2019 of

inter dependency of the group companies and process irregularities, as noted below:

Irregularity in relation to information about the extent of inter dependency of the group companies "a. Amtek forms a part of the Group Companies whose business is inter-linked and inter-connected in as much as the 'Corporate Debtor' depends on the Group Companies for supplies of raw materials. During the bidding process, 'M/s. Liberty House Group Pte Ltd.' given to understand (through a presentation entitled "Amtek Auto Limited - Interlinkages and Dependencies on Group Companies" shared by the Resolution Professional in the VDR) that the 'Corporate Debtor's' dependency on Group Companies for its business is to the tune of forty-three percent (43%). Accordingly, 'M/s. Liberty House Group Pte Ltd.' factored a dependency of forty-three percent (43%) of the 'Corporate Debtor' on the Group Companies, while formulating the 'Resolution Plan'. b. Pursuant to attending 'Monitoring Committee' meetings, 'M/s. Liberty House Group Pte Ltd.' was surprised to learn that the actual dependency of the 'Corporate Debtor' on supplies from the Group Companies (for H1 of FY 2019) is to the extent Company Appeal (AT) (Insolvency) Nos.219, 442 & 443 of 2019 of sixty-six percent (66%) i.e. nearly 50% higher than as implied by the data shared with us in the VDR.

c. This changes the entire dynamics of the business for the 'Corporate Debtor', as the supplies from the Group Companies to the 'Corporate Debtor' are customised to suit the contracts of the 'Corporate Debtor' with the end customer and as such the supplies cannot be immediately (or within any reasonable period of time) procured by the 'Corporate Debtor' from any other supplier in case the Group Companies are unable to supply to the 'Corporate Debtor' because of their own status/financial position.

Process Irregularities Further, when the 'Resolution Plan' was filed by the 'Resolution Professional' on 16 th April 2018, the Letter of Intent was not even signed by 'M/s. Liberty House Group Pte Ltd.' and escrow terms and conditions were still under negotiations. Resolution Professional did not highlight this before the Adjudicating Authority while the 25 th July Order was being Passed."

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27. Learned counsel for 'M/s. Liberty House Group Pte Ltd.' submitted that it undertook all efforts to implement the 'Resolution Plan', including filing an application to 'Competition Commission of India'. To address the above serious issues and strive to arrive at a solution 'M/s. Liberty House Group Pte Ltd.' also held meetings with the 'Committee of Creditors' on 24th October 2018 and 31st October 2018. 'M/s. Liberty House Group Pte Ltd.' did not receive any response to their letter dated 6th November 2018. Thus, 'M/s. Liberty House Group Pte Ltd.' once again addressed a letter to the 'Resolution Professional' on 14th November, 2018 but no final solution could be given.

28. 'Deccan Value Investors LP', the other 'Resolution Applicant' appeared as an intervenor. It was submitted by learned counsel that new eligibility criteria were published by the 'Resolution Professional' / 'Committee of Creditors' when its matter was considered pursuant to an interim order passed by this Appellate Tribunal on 28th March, 2019.

29. It was submitted that on the ground of violation of this Appellate Tribunal's order dated 29th May, 2019, the 'Resolution Professional' published an entirely 'new eligibility criteria' for the 'prospective resolution applicants', which in essence was culmination of design to disqualify and exclude 'Deccan Value Investors LP'. Company Appeal (AT) (Insolvency) Nos.219, 442 & 443 of 2019

30. However, we are not going into the aforesaid issues as we find that 'Deccan Value Investors LP' has already withdrawn its 'Resolution Plan' and subsequently filed the revised application after interim order was passed by this Appellate Tribunal, but its revised plan has not been approved by the 'Committee of Creditors'.

31. 'M/s. Liberty House Group Pte Ltd.' has preferred the other appeals (Company Appeal (AT) (Insolvency) Nos. 442 & 443 of 2019) and challenged the same very impugned order dated 13th February, 2019. The plea taken by 'M/s. Liberty House Group Pte Ltd.' has already been noticed in the preceding paragraph. The two appeals have been filed in view of the common order passed in two Company Applications which were disposed of by common impugned order dated 19th February, 2018.

32. One of the question arises for consideration in these appeals is whether a case has been made out to exclude any period for the purpose of counting 270 days of the 'Corporate Insolvency Resolution Process'. In absence of any extraordinary situation and the fact that more than 270 days have already been passed, we find no ground to exclude any period. Further, once a plan is approved by the Adjudicating Authority under Section 31, if it is not implemented, that cannot be a ground to exclude any period.

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33. If a plan is approved under Section 31 within 180 days or much before completion of 270 days, one may request the Adjudicating Authority to allow the 'Committee of Creditors' to consider the other 'Resolution Plans', if the 'Resolution Applicant' is not ineligible and such plans were not rejected on merit but were not approved because best of the plan was approved by the 'Committee of Creditors'. However, we are not inclined to decide such issue in view of the provisions of Section 33(3) and mandate under Section 12 of the 'I&B Code'.

34. Section 33 deals with 'Initiation of liquidation'. The Adjudicating Authority, before the expiry of the 'Insolvency Resolution Process' period or the maximum period permitted for completion of the 'Corporate Insolvency Resolution Process' under Section 12, it does not receive a 'Resolution Plan' under sub-section (6) of Section 30 or reject the 'Resolution Plan' under Section 31 for the non-compliance of the requirements specified therein, it is empowered to pass order of liquidation

under sub-section (1) of Section 33.

35. Where the 'Resolution Professional', at any time during the 'Corporate Insolvency Resolution Process' but before confirmation of 'Resolution Plan', intimates the Adjudicating Authority of the decision of the 'Committee of Creditors' approved by not less than sixty-six percent of the voting share to liquidate the 'Corporate Debtor', the Adjudicating Company Appeal (AT) (Insolvency) Nos.219, 442 & 443 of 2019 Authority is bound to pass order of liquidation in terms of Section 33(2) of the 'I&B Code'.

36. Under Section 33(3), if the 'Resolution Plan' is approved by the Adjudicating Authority is contravened by the concerned 'Corporate Debtor', any person other than the 'Corporate Debtor', whose interests are prejudicially affected by such contravention, may make an application to the Adjudicating Authority for a 'liquidation' order as referred to in Section 33, which reads as follows:

"33. Initiation of liquidation. □(1) Where the Adjudicating Authority,□

(a) before the expiry of the insolvency resolution process period or the maximum period permitted for completion of the corporate insolvency resolution process under section 12 or the fast track corporate insolvency resolution process under section 56, as the case may be, does not receive a resolution plan under sub-section (6) of section 30; or

(b) rejects the resolution plan under section 31 for the non-compliance of the requirements specified therein, Company Appeal (AT) (Insolvency) Nos.219, 442 & 443 of 2019 it shall□

(i) pass an order requiring the corporate debtor to be liquidated in the manner as laid down in this Chapter;

(ii) issue a public announcement stating that the corporate debtor is in liquidation; and

(iii) require such order to be sent to the authority with which the corporate debtor is registered.

(2) Where the resolution professional, at any time during the corporate insolvency resolution process but before confirmation of resolution plan, intimates the Adjudicating Authority of the decision of the committee of creditors 1[approved by not less than sixty-six per cent. of the voting share] to liquidate the corporate debtor, the Adjudicating Authority shall pass a liquidation order as referred to in sub-

clauses (i), (ii) and (iii) of clause (b) of sub-section (1).

(3) Where the resolution plan approved by the Adjudicating Authority is contravened by the concerned corporate debtor, any person other than Company Appeal (AT) (Insolvency) Nos.219, 442 & 443 of 2019 the corporate debtor, whose interests are prejudicially affected by such contravention, may make an application to the Adjudicating Authority for a liquidation order as referred to in sub-clauses

(i), (ii), (iii) of clause (b) sub-section (1).

(4) On receipt of an application under sub-section (3), if the Adjudicating Authority determines that the corporate debtor has contravened the provisions of the resolution plan, it shall pass a liquidation order as referred to in sub-clauses (i), (ii) and (iii) of clause (b) of sub-section (1).

(5) Subject to section 52, when a liquidation order has been passed, no suit or other legal proceeding shall be instituted by or against the corporate debtor:

Provided that a suit or other legal proceeding may be instituted by the liquidator, on behalf of the corporate debtor, with the prior approval of the Adjudicating Authority.

(6) The provisions of sub-section (5) shall not apply to legal proceedings in relation to such transactions Company Appeal (AT) (Insolvency) Nos.219, 442 & 443 of 2019 as may be notified by the Central Government in consultation with any financial sector regulator. (7) The order for liquidation under this section shall be deemed to be a notice of discharge to the officers, employees and workmen of the corporate debtor, except when the business of the corporate debtor is continued during the liquidation process by the liquidator."

37. In appropriate case, on receipt of an application under sub- section (3), if the Adjudicating Authority determines that the 'Corporate Debtor' has contravened the provisions of the 'Resolution Plan', it requires to pass order of liquidation as provided under sub-clauses (i),

(ii) and (iii) of clause (b) of sub-section (1) as laid down under Section 30(4).

38. In the present case, it is argued that none of the persons' interests are prejudicially affected because of contravention, made any application to the Adjudicating Authority for liquidation order under sub-section (3) of Section 33, therefore, according to the counsel for the 'Committee of Creditors' and the 'Resolution Professional', no order could have been passed under Section 33(3) of the 'I&B Code'. Company Appeal (AT) (Insolvency) Nos.219, 442 & 443 of 2019

39. We have already observed that in case where the 'Resolution Plan' earlier approved within a reasonable period of 180 days or much before completion of 270 days, one may request the Adjudicating Authority to allow the 'Resolution Professional'/ 'Committee of Creditors' to consider the pending 'Resolution Plan (s)' or to call for fresh 'Resolution Plan'/ 'Revised Resolution Plan', in absence of any application under Section 33(3) filed by any person whose interest is prejudicially affected by contravention of the plan by the 'Corporate Debtor'.

However, as we have noted that more than 270 days have been completed much earlier and no case is made out to exclude any period, we hold that the Adjudicating Authority has no other option but to pass order of liquidation.

40. It is made clear that once order of liquidation is passed, the liquidator is required to follow the procedure laid down under the 'I&B Code', including Sections 35, 36, 37, 38, 39 and 40 etc. as also the procedure laid down under Section 230 of the Companies Act, 2013 as held by this Appellant Tribunal in "Y. Shivram Prasad Vs. S. Dhanapal & Ors. □ Company Appeal (AT) (Insolvency) No. 224 of 2018". Company Appeal (AT) (Insolvency) Nos.219, 442 & 443 of 2019

41. 'M/s. Liberty House Group Pte Ltd.' has shown certain grounds for non-compliance of the plan, which cannot be deliberated by this Appellate Tribunal to decide whether the grounds shown by 'M/s. Liberty House Group Pte Ltd.' is genuine or it attracts punishment prescribed under Section 74(3) of the 'I&B Code', which reads as follows:

"74. Punishment for contravention of moratorium or the resolution plan. □.....(3)
Where the corporate debtor, any of its officers or creditors or any person on whom the approved resolution plan is binding under section 31, knowingly and wilfully contravenes any of the terms of such resolution plan or abets such contravention, such corporate debtor, officer, creditor or person shall be punishable with imprisonment of not less than one year, but may extend to five years, or with fine which shall not be less than one lakh rupees, but may extend to one crore rupees, or with both."

42. The 'I&B Code' is silent on the issue as to whether the Adjudicating Authority has any jurisdiction to pass any order referring Company Appeal (AT) (Insolvency) Nos.219, 442 & 443 of 2019 the matter to the Central Government or the Insolvency and Bankruptcy Board of India for action under Section 74(3) of the 'I&B Code' or under any of the provisions 'for punishment' as prescribed under Chapter VII of Part II of the 'I&B Code'.

43. Section 236 of the 'I&B Code' deals with "Trial of offences by Special Court", as quoted below:

"236. Trial of offences by Special Court. □(1) Notwithstanding anything in the Code of Criminal Procedure, 1973(2 of 1974), offences under of this Code shall be tried by the Special Court established under Chapter XXVIII of the Companies Act, 2013 (18 of 2013).

(2) No Court shall take cognizance of any offence punishable under this Act, save on a complaint made by the Board or the Central Government or any person authorised by the Central Government in this behalf.

(3) The provisions of the Code of Criminal Procedure, 1973 shall apply to the proceedings before a Special Court and for the purposes of the said provisions, the Special Court shall be deemed to be a Court of Company Appeal (AT) (Insolvency)

Nos.219, 442 & 443 of 2019 Session and the person conducting a prosecution before a Special Court shall be deemed to be a Public Prosecutor.

(4) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, in case of a complaint under sub-section (2), the presence of the person authorised by the Central Government or the Board before the Court trying the offences shall not be necessary unless the Court requires his personal attendance at the trial."

44. From sub-section (2) of Section 236, it is clear that no Special Court can take cognizance of any offence punishable under the 'I&B Code', including punishment prescribed under Section 74(3) of Chapter VII of Part II, save on a complaint made by the Insolvency and Bankruptcy Board of India or the Central Government or any person authorised by the Central Government in this behalf.

45. Normally, the Insolvency and Bankruptcy Board of India or the Central Government are not made a party respondent to any of the 'Corporate Insolvency Resolution Process'. Therefore, they cannot have any idea as to whether any offence has been committed by any 'Corporate Debtor' or its members, including 'Successful Resolution Company Appeal (AT) (Insolvency) Nos.219, 442 & 443 of 2019 Applicant' ('Corporate Debtor') under Section 74(3) or any of the provisions of Chapter VII of Part II of the 'I&B Code'.

46. In this background, we are of the view that it is the Adjudicating Authority who is required to refer such matter to the Insolvency and Bankruptcy Board of India or the Central Government to take up the matter to the Special Court if on investigation, if any case of offence under Chapter VII, including Section 74(3) is made out.

47. There is no procedure laid down under the 'I&B Code', but the Adjudicating Authority, which is the National Company Law Tribunal is required to follow the procedure as mandated under Section 424 of the Companies Act, 2013 and quoted below:

"424. Procedure before Tribunal and Appellate Tribunal. (1) The Tribunal and the Appellate Tribunal shall not, while disposing of any proceeding before it or, as the case may be, an appeal before it, be bound by the procedure laid down in the Code of Civil Procedure, 1908, but shall be guided by the principles of natural justice, and, subject to the other provisions of this Act and of any rules made thereunder, the Tribunal and the Appellate Tribunal shall have power to regulate their own procedure. Company Appeal (AT) (Insolvency) Nos.219, 442 & 443 of 2019 (2) The Tribunal and the Appellate Tribunal shall have, for the purposes of discharging their functions under this Act, the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 while trying a suit in respect of the following matters, namely:--

(a) summoning and enforcing the attendance of any person and examining

him on oath;

(b) requiring the discovery and production of documents;

(c) receiving evidence on affidavits;

(d) subject to the provisions of sections 123 and 124 of the Indian Evidence Act, 1872, requisitioning any public record or document or a copy of such record or document from any office;

(e) issuing commissions for the examination of witnesses or documents;

(f) dismissing a representation for default or deciding it ex parte;

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(g) setting aside any order of dismissal of any representation for default or any order passed by it ex parte; and

(h) any other matter which may be prescribed.

(3) Any order made by the Tribunal or the Appellate Tribunal may be enforced by that Tribunal in the same manner as if it were a decree made by a court in a suit pending therein, and it shall be lawful for the Tribunal or the Appellate Tribunal to send for execution of its orders to the court within the local limits of whose jurisdiction, --

(a) in the case of an order against a company, the registered office of the company is situate;

or

(b) in the case of an order against any other

person, the person concerned voluntarily

resides or carries on business or personally works for gain.

(4) All proceedings before the Tribunal or the Appellate Tribunal shall be deemed to be judicial proceedings within the meaning of Company Appeal (AT) (Insolvency) Nos.219, 442 & 443 of 2019 sections 193 and 228, and for the purposes of section 196 of the Indian Penal Code, and the Tribunal and the Appellate Tribunal shall be deemed to be civil court for the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973."

48. As in terms of Section 424 of the Companies Act, 2013, the Adjudicating Authority/ National Company Law Tribunal is required to follow the principles of natural justice and the provision of the 'I&B Code' / 'Companies Act, 2013', therefore, without giving any opportunity of hearing, the Adjudicating Authority/ National Company Law Tribunal cannot refer the matter to the Central Government or the Insolvency and Bankruptcy Board of India for instituting a case against the alleged defaulter.

49. Section 213 of the Companies Act, 2013 may not be directly applicable to the proceeding under the 'I&B Code'. However, it relates to "Investigation into company's affairs in other cases". As per clause (b) of sub-section 213, on an application made to it (Adjudicating Authority/ Tribunal) by any other person (say, the 'Resolution Professional' or the 'Committee of Creditors') or otherwise (suo moto), if the Tribunal (Adjudicating Authority) is satisfied that there are circumstances Company Appeal (AT) (Insolvency) Nos.219, 442 & 443 of 2019 suggesting that the business of the company is being conducted with intent to defraud its creditors, members or any other person or otherwise for a fraudulent or unlawful purpose, or misfeasance or other misconduct towards the company ('Corporate Debtor' through 'Successful Resolution Applicant'), after giving a reasonable opportunity of being heard to the parties concerned, that the affairs of the company ought to be investigated by an inspector or inspectors appointed by the Central Government and where such order is passed, the Central Government shall appoint one or more competent persons as inspectors to investigate into the affairs of the company, which is quoted below:

"213. Investigation into company's affairs in other cases.□The Tribunal may,--

(a) on an application made by--

(i) not less than one hundred members or members holding not less than one-tenth of the total voting power, in the case of a company having a share capital; or

(ii) not less than one-fifth of the persons on the company's register of members, in the case of a company having no share capital, and supported by such evidence as may be necessary for the purpose of showing that Company Appeal (AT) (Insolvency) Nos.219, 442 & 443 of 2019 the applicants have good reasons for seeking an order for conducting an investigation into the affairs of the company; or

(b) on an application made to it by any other person or otherwise, if it is satisfied that there are circumstances suggesting that--

(i) the business of the company is being conducted with intent to defraud its creditors, members or any other person or otherwise for a fraudulent or unlawful purpose, or in a manner oppressive to any of its members or that the company was formed for any fraudulent or unlawful purpose;

(ii) persons concerned in the formation of the company or the management of its affairs have in connection therewith been guilty of fraud, misfeasance or other

misconduct towards the company or towards any of its members; or Company Appeal (AT) (Insolvency) Nos.219, 442 & 443 of 2019

(iii) the members of the company have not been given all the information with respect to its affairs which they might reasonably expect, including information relating to the calculation of the commission payable to a managing or other director, or the manager, of the company, order, after giving a reasonable opportunity of being heard to the parties concerned, that the affairs of the company ought to be investigated by an inspector or inspectors appointed by the Central Government and where such an order is passed, the Central Government shall appoint one or more competent persons as inspectors to investigate into the affairs of the company in respect of such matters and to report thereupon to it in such manner as the Central Government may direct:

Provided that if after investigation it is proved that--

- (i) the business of the company is being
conducted with intent to defraud its

Company Appeal (AT) (Insolvency) Nos.219, 442 & 443 of 2019 creditors, members or any other persons or otherwise for a fraudulent or unlawful purpose, or that the company was formed for any fraudulent or unlawful purpose; or

(ii) any person concerned in the formation of the company or the management of its affairs have in connection therewith been guilty of fraud, then, every officer of the company who is in default and the person or persons concerned in the formation of the company or the management of its affairs shall be punishable for fraud in the manner as provided in section 447."

50. We have notice that Section 213 of the 'Companies Act, 2013' has not been adopted under the 'I&B Code' but such order can be passed by the Tribunal on an application by any person against any Company ('Corporate Debtor'), if the fraud has been committed as mentioned in clauses (i) or (ii) or (iii) of Section 213 (b). Therefore, we are of the opinion that before referring any matter to the Insolvency and Bankruptcy Board of India or the Central Government, the Adjudicating Authority/Tribunal is required to provide reasonable opportunity of Company Appeal (AT) (Insolvency) Nos.219, 442 & 443 of 2019 hearing to the parties concerned/alleged offenders of provisions of Chapter VII of Part II and if satisfied may request the Central Government to investigate the matter by an Inspector or Inspectors and then to decide on such opinion whether to refer and lodge any case before the Special Judge for trial under Section 236 of the 'I&B Code' for alleged offence under Section 74(3) or any other provision under Chapter VII of Part II of the 'I&B Code' and for

punishment under Section 447 of the Companies Act, 2013.

51. In view of such observations, we are not inclined to give any direction as was sought for by the 'Committee of Creditors' nor inclined to exclude any period calling for fresh 'Resolution Plan'. More than 270 days having passed, the Adjudicating Authority will pass appropriate order of liquidation, which will be in accordance with law.

52. Further, in view of provisions of law, as discussed above, the impugned order dated 13th February, 2019 so far it relates to grant of liberty to the 'Resolution Professional' and the 'Committee of Creditors' to move before the Insolvency and Bankruptcy Board of India or the Central Government is set aside. However, liberty is given to the 'Resolution Professional' or the 'Committee of Creditors' or any creditor to move an application under Section 213 of the Companies Act, 2013 read with Section 74(3) of the 'I&B Code' before the Adjudicating Company Appeal (AT) (Insolvency) Nos.219, 442 & 443 of 2019 Authority/ National Company Law Tribunal to decide as to whether the matter is required to be referred to the Insolvency and Bankruptcy Board of India or the Central Government for taking any action under Section 74(3) and Section 213 read with Section 447 of the Companies Act, 2013. In such case, the Adjudicating Authority will decide the same after notice to the 'Successful Resolution Applicant'/ 'Corporate Debtor' after following the procedure of Section 213 of the Companies Act, 2013 as discussed in the preceding paragraph.

All the appeals are disposed of with aforesaid observations and directions. No cost.

(Justice S.J. Mukhopadhyaya) Chairperson (Kanthi Narahari) Member(Technical) NEW DELHI 16th August, 2019 P.S Company Appeal (AT) (Insolvency) Nos.219, 442 & 443 of 2019