NATIONAL COMPANY LAW APPELLATE TRIBUNAL
AT CHENNAI
(APPELLATE JURISDICTION)

COMPANY APPEAL (AT) (CH) (INS.) No. 422 / 2023
(IA No. 1288 & 1289 / 2023)

(Filed under Section 61 (3) of the Insolvency and Bankruptcy Code, 2016)

(Against the Impugned Order dated 13.10.2023 in IA (IBC)/308/KOB/2023 in CP(IB) /34/KOB/2023 passed by the 'Adjudicating Authority', National Company Law Tribunal, Kochi Bench)

In the matter of:

Mr. RAMESH KESAVAN,
S/o. Kesavan Vaidhyan,
Aged about 72 Years,
Residing at Dhanwanthri Bhawan,
Municipal Office Ward,
Iron Bridge, PO,
Alapuzha. **… Appellant**

Versus

1. CA JASIN JOSE,
Resolution Professional – M / s
SD Pharmacy Pvt Ltd,
5D, Skyline Riverscape,
Thottumugham,
Aluva – 683 105.
Email: jasinjoseponmattam@gmail.com **…Respondent No. 1**

2. Sri Anoop N,
Resolution Applicant in
Individual Capacity,
Dhanwanthari Sadanam,
Thodapuzha,
Idukki District,
Kerala – 685 584.
Email: anoop@dhanwanthari.org **…Respondent No. 2**

Present :

For Appellant: **Mr. Avinash Krishnan Ravi &**
Mr. Ujjwal Jain, Advocates for Appellant

For Respondents: **Mr. Akhil Suresh, Advocate for R1 / RP**
Mr. Ramasubramaniam Raja, Advocate, For R2

O R D E R
(Virtual Mode)

[Per: Shreesha Merla, Member (Technical)]

1. Aggrieved by the Order dated 13.10.2023, in IA(IBC)/308/KOB/2023 in CP(IB)/34/KOB/2021, the Appellant / Promoter and Suspended Director of the Corporate Debtor Company, preferred this Appeal under Section 61 of the Insolvency and Bankruptcy Code, 2016 (herein after referred to as 'the Code').

2. IA(IBC)/308/KOB/2023 was preferred by the Resolution Professional (RP) on 17.07.2023 seeking approval of the Resolution Plan which was approved by the Committee of Creditors (CoC) with a 100 % voting share in its 12th meeting which was held on 26.06.2023. The Adjudicating Authority, while allowing the Application observed that the Resolution Plan was in accordance with Sections 30 & 31 of the Code and that it also complies with Regulations 38 & 39 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

3. Learned Counsel for the Appellant strenuously contended that on account of ill health, the Appellant could not actively participate during the CIRP and despite his conditions filed an Application seeking to intervene against the approval of the Resolution Plan which was not considered by the Adjudicating

Authority. It is contended that the CoC was illegally constituted without including Edelweiss Asset Reconstruction Company (EARCL), which was the assignee of the debt from Federal Bank on 10.12.2012, enjoying a charge of Rs. 5.21 Crores plus interest in relation to a Corporate Guarantee from the Corporate Debtor in favour of the debt availed by another group Company, namely Orient Extraction Pvt. Ltd. It is submitted that neither Edelweiss nor Federal Bank had filed a Claim with the RP. It is contended that had Edelweiss been included in the CoC, it would have constituted 80% of the voting share and even though Edelweiss did not submit its claim, the (Resolution Professional) was duty bound to inform Edelweiss about the pendency of the CIRP proceedings.

4. It is also strenuously argued by the Learned Counsel for the Appellant Mr. Avinash Krishnan Ravi that *de hors* the illegal constitution of the CoC, the Corporate Debtor has been improperly valued as four assets which were mortgaged to Federal Bank were not included in the valuation Report. It is also submitted that several properties worth Rs. 25 Crores (and almost five times the Liquidation value), has been omitted, which is glaring, as the actual fair value is Rs. 9.52 Crores and the Liquidation value is Rs. 5.09 Crores. It is submitted that the Appellant had written to the RP seeking details of the CIRP, but there was no response. It is submitted that the Resolution Plan is discriminatory in nature amongst creditors who fall within the same class and does not provide

Operational Creditors with minimum Liquidation value and therefore the Resolution Plan is in contravention of Section 30(2) of the Code.

5. It is also the case of the Learned Counsel for the Appellant that the Appellant has the *'locus'* in challenging the Plan as was decided by this Tribunal in the matter of ***'M.K. Rajagopal v. Dr. Periasamy Palani Gounder'*** in CA (AT) (Ins.) No. 164/2022 and also upheld by the Hon'ble Apex Court in Civil Appeal No. 1682-1683/2022. It is also contended that the Plan provides for unilateral appropriation of fruits of avoidance transactions by the Resolution Applicant in violation of the Judgement of the Hon'ble Delhi High Court in ***TATA Steel BSL v. Venus Recruiters Pvt. Ltd. in 2023/DHC/000257.***

6. It is the main case of the Second Respondent / the Successful Resolution Applicant (SRA) that the Appellant has no *locus* to challenge the Order of the approval of the Resolution Plan as the Appellant is the suspended Director whose *locus* ends once the affairs of the Corporate Debtor are handed over to the IRP. Learned Counsel placed reliance on the Judgement of this Tribunal in the matter of **'*Dr. Ravi Shankar Vedam vs. Tiffins Barytes Asbestos and Paints Limited and others'*** in TA (AT) No. 134 / 2021 in support of this argument that shareholders have a limited role and are only confined to cooperate with the RP as specified under Section 19 of the Code. It is submitted that the CoC has approved the Resolution Plan with 100 % majority share and the commercial wisdom of the CoC is non-justiciable. It is submitted that the Operational Creditor

who had a claim of more than 10 % of the debt could participate in the CoC and had voluntarily agreed to accept an amount lower than the Liquidation value. It is argued that the reliance placed on Regulation 6A of CIRP Regulations is without any basis as it came into force only on 16.09.2022 and the public announcement in Form A was made on 16.04.2022.

7. It is seen from the record that Federal Bank had transferred its debt to Edelweiss but did not chose to file any Claim pursuant to the public announcement in Form A in accordance with Regulation 6 of CIRP Regulations, 2016. Having not exercised its right in the form of filing a Claim, the Appellant cannot have any grievance that Edelweiss was not included in the CoC. It is pertinent to mention that the Appellant / Promotor did not raise any objections regarding the constitution of the CoC, having had the Notice and the opportunity to do so as he had the *locus* to attend the CoC meetings. The only reason given by the Learned Counsel for the Appellant for not raising the objection regarding the constitution of CoC at the appropriate time is that the Appellant was unwell. This cannot be a substantial ground as it is an admitted fact that the Appellant had sufficient opportunities to attend the meetings and raise his grievances. Not being vigilant at that stage, the Appellant cannot now, raise at this belated stage, after the approval of the Resolution Plan, that the CoC was not properly constituted, specifically when Edelweiss itself has not chosen to file a 'Claim'.

8. The Hon'ble Supreme Court in a catena of Judgements, most recent being ***'Kalparaj Dharamshi & Anr. vs. Kotak Investment Advisors Ltd. & Anr.'***[1] has observed that the commercial wisdom of CoC must be adhered to unless the Adjudicating Authority is not satisfied that the requirement of sub-section (2) of Section 30 of the Code has been complied with. The relevant extract of the Judgement has been reproduced hereunder:

> ***146.*** *The view taken in the case of K. Sashidhar (supra) and Committee of Creditors of Essar Steel India Limited through Authorised Signatory (supra) has been reiterated by another three Judges Bench of this Court in the case of Maharashtra Seamless Limited (supra). 147. In all the aforesaid three judgments of this Court, the scope of jurisdiction of the Adjudicating Authority (NCLT) and the Appellate Authority (NCLAT) has also been elaborately considered. It will be relevant to refer to paragraph 55 of the judgment in the case of K. Sashidhar (supra), which reads thus:*
>
> > ***"55.*** *Whereas, the discretion of the adjudicating authority (NCLT) is circumscribed by Section 31 limited to scrutiny of the resolution plan "as approved" by the requisite per cent of voting share of financial creditors. Even in that enquiry, the grounds on which the adjudicating authority can reject the resolution plan is in reference to matters specified in Section 30(2), when the resolution plan does not conform to the stated requirements. Reverting to Section 30(2), the enquiry to be done is in respect of whether the resolution plan provides: (i) the payment of insolvency resolution process costs in a specified*

[1] 2021 SCC OnLine SC 204

manner in priority to the repayment of other debts of the corporate debtor, (ii) the repayment of the debts of operational creditors in prescribed manner, (iii) the management of the affairs of the corporate debtor, (iv) the implementation and supervision of the resolution plan, (v) does not contravene any of the provisions of the law for the time being in force, (vi) conforms to such other requirements as may be specified by the Board. The Board referred to is established Under Section 188 of the I&B Code. The powers and functions of the Board have been delineated in Section 196 of the I&B Code. None of the specified functions of the Board, directly or indirectly, pertain to regulating the manner in which the financial creditors ought to or ought not -16- to exercise their commercial wisdom during the voting on the resolution plan Under Section 30(4) of the I&B Code. The subjective satisfaction of the financial creditors at the time of voting is bound to be a mixed baggage of variety of factors. To wit, the feasibility and viability of the proposed resolution plan and including their perceptions about the general capability of the resolution applicant to translate the projected plan into a reality. The resolution applicant may have given projections backed by normative data but still in the opinion of the dissenting financial creditors, it would not be free from being speculative. These aspects are completely within the domain of the financial creditors who are called upon to vote on the resolution plan Under Section 30(4) of the I&B Code."

148. *It has been held, that in an enquiry Under Section 31, the limited enquiry that the Adjudicating Authority is permitted is, as to whether the resolution plan provides:*

> *(i) the payment of insolvency resolution process costs in a specified manner in priority to the repayment of other debts of the corporate debtor, (ii) the repayment of the debts of operational creditors in prescribed manner, (iii) the management of the affairs of the corporate debtor, (iv) the implementation and supervision of the resolution plan, (v) the plan does not contravene any of the provisions of the law for the time being in force, (vi) conforms to such other requirements as may be specified by the Board.*

149. *It will be further relevant to refer to the following observations of this Court in K. Sashidhar (supra):*

> *"57. ...Indubitably, the remedy of appeal including the width of jurisdiction of the appellate authority and the grounds of appeal, is a creature of statute. The provisions investing jurisdiction and authority in NCLT or NCLAT as noticed earlier, have not made the commercial decision exercised by CoC of not approving the resolution plan or rejecting the same, justiciable. This position is reinforced from the limited grounds specified for instituting an appeal that too against an order "approving a resolution plan" Under Section 31. First, that the approved resolution plan is in contravention of the*

provisions of any law for the time being in force. Second, there has been material irregularity in exercise of powers "by the resolution professional" during the corporate insolvency resolution period. Third, the debts owed to operational creditors have not been provided for in the resolution plan in the prescribed manner. Fourth, the insolvency resolution plan costs have not been provided for repayment in priority to all other debts. Fifth, the resolution plan does not comply with any other criteria specified by the Board. Significantly, the matters or grounds--be it Under Section 30(2) or Under Section 61(3) of the I&B Code--are regarding testing the validity of the "approved" resolution plan by CoC; and not for approving the resolution plan which has been disapproved or deemed to have been rejected by CoC in exercise of its business decision."

150. *It will therefore be clear, that this Court, in unequivocal terms, held, that the appeal is a creature of statute and that the statute has not invested jurisdiction and authority either with NCLT or NCLAT, to review the commercial decision exercised by CoC of approving the resolution plan or rejecting the same.*

151. The position is clarified by the following observations in paragraph 59 of the judgment in the case of K. Sashidhar (supra), which reads thus:

"59. In our view, neither the adjudicating authority (NCLT) nor the appellate authority (NCLAT) has been endowed with the jurisdiction to reverse the commercial wisdom of the dissenting financial creditors and that too on the specious ground that it is only an opinion of the minority financial creditors....."

152. *This Court in Committee of Creditors of Essar Steel India Limited through Authorised Signatory (supra) after reproducing certain paragraphs in K. Sashidhar (supra) observed thus:*

> *"Thus, it is clear that the limited judicial review available, which can in no circumstance trespass upon a business decision of the majority of the Committee of Creditors, has to be within the four corners of Section 30(2) of the Code, insofar as the Adjudicating Authority is concerned, and Section 32 read with Section 61(3) of the Code, insofar as the Appellate Tribunal is concerned, the parameters of such review having been clearly laid down in K. Sashidhar."*

153. It can thus be seen, that this Court has clarified, that the limited judicial review, which is available, can in no circumstance trespass upon a business decision arrived at by the majority of CoC.

154. *In the case of Maharashtra Seamless Limited (supra), NCLT had approved the plan of Appellant therein with regard to CIRP of United Seamless Tubulaar (P) Ltd. In appeal, NCLAT directed, that the Appellant therein should increase upfront payment to Rs. 597.54 crore to the "financial creditors", "operational creditors" and other creditors by paying an additional amount of Rs. 120.54 crore. NCLAT further directed, that in the event the "resolution applicant" failed to undertake the payment of additional amount of Rs. 120.54 crore in addition to Rs. 477 crore and deposit the said amount in escrow account within 30 days, the order of approval of the 'resolution plan' was to be treated to be set aside. <u>While allowing the appeal and setting aside the directions of NCLAT, this Court observed thus:</u>*

> *<u>"30. The appellate authority has, in our opinion, proceeded on equitable</u>*

perception rather than commercial wisdom. On the face of it, release of assets at a value 20% below its liquidation value arrived at by the valuers seems inequitable. Here, we feel the Court ought to cede ground to the commercial wisdom of the creditors rather than assess the resolution plan on the basis of quantitative analysis. Such is the scheme of the Code. Section 31(1) of the Code lays down in clear terms that for final approval of a resolution plan, the adjudicating authority has to be satisfied that the requirement of Sub-section (2) of Section 30 of the Code has been complied with. The proviso to Section 31(1) of the Code stipulates the other point on which an adjudicating authority has to be satisfied. That factor is that the resolution plan has provisions for its implementation. The scope of interference by the adjudicating authority in limited judicial review has been laid down in Essar Steel [Essar Steel India Ltd. Committee of Creditors v. Satish Kumar Gupta, MANU/SC/1577/2019 : (2020) 8 SCC 531], the relevant passage (para 54) of which we have reproduced in earlier part of this judgment. The case of MSL in their appeal is that they want to run the company and infuse more funds. In such circumstances, we do not think the appellate authority ought to have interfered with the order of the adjudicating authority in directing the - successful resolution applicant to enhance their fund inflow upfront."

155. *This Court observed, that the Court ought to cede ground to the commercial wisdom of the creditors rather than assess the resolution plan on the basis of quantitative analysis. This Court*

clearly held, that the appellate authority ought not to have interfered with the order of the adjudicating authority by directing the successful resolution applicant to enhance their fund inflow upfront."

(Emphasis Supplied)

9. In the instant case, the approval of the Resolution Plan below the Liquidation value is within the commercial wisdom of the CoC as the Code does not expressly bar that the Resolution Plan value should be over and above the Liquidation value. Hence, there is no material irregularity. As regarding the contention of the Learned Counsel for the Appellant that the Operational Creditor Kerala Ayurvedic Limited was getting an amount lower than the Liquidation value and hence the Plan is discriminatory is untenable, keeping in view that the very same Operational Creditor had voluntarily agreed to accept an amount lower than the Liquidation value. We are of the considered view that the ratio of '***Kalparaj Dharamshi (Supra)'*** is squarely applicable to the facts of this case as the Resolution Plan is approved by a 100 % voting share of the CoC and there is no material irregularity on the face of record and we are satisfied that the Resolution Plan conforms to the requirement set out in sub-section (2) of Section 30 of the Code. As regarding the contention of the Learned Counsel for the Appellant about avoidance transactions, the Hon'ble Delhi High Court in ***'TATA Steel BSL v. Venus Recruiters Pvt. Ltd.'*** has held that there is no bar to proceed against the concerned Resolution Applicants before other Fora/Courts in cases of avoidance transactions. Therefore, even on this ground we do not find any

material irregularity in the approval of the Resolution Plan as provided for under the Code.

10. At this juncture, we address to the '*locus'* of the Appellant challenging the approval of the Resolution Plan. It has been held in '***Ravi Shankar Vedam vs. Tiffins Barytes Asbestos and Paints Limited and Others'***[2] that the Promoter / Shareholder of the Corporate Debtor Company has no *locus* to challenge the Plan, *after its approval*. Learned Counsel for the Appellant placed reliance on the Judgement of the Apex Court in *'**M.K. Rajagopal v. Dr. Periasamy Palani Gounder'*** in Civil Appeal No. 1682-1683 of 2022**,** in support of his submission that the Appellant, being a Promotor has the *locus* to challenge the approval of the Resolution Plan. The ratio of the Judgement in the matter of *'**M.K. Rajagopal' (Supra),*** is not applicable to the facts of the attendant case on hand as the subject matter of that case is that there was an established material irregularity in the approval of the Plan and the issue of the *'locus'* has not been specifically been addressed to. More ever, the Judgement of the Hon'ble Apex Court in the matter of '***Ravi Shakar Vedam' (Supra)*** is dated 06.11.2023 and is later than ***'M.K. Rajagopalan' (Supra)*** which is dated 03.05.2022. The relevant Paragraphs of the NCLAT Judgement in '***Ravi Shakar Vedam',*** pertinent to the issue of *'locus'* of the Shareholder / Promoter in challenging the approval of the Plan are reproduced as hereunder:

[2] 2023 SCC OnLine NCLAT 274

> *"27. From the aforenoted observations, it is clear that once the affairs of the Corporate Debtor was handed over to the IRP, any action taken by Shareholder, even if a Majority shareholder, would not be maintainable.*
>
> *28. Keeping in view, the scope and intent of the Legislature, and that the 'I & B Code, 2016' is a distinct shift from 'Debtor in Possession' to 'Creditor in Control' Insolvency System, where the Shareholders have a limited role and are only confined to co-operate with the Resolution Professional as specified under Section 19 of the Code, are entitled to receive the Liquidation value of its equity, if any, in accordance with Section 53 of the Code, we are of the considered opinion that a 'Shareholder' has 'no locus standi' to challenge the Resolution Plan."*

11. On an Appeal before the Hon'ble Supreme Court in CA No. 5516 / 2023, the Hon'ble Supreme Court vide Order dated 06.11.2023 dismissed the Appeal and hence, the issue whether a shareholder has *locus* to challenge the Resolution Plan has attainted finality.

12. For all the foregoing reasons, viewed from any angle, we do not find any considerable grounds to entertain this Appeal and hence, this Appeal is dismissed accordingly at the threshold. No Order as to costs.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Shreesha Merla]
Member (Technical)

10/01/2024
RO/TM