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CORPORATE LAWS
Case Law Update

Companies Act – Case 1

ROC, NCT of Delhi & Haryana Adjudication order dated 27th June 2023, for non-compliance of Section 149(8) in the matter of PTC India Financial Services Limited

Facts of the case

1. PTC India Financial Services Limited ('PFS/the Company') is a listed Company and is a subsidiary of PTC India Limited.

2. On 19th January 2022, 3 independent directors ('IDs') of the Company resigned from the Company, citing some governance lapses in the Company.

3. As per the resignation letters of the IDs filed by the Company to stock exchanges, one such governance laps was that, the Company had taken a legal opinion in respect of the appointment of a director on the board, but the relevant backup documents including the Background note shared for the purpose of taking legal opinion was not shared with the IDs. This is non-compliance with Section 149(8) r/w schedule IV of the Companies Act, 2013.

4. Pursuant to the said resignations, the Ministry of Corporate Affairs ordered the inspection of the matter, as a result, the Registrar of Companies sent show cause notices to the Company, its Managing Director ('MD'), Chief Financial Officer ('CFO') and the Company Secretary ('CS').

5. The CFO and CS of the Company replied independently to the show cause notice. Whereas the Company and its MD gave a common reply.

Arguments from CFO

1. Shri. Sanjay Rustagi, the CFO of the Company replied to the show cause notice by saying that, neither he was holding any Board level position, nor was he concerned in the selection process of the Director (Finance). Further, he was not aware of any communication that has been marked by any Director (including erstwhile IDs) in this regard. He came to know about this matter only after going through the resignation letter of the erstwhile IDs.

Arguments from CS

1. CS through his reply informed ROC that, in the Board meeting held on 8th November 2021, the management placed the opinion of Ld. ASG relating to the joining of a new director (Finance). He was not aware about the existence of the legal opinion until the same was placed before the Board. Even he was not privy or informed about any documents/information which was provided to the Ld. ASG for framing his opinion.

2. IDs in their communication had desired that suitable authorization/instruction be given to the Company Secretary to provide necessary assistance to them. But the same was never given to him by the MD.

3. On receipt of the information/ documents from PTC India Limited on 15th January 2022 and on receipt of instruction/approval from MD&CEO, the documents/information related to the appointment of Director (Finance) as provided by PTC India Limited (holding company) were provided to the IDs on 15th January 2022 itself. These facts were also duly captured by the forensic auditor (CNK & Associates) in their report which is available on the stock exchanges

Arguments by Company and the MD

1. The Company and its managing director through their common reply stated that the erstwhile IDs vide email dated 7th December 2021 asked for whole documents pertaining to the appointment of the Director (Finance) and back-up papers in connection with the same. The legal opinion of the Ld. ASG along with the document/ information shared with him during the discussion was shared with the erstwhile IDs independent directors vide email dated 15th January 2022.

2. For obtaining such a legal opinion, no background note had been shared with the Ld. ASG. Since no background note existed, the same could not be shared with the erstwhile IDs.

3. On receiving the email dated 12th July 2021 from IDs asking for documents relating the appointment of a Director (Finance), the Chairman of the Company reached out to the holding Company for the said information, as the same was not available with the Company. The information along with all supporting documents was received from the holding Company through email dated 15th January 2022 and was immediately provided to the IDs.

Submissions by the independent directors

1. As the matter had come to light through the resignation letter of the independent directors, the ROC had asked for their comments on the reply received by ROC. In their written reply IDs submitted as follows:

    a. The Company's submission that there was no Background note submitted to ASG is incorrect and this can be observed from the minutes of the board meeting dated 8th November 2021.

    b. Moreover, this was not the only one instance of non-sharing of information or sharing skewed

information. The Company has ignored the requests of the IDs for the documents sought by the IDs on one pretext or the other. This is evident from the various emails sent to the management by the IDs, collectively as well as individually, which have been neither acknowledged nor responded to.

ROC held

1. The reply of the Company insofar as it states that necessary documents were not provided to them is misconceived. To say that the Company is not privy to the documents does not hold any water. In any case, the right of representation and natural justice was solemnly adhered to in this matter.

2. Schedule IV places such requisition for clarification or additional information from the IDs, on the pedestal of a "duty" of the ID. By discharging this duty, an ID is supposed to protect the "rights" of the stakeholders of the Company.

3. Concomitantly, once such a requisition is made by an ID, it is also the "duty" of the Company and its concerned officer to attend to such request as soon as possible. If the Company fails in its duty, the flow of information to the IDs would be impeded, and the ultimate repercussion of this information asymmetry would befall on the stakeholders.

4. The Company is duty bound under Schedule IV to render such information to the IDs and Company did not give due regard and supplied documents with considerable delay.

5. On perusal of the minutes of the 142nd Board meeting, it is evident that the Chairman had clearly requested that the brief given to the Ld. ASG along with the queries put to him be shared. No rebuttal has been recorded in the minutes to convey that no such brief was ever shared at the time of obtaining the legal opinion. Thus, the preponderance of the probabilities clearly points out to the existence of a briefing document which was not shared with the erstwhile IDs.

6. It is quite clear that Company has failed to comply with the provisions of Section 149(8) of the Companies Act, 2013 r/w sub-para (2) of para (III) of Schedule IV.

7. As far as Shri Sanjay Rustagi, CFO is concerned, his submission is satisfactory. He was not able to undertake any act of omission or commission with respect to alleged violation on the part of the Company.

8. As far as Shri Vishal Goyal, CS is concerned, his submissions are satisfactory. Comments of the Company, MD&CEO and erstwhile IDs were called on the reply submitted by Shri Goyal. No one refuted the submissions made by the CS and accordingly, the ROC said that it had sufficient cause to believe that he is not a party to any act of omission or commission with respect to the alleged violation on the part of the Company.

Penalty on Company and its MD

1. The ROC found the reply given by CFO and CS of the Company to be satisfactory and did not impose any

penalty on them. But at the same time, he noted that the Company and its managing director have failed to comply with the requirements of Section 149(8) read with Schedule IV.

2. Therefore, ROC, NCT of Delhi & Haryana imposed a penalty on the Company and its MD under Section 172 of the Companies Act 2013.

3. The penalty on the Company and its managing director was ₹ 70,000 each. (Fixed penalty of ₹50,000 plus continuous penalty of ₹ 500 per day for the delay of 40 days).

Companies Act – Case 2

In the matter of *Jaiprakash Associates (Appellant) vs. Neena Somani (Respondent).* NCLAT New Delhi, order dated 9th December 2022.

Facts of the case

1. Jaiprakash Associates (Appellant/ Company) is a company registered under the Companies Act 1956. Whereas, Neena Somani (Respondent) is an investor/depositor who has invested in fixed deposits of the Appellant company.

2. The Respondent had invested her money in the Fixed Deposit Receipts (FDRs) issued by the Company as per the provisions of the Companies Act 1956. However, the Appellant Company failed to refund the said FDRs on the maturity date and did not pay interest on the deposit amount after the period of maturity.

3. The Respondent sent some claim letters to the Appellant-Company about non-payment of due interest after the maturity period of FDRs and approached the Appellant-Company many times, but the Respondent had not received any satisfactory response from the Company.

4. The Respondent filed a petition before NCLT, Allahabad Bench, under Section 73(4) of Companies Act, 2013 seeking direction to Appellant-Company to make repayment of the interest due. As a result, NCLT passed an Order dated 13th September 2019 and directed the Appellant to make the payment to the Respondent at the rate of 12/12.5 percent per annum from the date of maturity till the date of actual payment was released to the depositors.

5. The Appellant Company challenged the above Order passed by the NCLT, Allahabad Bench which is the subject for discussion in this article.

6. In this appeal, the Appellant has challenged the said NCLT order on the grounds that the deposits in question were accepted before the commencement of the Companies Act, 2013. Therefore, the petition under Section 73(4) of the Companies Act, 2013 is not maintainable.

7. Parallelly, when the Company was not able to repay deposits on the maturity date, it had already filed an application for an extension of time for repayment of deposits under Section 74 Companies Act, 2013. While the petition under Section 73(4) Companies Act, 2013 was pending before NCLT, one of the investors filed an appeal before NCLAT against the extension of time granted to

the Company. Accordingly, NCLAT had issued certain directions in the favor of the said depositor (investor).

8. Aggrieved with that NCLAT order, the Company had preferred a statutory appeal before the Hon'ble Supreme Court, which directed for making payment of interest even after the date of maturity till the date of actual payment.

9. This Order of Hon'ble Supreme Court was one of the reasons which persuaded NCLT in the parallelly going case of the Respondent, to order payment of interest to the Respondent, as it also related to a similar matter. Then the Appellant Company challenged this NCLT Order also (as mentioned in point 5 above) and the following were the arguments:-

Questions of law

1. Whether Ld. NCLT has committed an error in entertaining a petition filed under Section 73(4) Companies Act, 2013 by the Respondent?

2. Whether the NCLT has committed an error in issuing direction to make payment of interest even after the date of maturity till the date of actual payment?

Appellant Company's contentions

1. Impugned NCLT order is firstly liable to be set aside on the ground that once the proceedings which were initiated by the Appellant Company under Section 74 Companies Act, 2013 was concluded, there was no reason for the NCLT to again entertain the petitions filed under Section 73(4) of the Act which were filed by the Respondents.

2. It was clarified that whatever deposits were accepted by the Company, were cleared with interest up to the date of maturity.

3. Petition filed under Section 73(4) Companies Act, 2013 by the Respondents were not maintainable, since it was not a case that deposits were accepted after the commencement of the new Companies Act, 2013.

4. Section 73 was applicable in the case of accepting deposit after the commencement of the new act, whereas in the present case, it is not in dispute that all the deposits were accepted while the old Act i.e., Companies Act, 1956, were in operation. Accordingly, it has been argued that the NCLT order impugned is liable to be set aside. Even though the Order was passed by Hon'ble Supreme Court in which there is a reference of payment of interest @ 12/12.5% p.a., but the Respondents may not get any benefit from the said order since the order of the Hon'ble Supreme Court was a consent order and no reliance can be made on the said order by the Respondent.

Respondent's contentions

1. Deposits though were matured in the year 2015, payment was not made, however much belatedly payments were made in the month of July, 2017. The said Respondents were not paid interest after the maturity date till the date of actual payment.

2. It has been argued from the Appellant

side that section 73(4) of the Companies Act 2013 is not applicable, in cases of deposits accepted prior to the commencement of the Companies Act, 2013, but the fact remains that the Ministry of Corporate Affairs (MCA) had issued a circular dated 18th June 2015, wherein it was clarified that depositors were free to file application under Section 73(4) of the Companies Act, 2013 regarding repayment of deposits which were accepted prior to the commencement of the Companies Act, 2013.

3. In the appeal which was filed by one of the investors (depositors) against the extension of time granted by the NCLT, NCLAT had taken a serious view of the matter and clarified that till the date of payment, the depositors were entitled to claim the interest. Even the Hon'ble Supreme Court had directed for making payment of interest @ 12/12.5% p.a. till the date of actual payment.

Held

1. It is not in dispute that the Appellant Company had accepted deposits from the Respondents which were treated as Fixed Deposits with a condition to repay the amount with interest @ 12/12.5% on maturity. It is also not in dispute that even after the date of maturity payments were not made immediately to the depositors particularly the Respondents herein.

2. Merely filing of such Petition under Section 74 for an extension of time with the NCLT for clearing payment, does not debar the depositors from claiming interest or even claiming maturity amount from the Appellant Company.

3. There was no connection of the Petition filed by the Respondent under Section 73 and the Petition filed by the Appellant under Section 74. Both are on different footings and as such the plea of Ld. Sr. Counsel for Appellant, that pendency of petition filed by the Appellant under Section 74 of the Act entertaining was a bar to Petition under Section 73(4) of the Act before the NCLT, appears to have no force.

4. So far as, the Order of Hon'ble Supreme Court is concerned, the NCLAT said that we are conscious of the fact that the said order was passed on consent given by the Ld. Counsel for the Appellant Company before the Hon'ble Supreme Court, even thereafter we are of the opinion that once in a case of some of the depositors as per the Order of the Hon'ble Supreme Court they were granted liberty to get interest till the date of actual payment, if we pass a different order it will amount to passing a discriminatory order. We may not place reliance on the said Order but the fact remains that in respect of the same Appellant Company, some of the depositors had received payment of interest till the date of actual payment.

5. Even otherwise if a person who accepts deposits fails to make payment after maturity and delay is on the part of the person accepting deposit, in that event such person would be liable to make payment of interest till the actual payment.

6. In view of the aforesaid facts and circumstances, NCLAT held that we are of the opinion that Ld. NCLT has committed no error in passing the

impugned order. We do not find any error in the order.

7. The Appeal stands dismissed.

SEBI - Case 1

SEBI Adjudication order in the matter of Havells India Limited

Facts of the case

1. The securities and Exchange Board of India ('SEBI') conducted an investigation into the trading of the scrip of Havells India Limited ('Havells'/'HIL'/'the company') to ascertain if Company was in contravention of provisions of the Securities and Exchange Board of India Act, 1992 ('SEBI Act') and the Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 2015 ('PIT Regulations') for the investigation period from December 01, 2020, to February 26, 2021. A show cause notice was issued to Mr. Surjit Kumar Gupta (Noticee No. 1), Mr. Ajay Kumar Gupta ('Noticee No.2') and Mr. Sadhu Ram Gupta ('Noticee No.3'). The relationship of these Noticees was as follows:

   - Noticee no. 1 was the promoter and one of the directors of HIL whereas
   - Noticee 2 was son in law of Noticee no. 1 and
   - Noticee 3 was the father of Noticee 2.
   - Mr. Ameet Kumar Gupta was the son of Noticee no. 1 and also the promoter director of HIL.

2. On January 20, 2021, HIL disclosed its unaudited financial results for the quarter ended December 31, 2020 through a corporate announcement to the National Stock Exchange ("NSE") and Bombay Stock Exchange ("BSE") at 16:40 and 16:43, respectively i.e. after close of market hours. Further on January 21, 2021, there was price movement in the scrip of HIL which was positive by 10.96%. SEBI considered "Unaudited Financial Results of the company for quarter ending December 31, 2020" as UPSI in terms of provisions of Regulation 2(1)(g) of PIT Regulations. It was further alleged that this UPSI came into existence on January 01, 2021. The period of UPSI was considered from January 01, 2021 to January 20, 2021. SEBI further alleged that the Noticee No.1, through a mobile call, communicated UPSI to the Noticee No.2, who along with his father i.e. the Noticee No.3 traded on basis of the UPSI.

3. Mr. Manoj Arora who was Asst. Vice President (Accounts) of HIL had shared a flash report regarding the financials of HIL for the month ending December 2020 with certain designated individuals including the Noticee No.1 and Mr. Ameet Kumar Gupta. The said flash report contained **figures of the revenue and profit of HIL for** the month of December 2020. The **flash report dated January 01, 2021** showed that figures of revenue and profits of HIL for the quarter ending December 31, 2020. Prior to January 01, 2021, similar monthly flash reports for previous months were

shared with top company officials of HIL on the first day of every subsequent month.

4. SEBI further alleged that Noticee No 1 and Mr. Ameet Kumar Gupta were connected persons in terms of regulation 2(1)(d) of the PIT Regulations and Insider in terms of Regulation 2(1)(g) of the PIT Regulations. Noticee no 2 was Founder, Promoter and Director of Svarn Infratel Pvt Ltd ('SIPL'), an unlisted company engaged in the business of manufacturing of electric cables and allied products. SIPL was also one of the clients of HIL as SIPL purchased raw materials/finished goods from HIL. In view of the contractual relationship of SIPL with HIL, Noticee No. 2 was alleged to be a "connected person" in terms of Regulation 2(1)(d)(i) of the PIT Regulations and insider in terms of Regulation 2(1)(g) of the PIT Regulations. Noticee No.3 shared close relationship and common address with the Noticee No.2, thus, he was also alleged to be an insider in terms of regulation 2(1)(g)(ii) of PIT Regulations.

Charges Levied

- Noticee No. 1 violated provisions of Sections 12A(d) and (e) of SEBI Act and Regulation 3(1) of PIT Regulations, 2015
- Noticee No.2 violated provisions of Sections 12A(d) and (e) of SEBI Act and Regulation 3(1), 3(2) and 4(1) of PIT Regulations
- Noticee No. 3 violated provisions of Sections 12A(d) and (e) of SEBI Act and Regulation 3(2) and 4(1) of PIT Regulations

Contentions by Noticees

1. **Flash Report dated January 01,2021 was not UPSI**
   - Noticees submitted that there was nothing extraordinary in the financial results and performance of HIL for the quarter ended December 2020. Noticees further stated that there was no correlation between the financial results and the share price of HIL. Their contention was that the financial results of quarter ended September 2020 were extraordinary still share price of HIL dipped right after the announcement of the results. This shows a lack of correlation between the share price of HIL and its continued performance.
   - Further, Noticees submitted that for an information to be treated as UPSI, the material impact that it may have on the share price has to be determined at the time that the information becomes available to the "insider". The information contained in the flash report was not an information that would have materially impacted the share price of HIL and hence does not fulfill the requirement set out in Regulation 2(1)(n) of the PIT Regulations. Noticees hence contended that financial results may not always be considered as UPSI and should be considered on case-to-case basis as to whether the financial results were price sensitive or not.

2. Whether there was unusual pattern of communication and communication of UPSI by the Noticee No.1 to Noticee No.2?

The Noticee No.1 contented that he would speak generally on Sunday and periodically every 10-15 days with his son-in-law. Such a pattern of general communication extended not only in the period immediately prior to, during and post the period of UPSI, but for several years. To support the said contention, the Noticee No.1 submitted call data record. Hence Noticee no.1 contended that there was nothing unusual in his call record with Noticee no. 2.

3. Whether the pattern of trading of the Noticee No. 2 and 3 during and post UPSI was unusual?

- Noticee No.2 submitted that the corresponding figures of purchase and sale of equity shares by him for FY 2021-22 and FY 2022-23 were approximately ₹44 Crore (purchase) and ₹ 41 Crores (Sale), ₹ 81 Crores (Purchase) and ₹ 49 Crore (Sale), respectively. Total purchases made by the Noticee No.2 in the derivative segment for FY 2020-21, 2021 22 and FY 2022-23 was approximately ₹ 84 Crore, ₹ 34 Crores and ₹ 16 Crore, respectively.

- Noticee No.3 further had submitted that he had been taking exposure for an amount of approximately ₹ 120 Crores in the derivative segment every year since FY 2017-18. He had taken exposure in the scrip of HIL in the derivative segment in FY 2017-18, 2018-19, 2019-20, 2020-21 for the amount of ₹ 9.3 Crore, ₹ 11 Lakh, ₹ 6.5 Lakh, ₹ 4.5 Crore, respectively. Noticee no. 2 and no.3 submitted that the impugned transactions in 2021 in the scrip of HIL were neither unusual, unique nor isolated.

Submissions by SEBI

1. Flash Report dated January 01, 2021 was not UPSI

- SEBI noted that for determining any information as UPSI it has to fulfill two criteria i.e. (1) it must not be generally available (2) Upon coming in the public domain, it is likely to materially affect the price of the securities. Thus, information which is not likely to materially affect the price of the securities cannot be treated to UPSI.

- SEBI further noted that HIL had made profit in the quarter ending June 2020, September 2020, and December 2020. Change in revenue and profit before tax of HIL was significant in the quarter ending September 30, 2020, in comparison to the quarter ending December 31, 2020. Therefore, it can be reasonably expected that the market must have already consumed and digested the significant change in the financial results of the company through the publication of the September 30, 2020, quarterly results.

- SEBI noted that financial results are presumed to be UPSI as per PIT Regulations. It is common knowledge that such

a presumption is rebuttable by the Noticees. Hence SEBI would usually get the advantage, protection and cover of such rebuttable presumptions initially till adequately defended or rebutted by the Noticees. Once the Noticees brings out defence to this presumption, the said protection vanishes. SEBI relied on the decision of Hon'ble Supreme Court in ***Rangappa vs. Sri Mohan (2010) 11 SC 441*** wherein it was held that, "*In the absence of compelling justifications, reverse onus clauses usually impose an evidentiary burden and not a persuasive burden. Keeping this in view, it is a settled position that when an accused has to rebut the presumption under Section 139, the standard of proof for doing so is that of "preponderance of probabilities". Therefore, if the accused is able to raise a probable defence which creates doubts about the existence of a legally enforceable debt or liability, the prosecution can fail. As clarified in the citations, the accused can rely on the materials submitted by the complainant in order to raise such a defence and it is conceivable that in some cases the accused may not need to adduce evidence of his/her own*"

- SEBI further stated that Noticees have raised defence as to how the impugned UPSI cannot be treated as such which shatters the statutory presumption. In light of the arguments of the Noticees and on the basis of Doctrine of preponderance of probabilities, SEBI was of the view that protection guaranteed by the statute has been wiped away in the matter. Further having considered quarterly results of HIL for quarter ending September 30, 2020 and December 30, 2020, flash reports for the month of October 2020, November 2020 and December 2020 and share price movements of HIL post-declaration of quarterly results for September 30, 2020 and December 30, 2020, SEBI was of the view that flash report dated January 01, 2021 cannot be treated to UPSI.

2. Whether there was unusual pattern of communication and communication of UPSI by the Noticee No.1 to Noticee No.2?

Based on call records of the Noticee No.1 for the period April 2022 to March 2023, SEBI was of the view that Noticee was in frequent communication particularly on Sundays with the Noticee No.2. Hence communication of the Noticee No.1 with the Noticee No.2 was not unusual. Therefore there was no cogent material on record to evidence communication of UPSI from the Noticee No.1 to Noticee No.2 during the period of UPSI.

3. Whether pattern of trading of the Noticee No. 2 and 3 during and post UPSI was unusual?

SEBI took note of the submission of Noticee no.2 and no.3 with respect to submissions on the trading pattern. SEBI was of the view that dealings of the Noticee No.2 and 3 in the securities

market were not confined to trading during or near to UPSI period. Further Noticee No.2 and 3 were dealing in the scrip of HIL in the derivative segment even post UPSI period i.e. January 21, 2021 to April 22, 2021. Hence after considering the trading details of the Noticee No.2 and 3 for the period prior to, during and post UPSI period, SEBI concluded that there was no unusual pattern of trading in trades of the Noticee No.2 and 3.

Penalty

SEBI in exercise of powers under Section 11(4A) and 11B of the SEBI Act read with Section 19 of the SEBI Act, disposed of the SCN against the Noticee No.1, 2 and 3 without any directions.

Link to the order

https://www.sebi.gov.in/enforcement/orders/jun-2023/final-order-in-the-matter-of-havells-india-limited_73270.html

IBC – Case 1

In the matter of *Ravi Shankar Vedam - Appellant vs. Tiffins Bartyes Asbestos and Paints Limited – Respondent-1* and *Vasudevan Respondent -2 Embassy Property Development Private Limited - Respondent - 3* in the order passed by National Company Law Appellant Tribunal (NCLAT) dated 13 June 2023

Facts of the Case

- The application was filed u/s 7 of the Insolvency and Bankruptcy Code, 2016 (IBC) against the Tiffins Bartyes Asbestos and Paints Limited who is Corporate Debtor(CD) by Udhyaman Investments Private Limited – the Financial Creditor (FC). The application was approved and Corporate Resolution Insolvency Process (CIRP) was initiated. And Mr. Vasudevan was appointed as Resolution Professional (RP).
- RP filed an application with NCLT to approve the Resolution Plan submitted by Embassy Property Development Private Limited - Respondent 3.
- Another application was filed with NCLT by Mr. Ravi Shankar Vedam - the appellant who was 38 % shareholder of the CD seeking for a forensic audit of the books of account of the CD and not to approve the resolution plan till disposal of the application.
- The appellant being a major shareholder of the CD claimed that Udhayaman Investments Private Limited was not a FC of the company and their inclusion in this category had influenced insolvency proceedings.
- It was also stated that the directors were suspended directors and that the company took action beyond board approvals and in such a situation, it was necessary to conduct a forensic audit to ascertain the actual financial creditors.
- NCLT approved the Resolution Plan vide Order dated 12 June 2019 which was also approved by the Committee of Creditors (CoC) and dismissed the application of the appellant on the following grounds
  - IBC doesn't prescribe any role for the shareholders of the CD during CIRP as there is no requirement for any approval of the shareholders to implement actions under the resolution plan except to the

explanation u/s 30(2) of the IBC and such approval shall be deemed to be given and it shall not be a contravention of that Act or Law.

— Any objection raised by the shareholder cannot be considered by the NCLT while approving/ rejecting the resolution plan.

— *Reliance is placed on the judgement given by Hon'ble NCLAT in J M Financial Asset Reconstruction Company Limited us. Well-Do Holding and Exports Pvt. Ltd, and Ors., wherein, it has been held that the* ***Shareholders and Promoters being ineligible to file the Resolution Plan under Section 29A, has no right to raise their grievances In view of it this Authority is not legally required to entertain any kind of objection pertaining to the Resolution Plan approved by the CoC. Therefore, the objections raised by the shareholder are hereby rejecte****d."*

- Aggrieved by the order of NCLT – an appeal was filed with NCLAT.

Arguments of the Appellant

- It was argued that CIRP was initiated fraudulently and with a malicious intent for a purpose other than the Resolution of Insolvency; that the Successful Resolution Applicant (SRA) was admittedly the Co-Subsidiary of the CDs;
- The RP was duty bound under Regulation 35A of the Corporate Persons Regulations' read with Section 25(2)(j), 43, 45, 49, 50 and Section 66 of the IBC to form an opinion on whether the CD has been subjected to any of the Transactions covered therein;
- That the RP was duty bound under the provisions of the Code to protect and preserve the value of assets of the CD;
- It was highlighted that during the CoC meetings - a proposal for conducting the Forensic Audit was placed before the CoC, which was rejected; that the decision by the CoC was taken by 91.90% voting share, out of which 46.20% voting share was by ineligible persons;
- Further, RP gave a report stating that he was not taking any responsibility about the authenticity of the Financial Transactions that occurred prior to his engagement;
- The account of the CD after 'CIRP' commenced was inconsistent when compared with the 'Tax Audit Accounts' before 'CIRP';
- The Impugned Order was a non-speaking Order and that approval of the Resolution Plan has no nexus with the Appellant's prayer for a Forensic Audit in the interest of Justice;
- NCLT failed to consider that the three claimants, who were termed as Financial Creditors by the RP in the 2nd CoC Meeting which were directed to be deleted as Financial Creditors from the list of CoC by the NCLT, and therefore the Resolution Plan filed by the SRA should not have been approved, without directing the RP to reconstitute the CoC;
- It was also submitted that there was a material irregularity in the exercise of power by the RP and that the CD

was sold at a throwaway price of ₹ 89 Crores, despite the fact that the CD had assets to the tune of ₹ 150 Crores, and that the refusal of RP to conduct the Forensic Audit despite specific remarks made by the erstwhile Auditors, was in contravention of the provisions of the law for the time being in force;

- NCLT ought not to have admitted the Application for initiation of CIRP by FC in so far as the Application was in clear violation of Section 65 of the Code for suppression of material facts as the presence of Mr. Poobalan and his aides were involved in the functioning of the Company till 2018 and thereafter being a member of CoC, was in violation of Section 29A of the Code;
- It was submitted that Mr. Poobalan was in charge of the day-to-day affairs of the CD Company and was working hand in glove with the RP for their personal benefits and the RP was determined to undervalue the Company;
- It was further stated that the Company had paid advances to various third parties and had not given details of these advances and that the RP had kept these documents confidential;
- There was 'Material irregularity' in the conduct and exercise of the powers of the RP and that had the Forensic Audit been done, CIRP would not have been triggered against the CD and that the NCLT ought not to have approved the Resolution Plan without reconstituting the CoC.

Arguments of the Respondents

- It was contended that a 'shareholder' does not have locus to challenge a Resolution Plan which has already been approved; that the Code recognizes 'stakeholders' only in the Liquidation process;
- In 'CIRP', stakeholders had no role to play and further drew the attention to the family tree explaining the relationship between the brothers and their wives and the number of shares held by each, for a better understanding of the case;
- It was highlighted that the Application seeking Forensic Audit in which it was submitted that the Applicant's, father, played a significant role in building the business of the CD and was actively involved in the management of the business till the financial year 2011-2012, but unfortunately due to deterioration in health in the second half of 2012, his involvement was greatly reduced and the Applicant's brother, who was appointed as the Managing Director of the Company was looking after the management along with his wife Mr. Geetha Vedam and two other Directors;
- It was not the debtors who were managing the Company and from 2011-2018, the 'Appellant'/'Applicant' did not raise any issue, that various Creditors have approached different Courts seeking other reliefs, the MoU was entered into with the FC on 16 April 2016, where by 'M/s Udhyaman Investments' had given a loan of ₹ 11,50,00,000/-, at the request of the CD;
- It was submitted that the MoU was entered into between the CD and FC keeping in view, the mutual interest

of both the parties. It was consented that the CD would pay to FC, a sum of ₹ 11,50,00,000/- with interest of 18% p.a. as recorded in the 'Joint Memo of Compromise';

- It was stated before the NCLT by the FC, who had filed the Section 7 Application, that the CD had given a cheque to the FC for an amount of ₹ 8,82,68,439/-, on 3 April 2014, which was dishonoured due to lack of funds;
- That the CD had raised all the issues through its Managing Director and also preferred an Appeal, which was dismissed by NCLT;
- When 'EOI' was published, the Appellant had approached the RP stating that he was intending submitting a Resolution Plan, and stepped in when the CoC was finalising the Plan;
- None of these issues were ever raised during 'CIRP' and that the Appellant was the Director at that point of time and was aware of the Statutory Applications as he was active till 20 November 2012 and thereafter his brother had become the Managing Director;
- Also, it was highlighted that the Resolution Professional had acted based on the Valuation Report of the registered valuers.

Findings

- **Right of Shareholders during insolvency proceeding – a Shareholder has no locus standi to challenge the Resolution Plan- i**n an Insolvency process, when an insolvency of Debtor is imminent, the fiduciary duty of the directors and managers, who are agents of the shareholders, shifts to the creditors to preserve the value of the enterprise for maximising the returns for creditors. The legislature in its wisdom, has curtailed the 'Rights of the Shareholders' based on the established 'Principles of Creditors' in the control framework. The Court provides the shareholders the right to file a claim only in the Liquidation Process as stakeholders and the advances of stakeholders as stated in Regulation 2(k) includes shareholders only because unlike CIRP, in Liquidation, distribution to stakeholders is in accordance with the waterfall mechanism. Shareholders are excluded from representation, participation or voting in the CoC and are represented in the CoC only through the directors and can speak only through the directors.
- Once the CIRP is triggered, the Management of the affairs of the CD lies with the IRP and the shareholders do not have a right to file any claim in the CIRP but can only do so in the Liquidation Process.
- The Explanation to Section 30(2) of the IBC contemplates for '*Deemed Approval*' of the shareholders of the resolution plan and its implementation and even a shareholder, is deemed to have given its approval for implementation of the resolution plan, and such '*Deemed Approval*' cannot be taken away or undone by objecting to the resolution plan. NCLAT held that giving the shareholder a right to challenge the resolution plan or raise objections against its Approval, would '*render the Explanation redundant*'.

- The CIRP proceedings are proceedings *in rem* to the extent that once a petition filed by a Financial Creditor/Operational Creditor against the CD is admitted, it becomes a collective Creditors Proceedings and all Creditors, pool their Security Interest, in a common manner and the same is distributed as provided for, under Section 30(4) of the IBC, subsequent to the approval of the plan by the CoC.
- From the observations of the High Court of Delhi in the matter of *ICP Investments (Mauritius Ltd.) vs. Uppal Housing Pvt. Ltd. & Ors., it is clear that once the affairs of the CD was handed over to the IRP, any action taken by Shareholder, even if a Majority shareholder, would not be maintainable.*
- Keeping in view, the scope and intent of the Legislature, and that IBC 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, hence ***a Shareholder has no locus standi to challenge the Resolution Plan.***
- The Hon'ble Supreme Court judgment in *Arunkumar Jagatramka V. Jindal Steel & Power Ltd. & Anr. ,* it is *clear that the Foundational Principles of the Insolvency and Bankruptcy Code, cannot be disturbed and NCLT is of the considered view that giving the Shareholder the locus to challenge the approval of the Resolution plan tantamount to disturbing the Foundational Principles of the Insolvency and Bankruptcy Code.*
- From the decision rendered by the Hon'ble Supreme Court *in* ***Kalparaj Dharamshi vs. Kotak Investment Advisors Ltd.*** *it is crystal clear that the discretion of the Tribunals is circumscribed by Section 31 limited to scrutiny of the Resolution Plan, if it is in violation of Section 30 of the IBC.*
- *Judgment of the Supreme Court states that the Commercial Wisdom of the CoC has been given paramount importance and that there can be judicial intervention only when there is any material irregularity or if the Plan is not in adherence to Section 30(2) of the IBC.*
- The Hon'ble Apex Court, in the matter of *Ebix Singapore Pvt. Ltd. vs. CoC of Educomp Solutions Ltd. & Anr., has clearly laid down that subsequent to the approval of the Resolution Plan of the CoC and before the approval by the NCLT, no modifications/alterations can be called for as IBC is a time bound process.*

Held

- NCLAT was of the earnest view that there was no material irregularity in the approval of the Resolution Plan and to the fact that the Resolution Plan was successfully implemented and we do not find it a fit case to interfere in the well-reasoned orders of the NCLT and hence appeal failed and was accordingly dismissed.

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