

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 629 of 2018

[Arising out of Order dated 20th September, 2018 passed by National Company Law Tribunal, Guwahati Bench, in I.A. No. 58/2018 in C.P. (IB) No. 20/GB/2017]

IN THE MATTER OF:

Securities and Exchange Board of India,

Plot No. C4A, G Block,
Bandra Kurla Complex,
Bandra East,
Mumbai – 400 051.

Through its Manager – Mr. Deepak Wadhwa

...Appellant

Vs

1. Assam Company India Ltd.

Having its registered office at
Green Wood Tea Estate, P. O. Dibrugarh
Assam.

Through its Managing Director.

2. SREI Infrastructure Finance Pvt. Ltd.

Having its registered office at:
86C, Topsia Road (South),
Kolkata – 700 046

Through its Managing Director.

3. Mr. C. A. Kannan Tiruvengadam,

Netaji Subhas Villa,
Flat No. 3C, 3rd Floor, 18 Karunamoyee,
Ghat Road, Near Dharapara tollygunge,
Kolkata, West Bengal – 700 082.

4. BRS Ventures Investment Limited,

Having registered office at:
Unit S503A, Level 5, Emirates Financial Towers,
Dubai International Financial Centre, P.O. Box 507117,
Dubai, United Arab Emirates.

....Respondents

Present:

For Appellant: Mr. Dileep Poolakkot, Advocate.

**For Respondents: Mr. Ajay Gagar, Ms. Upama Bhattacharjee,
Mr. Robin Sirohi, Ms. Vinita Rathore, Advocates.**

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

Corporate Insolvency Resolution Process was initiated against ‘Assam Company India Limited’ (Corporate Debtor) by order dated 26th October, 2017 passed by the Adjudicating Authority (National Company Law Tribunal), Guwahati Bench. By the impugned order dated 20th September, 2018, the Adjudicating Authority approved the Resolution Plan submitted by the 4th Respondent – ‘BRS Ventures Investment Ltd.’ (Successful Resolution Applicant).

2. The Adjudicating Authority noticed that the plan has been approved by 100% voting share of the Committee of Creditors in its meeting held on 25th June, 2018 and fulfill the criteria including viability and feasibility and plan is in consonance with Section 30(2) of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as ‘I&B Code’). The Appellant – ‘Securities and Exchange Board of India’ (hereinafter referred as ‘SEBI’) has challenged the order of approval of the Resolution Plan dated 20th September, 2018.

3. The case of the Appellant, as pleaded, is that Appellant (SEBI), a Statutory Regulator constituted by and under ‘The Securities and Exchange Board of India

Act, 1992', to protect the interests of investors in Securities and to prompt the development of, and to regulate, the securities market and for matters connected therewith or incidental thereto, received a letter dated 09.06.2017 from the Ministry of Corporate Affairs (MCA) forwarding therewith a copy of letter dated 23.05.2017 of Serious Fraud Investigation Office (SFIO) annexing a list of 331 shell companies. SEBI thereupon, issued directions vide a letter dated 07.08.2017 to the concerned stock exchanges to take certain measures, whereupon, 1st Respondent (Corporate Debtor) preferred an Appeal to the Securities Appellate Tribunal, Mumbai (the SAT), when by an order dated 21.08.2017 the directions 1 (a) and (b) in the communication dated 07.08.2017 issued by SEBI were stayed and liberty granted to 1st Respondent to make a representation to SEBI, which if made was to be disposed of in accordance with law. It was also made clear that the said order of the SAT would not come in the way of SEBI as well as stock exchanges to investigate 1st Respondent.

4. Appellant, received representations dated 29.08.2017 from 1st Respondent and granted to 1st Respondent an opportunity of personal hearing on 13.09.2017. Thereafter, on an independent examination and analysis of the information and documentary evidence submitted to Appellant by 1st Respondent, a detailed interim order dated 08.12.2017 under Sections 11, 11(4), 11A and 11B of the Securities and Exchange Board of India Act, 1992 was

passed by the Whole Time Member of the Appellant. The said interim order issued the following directions:

- “1. The trading in securities of ACIL shall be reverted to the status as it is stood prior to issuance of letter dated August 7, 2017 by SEBI.*
- 2. Stock Exchange shall appoint an independent forensic auditor, inter alia, to verify:*
 - a) Misrepresentation including of financials and/or business of ACIL,*
 - b) Misuse of the funds/ books of accounts of ACIL.*
- 3. The promoters and directors in ACIL are permitted only to buy the securities of ACIL. The shares held by the promoters and directors in ACIL shall not be allowed to be transferred for sale by the depositories.*
- 4. The other actions envisaged in SEBI’s letter dated August 7, 2017 in para 1 (d), as may be applicable, and the consequential action taken by Stock Exchanges shall continue to have effect against ACIL.”*

5. The representations of the 1st Respondent were disposed of and the above directions were to take effect immediately and were to remain in force until further orders. The said order also advised the 1st Respondent to file its reply/ objections to the interim order, if any, within 30 days from the date of receipt thereof and also to indicate whether it desires to avail an opportunity of personal hearing on a date and time to be fixed on specific request being made in this regard in the reply/ objection, failing which the preliminary findings in the order and ad interim directions would stand confirmed against the 1st Respondent, without any further orders. Post passing of the interim order, the Appellant vide letter dated 25.01.2018 and 02.04.2018 provided the inspection of documents to 1st Respondent as was sought for. Additionally, the Appellant granted an opportunity of hearing to 1st Respondent through Resolution Professional ('RP') on April 24, 2018. However, the 1st Respondent failed to respond to the same. Further, the Appellant granted another opportunity of hearing to the 1st Respondent through RP on 23.05.2018, to which the RP requested to defer the scheduled hearing till disposal of the Writ Petition filed before the Hon'ble Gauhati High Court.

6. In spite of the same, the 1st Respondent failed to avail the various opportunities of hearing granted to it nor filed its objection/ reply to the observations made in the interim order.

7. 1st Respondent, thereafter, filed a Writ Petition being W.P. (C) No. 2572/2018 before the Gauhati High Court and challenged the letter dated 09.06.2017 of the Government of India, Ministry of Corporate Affairs, which came to be allowed by a Learned Single Judge of the Gauhati High Court, setting aside only the letter dated 09.06.2017 of MCA and not the letter dated 23.05.2017 of the SFIO. Appellant, thereafter, challenged the order of the Learned Single Judge by way of a Writ Appeal No.102/2019 before the Hon'ble High Court wherein the Application for stay filed by Appellant has been heard and order was reserved.

8. Appellant-SEBI on 28.09.2018 received intimation(s) from National Stock Exchange of India Ltd. and BSE Ltd. that the 1st Respondent had by letter dated 25.09.2018 communicated to the said exchanges that an order dated 20.09.2018 had been passed by the NCLT, Guwahati Bench, approving a Resolution Plan submitted by the Successful Resolution Applicant namely a Abu Dhabi based "BRS Ventures Investment Ltd." Thereafter, the Appellant-SEBI, on receipt of the aforementioned information and enquiry, found that the Resolution Plan under Chapter IX-Restructuring of Capital vide Clause 3 thereof provides for Delisting of Equity Shares of 1st Respondent.

According to learned counsel for the Appellant, the aforesaid communication dated 25.09.2018 addressed by the 1st Respondent to the Stock Exchanges clearly seeks delisting of the Equity Shares of the 1st Respondent by making payments to public shareholders (in terms of the exit price so determined) on or before 19.10.2018. The concerned Stock Exchange (National Stock Exchange of India Ltd.) vide e-mail dated 4.10.2018 had indicated that the Company has fixed record date of 11.10.2018 to determine the shareholders who were to receive the consideration. Hence, Appellant preferred the present Appeal on 10.10.2018 before this Hon'ble Appellate Tribunal.

9. It was submitted that the approved Resolution Plan in so far as it has the effect of denuding the jurisdiction of Appellant under the provisions of the Securities and Exchange Board of India Act, 1992 ("the SEBI Act"), in an indirect manner, the 1st Respondent without having taken any steps to file its reply/ objections against the interim order dated 08.12.2017 passed by Appellant or seeking an opportunity of hearing with respect thereto or challenging the same before the appropriate Forum, contravened the SEBI Act and thereby hit by the provisions of Section 30 (2) (e) of the Insolvency and Bankruptcy Code, 2016.

10. Further, according to Appellant the effect of the impugned clause in the Resolution Plan is that the Equity Shares of the 1st Respondent shall stand delisted from the concerned Stock Exchanges viz. National Stock Exchange of India Ltd. and BSE Ltd., will not only render the examination/ action initiated

by Appellant – SEBI in conjunction with the said Stock Exchanges against the 1st Respondent nugatory and ineffective, but also consequently compel Public Share Holders to exit for a very meagre amount, which would not be in the interest of investors and the Securities market.

11. It was submitted that the investigations of Appellant under the provisions of the SEBI Act, 1992 and SEBI Regulations framed there under in respect of the various violations of the Companies Act, 2013, LODR Regulations and other laws noticed in the Secretarial Audit Report as well as prima facie observations regarding misuse of books of accounts/ funds by 1st Respondent, cannot and ought not be permitted to be scuttled by adopting the method of delisting of the equity shares of the 1st Respondent, by way of approval of the Resolution Plan. The inclusion of delisting of Securities in the Resolution Plan is clearly an attempt to wriggle out of the Jurisdiction of and proceedings instituted by Appellant.

12. Further, according to Appellant Resolution Plan involving delisting of Equity Shares ought not and could not have proceeded with in the absence of and without hearing Appellant – SEBI, a Statutory Regulator entrusted with protection of investors and regulation of securities market, in as much as the said Plan in so far as it allows delisting of Equity Share of the 1st Respondent is in the nature of hampering further examination by the Appellant/ Stock Exchanges over the listed company.

13. It was submitted that 1st Respondent after having impleaded Appellant SEBI as party/ Respondent before the Hon'ble High Court of Guwahati ought to have caused 3rd Respondent to implead Appellant SEBI before the Adjudicating Authority (NCLT), particularly keeping in view the examination / actions initiated by Appellant, details whereof are available in public domain.

14. It was further submitted that the Learned Single Judge of the Guwahati High Court while allowing W.P. (C) No. 2572/2018 filed by the 1st Respondent has only quashed and set aside letter dated 09.06.2017 issued by the Director General Corporate Affairs, Ministry of Corporate Affairs, Government of India to the Chairman of the Appellant but the letter dated 23.05.2017 issued by the Serious Fraud Investigation Office (SFIO), which refers to a meeting held at 11.00 hrs. on 23.05.2017 at the Conference Room of the Secretary, MCA and discussions on sharing of database of listed shell companies with SEBI, or the database of listed shell companies or the interim order dated 08.12.2017 of the WTM of Appellant and the preliminary findings and directions contained therein have not been, interfered with or set aside.

15. According to Appellant the conduct of the 1st Respondent in neither availing of the various opportunities of hearing granted to them by Appellant nor filing any objections/ reply to the observations made in the interim order dated

08.12.2017 passed by Appellant clearly establishes that 1st Respondent deliberately and willfully delayed to render the proceedings before Appellant nugatory and void and thereby tried to avoid by any means, undergoing the Forensic Audit as was directed by the Appellant.

16. It is informed that the 1st Respondent has in its representation dated 29.08.2017 submitted to Appellant that the 1st Respondent is a fully operating company, having a labour force more than 20,000 workers at its various Tea Estates, with sale of tea being effected in the domestic market as also through various tea auctioneers as well as by private sale arrangements with customers. Furthermore, the 1st Respondent is also stated to have forayed into exploration and production of oil and gas (hydrocarbon) in the State of Assam. According to Appellant, the 1st Respondent in its Application has also taken similar plea asserting that it has employees over 25,000 people with well laid-out infrastructure, duly supported by planned social welfare activities. Therefore, according to Appellant in these purported circumstances, it is wholly illogical that 1st Respondent would fail to contest corporate insolvency resolution process and permit confirmation of a Final Resolution Plan.

17. Learned counsel appearing on behalf of the 4th Respondent submitted that the sole ground taken by the Appellant is that there are pending investigations initiated by Appellant against 'Assam Company India Limited' (1st Respondent) as a shell company pursuant to a letter dated 9th June, 2017 issued by the

Ministry of Corporate Affairs and therefore the delisting of equity shares should not be allowed in terms of the resolution plan.

18. However, it is informed that the 1st Respondent has challenged such investigation of SEBI before the Hon'ble High Court, Guwahati in Writ Petition (C) 2572/2018 and by an order dated 7th March, 2019, the Hon'ble High Court has already set aside the investigation. Thereafter, the Appellants preferred an appeal before the Division Bench against the said Order dated 7th March, 2019, however, no order of stay has been passed in the said case.

19. Further, according to the 4th Respondent, the 1st Respondent cannot be treated as a shell company after it has been taken over by 4th Respondent pursuant to resolution plan.

20. Learned counsel appearing on behalf of the 4th Respondent while submitted that under Sub-section (3) of Section 61 r/w Section 32 of the I&B Code the appeal is not maintainable, it is also submitted that rights of public shareholders have been protected.

21. It was submitted that apart from protecting rights of all the stakeholders including Financial Creditors, Operational Creditors, the rights of Public Shareholders have also been protected. Liquidation value of 1st Respondent (Corporate Debtor) is much lower than the amount payable to Financial

Creditors and therefore the liquidation value of the Corporate Debtor has been assessed to be NIL. The same has been reflected in the order dated 20th September, 2018 passed by the Adjudicating Authority.

22. Further, according to learned counsel for the 4th Respondent, the Successful Resolution Applicant has provided a sum of Rs.1.82 crores for the public shareholders which is in consonance with the Gazette Notification dated 31st May, 2018 issued by SEBI for delisting of shares pursuant to the Resolution Plan approved under Section 31 of the I&B Code.

23. It was contended that the approved resolution plan has clearly laid down the procedure for delisting of the equity shares of the 1st Respondent. The said procedure is in complete conformity with the procedure laid down by SEBI and in particular the Gazette Notification dated 31st May, 2018 for 'Delisting of Equity Shares (Amendment) Regulations, 2018'.

24. According to learned counsel, the 4th Respondent has provided for exit route to the public shareholders by earmarking Rs.1.82 crores for cancellation of their shares and no individual and/or entity having any dues has been deprived of any amount under the approved resolution plan. Therefore, according to him the approved resolution plan has taken care of interest of the public shareholders and all the stakeholders, therefore, the apprehension of the Appellant is completely misplaced.

25. It was further submitted that the delisting of the shares of 1st Respondent is indispensable for proper execution and implementation of the Resolution Plan. The 4th Respondent has already infused a sum of Rs.1064 crores in order to pay off all stakeholders in terms of the approved Resolution Plan and the 4th Respondent is entitled to take complete control over 1st Respondent without having any exposure towards public interest.

26. We have heard learned counsel for the parties and perused the records.

27. The copy of the revised Resolution Plan has been enclosed by the 4th Respondent (BRS Ventures Investment Ltd.) as Annexure 'A' to their reply affidavit. In the said Resolution Plan, the 4th Respondent has specifically mentioned as to how it intends to delist the shares of the Corporate Debtor, relevant of which reads as follows:-

“3. Delisting of the Equity Shares of ACIL

ACIL shall take the following steps for delisting of its Equity Shares in accordance with the provisions of the Securities and Exchange Board of India (Delisting of Equity Shares) Regulations, 2009, as amended from time to time, read with the Securities and Exchange Board of India (Delisting of Equity

Shares) (Amendment) Regulations, 2018 issued by the SEBI on May 31, 2018:

- (a) ACIL shall, within 7 (seven) days of the Effective Date, submit an application to the concerned stock exchanges and SEBI for clarification/ approval to delist its shares from the recognised stock exchanges and requesting for clarity on the procedure to be followed for such delisting.*
- (b) In the application made under paragraph 3(a), ACIL shall disclose (i) the details of delisting its shares; (ii) the justification for exit price of 1.82 Crores to be paid to the public shareholders in respect of the proposed delisting; (iii) the record date to be fixed for determining the public shareholders to whom the exit price is to be paid; and (iv) the manner and timelines within which the exit price payments are intended to be made by ACIL to the public shareholders.*
- (c) The application shall be accompanied by a copy of the Resolution Plan as approved by the NCLT.*

ACIL shall thereafter, undertake a delisting of its shares and a capital reduction and cancellation of the entire existing equity share capital held by the Public (i.e. 18,19,18,027

Equity Shares shall stand cancelled without requirement of writing of the words “and reduced” in the corporate name and style of ACIL) and in consideration thereof, make payments of the exit price to the public shareholders (as on record date), in accordance with the approval letter/order issued by SEBI/ the stock exchanges. The cancellation of shares and capital reduction (a) shall be applicable to the Public Shareholders of ACIL; (b) shall be pursuant to the NCLT Approval Order and shall not require any other procedure as required under the Companies Act, including that under Section 66 of the Companies Act or regulations of the SEBI; and (c) shall not require the consent of any of the creditors of ACIL or approval of the shareholders of ACIL as the Resolution Plan upon being approved by the NCLT shall be binding on ACIL and its stakeholders (including its creditors and shareholders).”

28. Section 32 of I&B Code deals with appeal from an order approving the resolution plan, which is quoted below:-

“32. Appeal. - *Any appeal from an order approving the resolution plan shall be in the manner and on the grounds laid down in sub-section (3) of section 61.”*

29. Sub-section (3) of Section 61 shows the limited ground(s) on which an appeal can be preferred against an approved Resolution Plan, as quoted below:-

“61. Appeals and Appellate Authority.*(1) Notwithstanding anything to the contrary contained under the Companies Act 2013, any person aggrieved by the order of the Adjudicating Authority under this part may prefer an appeal to the National Company Law Appellate Tribunal.*

.....X....X...X.....

(3) An appeal against an order approving a resolution plan under section 31 may be filed on the following grounds, namely:—

- (i) the approved resolution plan is in contravention of the provisions of any law for the time being in force;*
- (ii) there has been material irregularity in exercise of the powers by the resolution professional during the corporate insolvency resolution period;*
- (iii) the debts owed to operational creditors of the corporate debtor have not been provided for in the resolution plan in the manner specified by the Board;*

(iv) the insolvency resolution process costs have not been provided for repayment in priority to all other debts; or

(v) the resolution plan does not comply with any other criteria specified by the Board.”

30. Learned counsel appearing on behalf of the Appellant submitted that the approved Resolution Plan is against the interim order dated 8th December, 2017 passed by SEBI (Appellant) under Section 7, 11(4), 11A and 11B of the Securities and Exchange Board of India Act, 1992. However, such alleged violation of the interim order passed by SEBI cannot be held to be as against ‘any existing provision of law’, as prescribed under Section 30(2)(e), which reads as follows:-

“30. Submission of resolution plan.”-(1) *A resolution applicant may submit a resolution plan to the resolution professional prepared on the basis of the information memorandum.*

(2) The resolution professional shall examine each resolution plan received by him to confirm that each resolution plan—

- (a) provides for the payment of insolvency resolution process costs in a manner specified by the Board in priority to the repayment of other debts of the corporate debtor;*
- (b) provides for the repayment of the debts of operational creditors in such manner as may be specified by the Board which shall not be less than the amount to be paid to the operational creditors in the event of a liquidation of the corporate debtor under section 53;*
- (c) provides for the management of the affairs of the Corporate debtor after approval of the resolution plan;*
- (d) the implementation and supervision of the resolution plan;*
- (e) does not contravene any of the provisions of the law for the time being inforce;”***

31. The Appellant has not disputed that the investigation started against the Corporate Debtor was challenged by the Corporate Debtor before Hon’ble High Court of Guwahati in Writ Petition (C) No. 2572/2018. In said case, by order

dated 7th March, 2019, the Hon'ble High Court of Guwahati has set aside the investigation, copy of which has been enclosed.

32. The interim order passed by SEBI (Appellant) does not amount to any existing law, to attract Clause (e) of Section 30(2) of the I&B Code, therefore, the Appellant cannot take plea that the approved Resolution Plan is in contravention of any law for the time being in force. Therefore, ground shown in Section 61(3)(i) for preferring an appeal against approved Resolution Plan is not attracted and is not applicable in the present case.

33. The Appellant has also failed to make out a case under Section 61(3)(ii) to suggest that there has been any material irregularity in exercising the powers by the resolution professional during the corporate insolvency resolution period. The ground shown in Section 61(3)(iii), (iv) and (v) are also not attracted and not the ground taken by the Appellant to allege that debt owed to Operational Creditors have not been provided, or Insolvency Resolution Process costs have not been provided for repayment or the Resolution Plan does not comply with any other criteria specified by the Board.

34. In view of the aforesaid position, we hold that the appeal is not maintainable under Section 61(3) of the I&B Code as also on merit, in absence of any violation of the provisions of the Code or any existing law or material irregularity.

35. For the reason aforesaid, we are not inclined to interfere with the impugned order of approval dated 20th September, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), Guwahati Bench. However, the order passed by the Adjudicating Authority or this Appellate Tribunal will not come in the way of the SEBI or any competent authority to take steps against erstwhile Promoters, Directors or Officers or others, if any or all of them had violated any of the provisions under SEBI Act or rule framed thereunder or any other law as may be taken against such person of listed company. The appeal is dismissed but with aforesaid observation and liberty. No costs.

[Justice S. J. Mukhopadhaya]
Chairperson

[Justice A. I. S. Cheema]
Member (Judicial)

[Kanthi Narahari]
Member (Technical)

NEW DELHI

29th August, 2019

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