

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 189 of 2019

IN THE MATTER OF:

M/s. B.R. Traders

...Appellant

Versus

Venkataramanarao Nagarajan & Ors.

...Respondents

Present:

For Appellant : **Mr. Vikram Singh Arya, Advocate.**

For Respondents: **Mr. J. Manivannan, Advocate for R-1.**
 Mr. E. Omprakash, Senior Advocate with Ms.
 Madhusmita Bora, Advocate for SEBI.
 Mr. D. Sreenivasan, Advocate for ICICI Bank.

Company Appeal (AT) (Insolvency) No. 190 of 2019

IN THE MATTER OF:

M/s. K.K. Foods

...Appellant

Versus

Venkataramanarao Nagarajan & Ors.

...Respondents

Present:

For Appellant : **Mr. A. Mohan Roy and Ms. Chemlata Chaudhary,**
 Advocates.

For Respondents: **Mr. J. Manivannan, Advocate for R-1.**
 Mr. E. Omprakash, Senior Advocate with Ms.
 Madhusmita Bora, Advocate for SEBI.
 Mr. D. Sreenivasan, Advocate for ICICI Bank.

Company Appeal (AT) (Insolvency) No. 784 of 2018

IN THE MATTER OF:

Arokiasamy Joseb Raj **...Appellant**

Versus

Venkataramanarao Nagarajan & Ors. **...Respondents**

Present:

For Appellant : Mr. S.C. Das, Advocate.

**For Respondents: Mr. J. Manivannan, Advocate for R-1.
Mr. E. Omprakash, Senior Advocate with Ms.
Madhusmita Bora, Advocate for SEBI.
Mr. D. Sreenivasan, Advocate for ICICI Bank.**

Company Appeal (AT) (Insolvency) No. 686 of 2019

IN THE MATTER OF:

Pepsico India Holdings Pvt. Ltd. **...Appellant**

Versus

**V. Nagarajan,
Resolution Professional of
Oceanic Tropical Fruits Pvt. Ltd.** **...Respondent**

Present:

**For Appellant : Mr. Sanjeev Puri, Senior Advocate with Mr.
Dheeraj Nair, Mr. Manish K. Jha and Ms.
Vishrutyi Sahni, Advocates.**

**For Respondents: Mr. J. Manivannan, Advocate for R-1.
Mr. E. Omprakash, Senior Advocate with Ms.
Madhusmita Bora, Advocate for SEBI.
Mr. D. Sreenivasan, Advocate for ICICI Bank.**

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

In the ‘Corporate Insolvency Resolution Process’ of ‘M/s. Oceanic Tropical Fruits Pvt. Ltd.’- (‘Corporate Debtor’), ‘M/s. B.R. Traders (one of the Appellants herein) filed Miscellaneous Application under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 (“I&B Code” for short) for direction to the ‘Resolution Professional’ and the members of the ‘Committee of Creditors’ to reconsider the ‘Resolution Plan’ submitted by the Resolution Applicant- ‘M/s. B.R. Traders’. It was rejected by the Adjudicating Authority (National Company Law Tribunal), Single Bench, Chennai by impugned order dated 31st October, 2018, which is under challenge in Company Appeal (AT) (Insolvency) No. 189 of 2019.

2. ‘M/s. K.K. Foods’ (another Appellant) filed similar application under Section 60(5) of the ‘I&B Code’ in the said ‘Corporate Insolvency Resolution Process’ of ‘M/s. Oceanic Tropical Fruits Pvt. Ltd.’- (‘Corporate Debtor’) with similar prayer to direct the ‘Resolution Professional’ and the ‘Committee of Creditors’ to reconsider its ‘Resolution Plan’. The Adjudicating Authority by another order dated 31st October, 2018 rejected the prayer, which is also under challenge in Company Appeal (AT) (Insolvency) No. 190 of 2019.

3. In absence of any viability and feasibility in the 'Resolution Plan', the 'Resolution Professional', on instruction of the 'Committee of Creditors', filed application under Section 33(1)(a)/ 34(1) of the 'I&B Code' for liquidation of the 'Corporate Debtor' ('M/s. Oceanic Tropical Fruits Pvt. Ltd.'). By third order dated 31st October, 2018, the Adjudicating Authority allowed the application and ordered for liquidation of the 'Corporate Debtor'. The aforesaid order has been challenged by Mr. Arokiasamy Joseb Raj, Shareholder of the 'Corporate Debtor' in Company Appeal (AT) (Insolvency) No. 784 of 2018.

4. 'Pepsico India Holdings Private Limited', one of the Appellants herein, filed a Miscellaneous Application under Section 60(5) read with Sections 36(3) & (4) of the 'I&B Code' seeking directions to the 'Resolution Professional' to handover to the Appellant certain Plant & Machinery owned by it which are lying at the premises of the 'Corporate Debtor'. The Adjudicating Authority by order dated 28th May, 2019 rejected the application which has been challenged by the Shareholder in Company Appeal (AT) (Insolvency) No. 686 of 2019.

Case of 'M/s. B.R. Traders'

5. Learned counsel appearing on behalf of the Appellant submitted that the 'Resolution Plan' submitted by the 'Resolution Applicant'- 'M/s. B.R. Traders' was within time. The Appellant is belonging to the similar

line of business as that of the 'Corporate Debtor' and would have the potentiality to be in a position to revive the 'Corporate Debtor' and to run the same as a 'going concern, which is in the interest of all stakeholders.

6. It was submitted that pursuant to e-mail issued by the 'Resolution Professional', the 'Revised Plan' was submitted by way of a proposed consideration of Rs.66,29,50,501/-. The said 'Resolution Plan' envisages payment mechanism for each of the stakeholders including statutory dues, payment to the 'Operational Creditors' etc.

7. The members of the 'Committee of Creditors' appeared before the Adjudicating Authority and taken specific plea that 'Information Memorandum' have several discrepancies as it did not capture the security structure properly in terms of ranking of charge as well as mixing the assets of the Company and personal guarantors.

8. The stand of the 'Committee of Creditors' is that market value of the assets of the 'Corporate Debtor' as well as the Promoters is Rs. 121.60 Crores excluding the non-core assets which 'Resolution Professional' failed to take into consideration and the liquidation value of the assets of the 'Corporate Debtor' as well as the Promoters is Rs. 89.10 Crores. In spite of the same, the 'Resolution Applicant'- 'M/s. B.R. Traders' quoted Rs.66,29,50,501/- which being below the Liquidation Value is unacceptable.

Case of ‘M/s. K.K. Foods’

9. Similar plea has been taken by the ‘Committee of Creditors’ and it was brought to the notice of the Adjudicating Authority that though the market value of the assets of the ‘Corporate Debtor’ is Rs. 121.60 Crores approximately excluding the non-core assets which the ‘Resolution Professional’ has failed to take into consideration and liquidation value of the assets of the ‘Corporate Debtor’ as well as the Promoters is Rs. 89.10 Crores which was also accepted by the Promoters. However, the ‘Resolution Applicant’- ‘M/s. K.K. Foods’ quoted lesser amount of Rs.71.17 Crores which is below the Liquidation Value and, therefore, it is not accepted.

10. From the record, we find that both the ‘Resolution Applicants’ namely— ‘M/s. B.R. Traders’ and ‘M/s. K.K. Foods’ (Appellants herein) proposed amount less than the Liquidation Value of the assets of the ‘Corporate Debtor’. Any plan which is less than the liquidation value cannot be accepted as it will be against the provisions of sub-section (2) (b) of Section 30 in terms of which the liquidation value is to be paid to the ‘Operational Creditors’ and dissenting ‘Financial Creditors’.

11. The object of the ‘I&B Code’ is to reorganise the insolvency resolution of corporate persons, partnership firms and individuals in time bound manner for maximisation of the value of the assets of the

‘Corporate Debtor’/ Partnership Firms/ individuals and to promote entrepreneurship, availability of credit and balance the interests of all stakeholders including the ‘Financial Creditors’ and the ‘Operational Creditors’ and their assets are also to be maximised in a time bound manner. Any plan which is less than the Liquidation Value and the assets of the ‘Corporate Debtor’ and does not stipulate infusion of money for maximisation of the assets of the ‘Corporate Debtor’, is against the provisions of the ‘I&B Code’ and violative of Section 30(2) of the ‘I&B Code’.

12. For the aforesaid reasons, the ‘Committee of Creditors’ and the Adjudicating Authority if they refused to approve the ‘Resolution Plans’ filed by ‘M/s. B.R. Traders’ and ‘M/s. K.K. Foods’ and rejected the applications for reconsideration of the same, no interference is called for.

Case of Mr. Arokiasamy Joseb Raj (Shareholder)

13. According to the counsel for the Shareholder of the ‘Corporate Debtor’, the Liquidation Value was obtained in an open process which is fundamentally not correct.

14. It was submitted that the ‘Committee of Creditors’ informed about the assets value of the ‘Corporate Debtor’ (Liquidation Value) at Rs. 89.10 Crores which is not based on assets of the ‘Corporate Debtor’ but includes the assets of guarantor and 3rd Party.

15. It was submitted that the Adjudicating Authority erred by overlooking the reason for non-consideration of the 'Resolution Plan' by the 'Committee of Creditors' and instead of directing compliance under the 'I&B Code', has erroneously passed an order for liquidating the 'Corporate Debtor'.

16. We have noticed the object of the 'I&B Code' as per which the 'Corporate Insolvency Resolution Process' is required to be completed in a time bound manner for maximisation of the value of the assets of the 'Corporate Debtor' and to promote entrepreneurship, availability of credit and balance the interests of all stakeholders including the 'Financial Creditors' and the 'Operational Creditors'. Time is of essence in such matters as maximum value of assets can be achieved/ saved if process is time bound. Delay brings down the value. Thus, the law has prescribed period which are reasonable. If process has not been completed in a time bound manner i.e., in the maximum time prescribed under the 'I&B Code', we find no reason to direct the 'Resolution Professional' or the 'Committee of Creditors' to re-initiate the process.

17. In absence of any viability and feasibility of the 'Resolution Plan', the Adjudicating Authority has rightly entertained the application under Section 33 and ordered for liquidation. No interference is called for against the impugned order of liquidation dated 31st October, 2018.

Case of ‘Pepsico India Holding Pvt. Ltd.’

18. The Appellant- ‘M/s. Pepsico India Holdings Pvt. Ltd.’ claim that the Plant & Machinery belongs to it. The Plant and Machinery, in question, owned by the Appellant are lying at the premises of the ‘Corporate Debtor’. As per Clause 15.3(b) of the Agreement, either party was entitled to terminate the Agreement if the other party entered into bankruptcy, liquidation or in the event that its business or assets were confiscated or seized as a result of foreign interference or a winding up petition was admitted or if it made any assignment for benefit of its creditors.

19. According to the Appellant, it addressed a termination notice dated 28th November, 2017 to the ‘Corporate Debtor’. The copy to the ‘Interim Resolution Professional’ stating *inter alia* in view of the admission of the insolvency against the ‘Corporate Debtor’, the agreement was liable to be terminated under Clause 15.3(b) of the Agreement.

20. The ‘Resolution Professional’/ Liquidator submitted that the ‘Corporate Insolvency Resolution Process’ was triggered against the ‘Corporate Debtor’ on 13th September, 2017. After initiation of the ‘Corporate Insolvency Resolution Process’, it was not open to the Appellant to terminate the Agreement as in terms of the provisions of Section 20(1) of the ‘I&B Code’, the ‘Interim Resolution Professional’ is liable to make every endeavour to protect and preserve the value of the

property of the 'Corporate Debtor' and manage the operations of the 'Corporate Debtor' as a going concern.

21. In regard to the alleged dues, the Appellant- 'Pepsico India Holdings Pvt. Ltd.' addressed a letter dated 22nd February, 2018 denied and disputed the alleged liability to pay a sum of Rs.95,99,955/-. It was intimated that as per its undertaking, a sum of Rs.24,34,314/- was payable by the Appellant- 'Pepsico India Holdings Pvt. Ltd.' to the 'Corporate Debtor'. On the other hand, the 'Corporate Debtor' was liable to pay a sum of Rs.61,09,876/- to the Appellant in terms of the Agreement for the period between September, 2017 to November, 2017.

22. From the aforesaid fact, it is clear that the claim and counter claim by the 'Corporate Debtor' and the Appellant-'Pepsico India Holdings Pvt. Ltd.' till it is decided, the question of handing over any asset i.e. Plant & Machinery to the Appellant does not arise.

23. It appears that the 'Corporate Debtor' was a plant and the Appellant has supplied Plant & Machinery. Even during the liquidation process, the Liquidator is to ensure that the 'Corporate Debtor' remains a going concern.

24. As per the decision of the Hon'ble Supreme Court and this Appellate Tribunal, one should ensure that the 'Corporate Insolvency Resolution Process' ends in success for revival and restructuring of the company. Liquidation is not answer but the sale of assets can be made only at final stage.

25. As per the decision of this Appellate Tribunal in “**Y. Shivram Prasad Vs. S. Dhanapal & Ors.— Company Appeal (AT) (Insolvency) No. 224 of 2018**”, during the liquidation process, the Liquidator is to ensure that the ‘Corporate Debtor’ remains a going concern and steps required to be taken for Arrangement or Scheme under Section 230-232 of the Companies Act, 2013 for revival and restructuring of the company. If it does not succeed then in such case, the ‘Corporate Debtor’ is to be sold as a going concern to a third party. Only on such failure, liquidation should take place following the procedure under Section 53 read with Section 52 of the ‘I&B Code’.

26. In view of the aforesaid position of law, the Appellant cannot derive advantage of Clause 15.3(b) of the Agreement as the provisions of the ‘I&B Code’ can prevail over such agreement. Finally, if no arrangement or Scheme framed under Section 230-232 of the Companies Act, 2013 becomes possible or the ‘Corporate Debtor’ is not sold in its totality along with the employees as ordered by this Appellate Tribunal in “**Y. Shivram Prasad Vs. S. Dhanapal & Ors**” (Supra) and there is no option but to sell the assets of the ‘Corporate Debtor’ and to distribute the same amongst the Creditors in terms of Section 53 read with Section 52 of the ‘I&B Code’, at that stage, the Appellant may ask the Liquidator to return the assets i.e. Plant & Machinery, if it belongs to it as the third party.

For the reasons aforesaid, we find no merit in any of the appeals.
All the appeals are dismissed. No costs.

[Justice S.J. Mukhopadhaya]
Chairperson

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

[Kanthi Narahari]
Member (Technical)

NEW DELHI

13th November, 2019

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