

Company Appeal (AT) (Insolvency) No. 151 of 2018

30.05.2018 This appeal(s) has been preferred under Section 61(1) of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the 'I&B Code') against order dated 11th March, 2010 and 28th July, 2016 passed by the Board

for Industrial and Financial Reconstruction, New Delhi (for short, 'BIFR') referred to as the BIFR Case No. 372 of 2000.

2. The appeal(s) has been preferred in view of Notification No. S.O. 1683 (E) dated 24th May, 2017, issued by the Central Government whereby and whereunder 'The Eighth Schedule' of the I&B Code has been amended and the order passed by the BIFR has been ordered to be treated an order passed by the Adjudicating Authority under Section 31(1) of the I&B Code and thereby preferred appeal within 90 days before the National Company Law Appellate Tribunal (NCLAT).

3. The aforesaid Notification No. S.O. 1683 (E) dated 24th May, 2017 fell for consideration before this Appellate Tribunal in the '*Principal Director General of Income Tax (Admn. & TPS) vs. M/s. Spartek Ceramics India Ltd. & anr.*' – '*Company Appeal (AT) (insolvency) No. 160 of 2017*' and analogous case. In the aforesaid appeals, this Appellate Tribunal by judgment dated 28th May, 2018 while pointed out the infirmity in the Notification No. S.O. 1683 (E) dated 24th May, 2017 held that :

“44. If the intention of the legislature/Parliament substituting sub-clause (b) of Section 4 (by Eighth Schedule) is looked into, we find that the executive instruction issued by the Central Government under Section 242 is contrary to the provisions of sub-clause (b) of Section 4 of the 'SICA Repeal Act, 2003'.

45. In view of the aforesaid discussion, we find that the grounds shown by the Central Government in

Notification S.O. 1683(E) dated 24th May, 2017 for exercising powers conferred under Section 242 are in conflict with the amended sub-clause (b) of Section 4 of the 'SICA Repeal Act, 2003'.

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50. *From the aforesaid provision, it is clear that the grounds to prefer appeal under Section 61 of the 'I&B Code' against an order of approval of plan passed by the Adjudicating Authority under Section 31, should be such as mentioned in sub-section (3) of Section 61. As per sub-section (2) of Section 61, the appeal is required to be filed within thirty days before the NCLAT. The Appellate Tribunal is empowered to condone the delay of 'another fifteen days' after the expiry of the period of thirty days in preferring the appeal that too for sufficient cause. It has no power to condone the delay if appeal under Section 61 is preferred beyond fifteen days from the date of the expiry of the period of thirty days. Meaning thereby, no appeal under sub-section (1) of Section 61 can be entertained after forty-five days of knowledge of the order passed by the Adjudicating Authority.*

51. *The impugned Notification S.O. 1683(E) dated 24th May, 2017 was notified after five months twenty-seven days of enactment of the 'I&B Code' (came into force from 1st December, 2016). All Schemes have been framed by the Board prior to 1st December, 2016 i.e. before coming into force of the 'I&B Code' i.e. much more than five months twenty-seven days back (177 days).*
52. *The limitation of thirty days has been prescribed under sub-section (2) of Section 61 for preferring an appeal against an order passed by the Adjudicating Authority, including the order passed under section 31(1) of the 'I&B Code'. The Appellate Tribunal for sufficient cause can condone the delay but such period cannot exceed fifteen days. Therefore, no appeal can be entertained after forty-five days of knowledge of order. The Central Government, thereby cannot grant ninety days' period to prefer an appeal under section 61(1), which is contrary to Section 61(2) of the 'I&B Code'.*
53. *The 'difficulty' as contemplated under Section 242 of the 'I&B Code' has not been mentioned by the Central Government in the notification in question.*

The Central Government in exercise of its powers conferred under Section 242, is competent to make provision to remove the difficulty in giving effect to the provisions of the 'I&B Code', but it cannot be in conflict with nor can change the substantive provisions of the 'I&B Code'. The period of limitation as prescribed by Notification S.O. 1683(E) dated 24th May, 2017 being in conflict with the maximum period of limitation granted under sub-section (2) of Section 61 of the 'I&B Code' and beyond forty-five days, the NCLAT having not empowered to entertain the appeal. The NCLAT has no jurisdiction to entertain an appeal under Section 61 beyond the period of forty-five days.

54. *The NCLAT, having been empowered by the Parliament to hear the appeal under provisions of the Companies Act, 2013, 'I&B Code, 2016' and the Competition Act, 2003, the Central Government cannot empower the Appellate Tribunal to hear an appeal pursuant to Notification S.O. 1683(E) dated 24th May, 2017.*

55. *For the reasons aforesaid, we hold that both the appeals preferred by 'Pr. Director General of Income*

Tax (Admn. & TPS)’ and ‘GMB Ceramics India Ltd. & Ors.’ against the Scheme framed by the Board are barred by limitation and otherwise not maintainable under Section 61 of the ‘I&B Code’.

4. In view of the aforesaid finding, we hold that the present appeal under Section 61(1) is not maintainable and otherwise also barred by limitation prescribed under sub-section (2) of Section 61.

5. However, this Appellate Tribunal to maintain judicial decorum in ‘*Principal Director General of Income Tax (Admn. & TPS) (Supra)*’ observed as follows :

“57. To maintain the judicial decorum, though we have noticed the conflict in the order passed by the Hon’ble High Court of Delhi and the Notification S.O. 1683(E) dated 24th May, 2017, we refrain from giving any specific declaration about the same.

In spite of observations as made above, the next question requires consideration is that if otherwise the appeals are maintainable the impugned Scheme is legal or not.”

6. While so observing, this Appellate Tribunal had also gone into the merits of the appeals.

7. Though we are not supposed to decide the merit of the appeal(s), but if the arguments of the appellant is accepted, we find that there are infirmity in the scheme in question :

- (i) The Scheme was framed without notice to the appellant - unsecured creditor.
- (ii) The Scheme which is deemed to be a 'Resolution Plan' is in contravention of Section 30(2)(e) of the I&B Code i.e. not in accordance with the provisions of law time being in force. For example, if there is a material irregularity in exercising of the powers by the 'Insolvency Resolution Professional' during the 'corporate insolvency resolution process; whether 'debts' owed to the 'Operational Creditor' is to be provided in the 'Resolution Plan'. It has not been decided nor the 'scheme' complies with the guidelines prescribed in the 'Insolvency and Bankruptcy Board of India' and the provisions of the 'I&B Code'.
- (iii) The 'Committee of Creditors' are supposed to approve the 'Resolution Plan' and the 'Resolution Applicant' is supposed to pay the dues but no such provision has been made in the scheme.
- (iv) The 'Resolution Plan' contravenes the provisions of the Income-tax Act, as alleged by the Principal Commissioner of Income-Tax-7.

Thus, if the impugned Schemes are treated to be approved (Resolution Plan) under sub-section (1) of Section 31 of the 'I & B Code' they being against the provisions of the existing laws and being in violative of clause (e) of sub-section (2) of Section 30 of the I&B Code are illegal.

8. Though, we find that the impugned Schemes dated 11th March, 2010 and 28th July, 2016 are illegal, however, in absence of our jurisdiction to exercise of powers under Section 61 of the 'I&B Code' and appeals being barred by

limitation, we are not interfering with the illegal Schemes dated 11th March, 2010 and 28th July, 2016 though we hold them as illegal.

9. Further, in absence of any provision to get the Schemes in question executed through any court of Competent jurisdiction, the relevant provision(s) having been repealed, the appellant(s) may raise the question, if the respondent(s) move before any court of Law for implementation of the Schemes.

10. Both the appeal(s) are disposed of with aforesaid observations. However, in the facts and circumstances of the case, there shall be no order as to costs.

[Justice S.J. Mukhopadhaya]
Chairperson

[Justice Bansi Lal Bhat]
Member (Judicial)

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