

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL**  
**NEW DELHI**

**Company Appeal (AT) (Insolvency) No. 182 of 2019**

**IN THE MATTER OF:**

**Rajesh Balasubramanian**

**...Appellant**

**Versus**

**M/s. Everon Castings Pvt. Ltd. & Anr.**

**...Respondents**

**Company Appeal (AT) (Insolvency) No. 183 of 2019**

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**...Appellants**

**Versus**

**M/s. Everon Castings Pvt. Ltd. & Anr.**

**...Respondents**

**Present:**

**For Appellant :                    Mr. N. Ramanan and Mr. B. Rangunath, Advocates**

**ORDER**

**25.02.2019**            The appellant(s) – promoters have challenged the both the order(s) dated 21<sup>st</sup> December, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), Division Bench, Chennai. By one of the order the Miscellaneous Application No. 498 of 2018 preferred by Mr. Rajesh Balasubramanian, erstwhile Managing Director of the Corporate Debtor and Mr. T. Prabhakar another Director of the Corporate Debtor under Section 60(5) for

exclusion of 120 days of the 'corporate insolvency resolution process' from the date of commencement has been rejected. The prayer for setting aside the decision dated 26<sup>th</sup> July, 2018 declaring one of the appellant as ineligible under Section 29A(g) has also been rejected by other order dated 21<sup>st</sup> December, 2018. The Adjudicating Authority passed order under Section 33(1) of the Insolvency and Bankruptcy Code, 2016 (for short, 'the **I&B Code**') for liquidation of 'M/s. Precision Machine & Auto Components Private Limited' (Corporate Debtor).

2. Learned counsel appearing on behalf of the appellant(s) submitted that the 'corporate insolvency resolution process' had not proceeded in accordance with law. The 'Resolution Professional' or 'Committee of Creditors' had not acted in accordance with the provisions of the 'I&B Code' which resulted non-approval of the plan. Further according to the appellant(s), appellant cannot be held to be ineligible in terms of Section 29A(g) of the I&B Code. It is further submitted that the Adjudicating Authority has not decided the issue whether the appellant(s) are ineligible in terms of Section 29A(g) of the I&B Code.

3. We have heard the learned counsel for the appellant(s) and perused the record.

4. In these appeals it is not necessary to decide the issue as to whether the appellant(s) are ineligible in terms of Section 29A(g) of the 'I&B Code' in view of the following facts.

5. Two 'resolution plans' were submitted - one is submitted by Mr. T. Prabhakar, Director of the 'Corporate Director' and another 'resolution plan' was submitted by one 'M/s. Nitin Castings Ltd.'. Both the 'resolution plans' were considered by the 'Committee of Creditors' and finally in its 11<sup>th</sup> meeting held on 18<sup>th</sup> September, 2018, it rejected the 'resolution plans' filed by 'Mr. T. Prabhakar'

(Director of the Corporate Debtor) and 'M/s. Nitin Castings Limited' on the following grounds :

"It is resolved to reject both the resolution plans received under section 31 of IBC 2016 for the following reasons:

**1. Resolution Plan of Mr. T. Prabhakar:**

(a) *Mr. T. Prabhakar is a shareholder in Corporate Debtor and also Director in the Company till 2017. Funds to the tune of Rs. 13.00 Crores were diverted from the Corporate Debtor as per submissions made by the Forensic Auditor (FA) in the CoC on 14.09.2018; besides, the forensic auditor has submitted a long list of financial irregularities and improprieties during the period 2015-17. It is a reasonable assumption that Mr. T. Prabhakar would have been in the thick of the irregular practices of the Corporate Debtor and party to all fraudulent transactions put through by the Corporate Debtor. Hence we are of the opinion he is not eligible to participate as RA u/s 29A(g).*

(b) *Conditions imposed by Mr. T. Prabhakar such as i) withdrawal of legal actions initiated against the MD of the Corporate Debtor Mr. B. Rajesh, ii) Requesting the SBI for full and final settlement of Rs. 18 Crores and release of securities mortgaged by the Corporate Debtor, Guarantors and also release of Personal Guarantees furnished by Guarantors and also release of Personal Guarantees furnished by Guarantors – are beyond the scope of Resolution Plan.*



- (c) **Mr. T. Prabhakar intended to divest his stake in M/s. Green Valley Shelters P. Ltd. to the tune of Rs. 21.40 Crores to meet the repayment as per the resolution plan. He has not provided the details of his share value of the shares as on date in the GVSPL. Besides, the financial health of GVSPL is not established and not verifiable.**
- (d) **Mr. T. Prabhakar has not given any documentary evidence on how he is going to commence production, source of work orders as most of the existing customer of the ECPL have suffered due to mismanagement and shutdown of the operations etc.**

## 2. Resolution Plan of M/s. Nitin Castings Ltd.

*The Resolution Plan submitted by M/s. Nitin Castings Ltd., contains more of terms and conditions (Pre and Post Resolution Plan) than a Resolution Plan, such as*

- (a) *Reinstate all leases and licenses of the Corporate Debtor that have elapsed from the date of which they expired.*
- (b) *Genuineness of all the title deeds etc.*
- (c) *Reinstate all business permits required by the Corporate Debtor to conduct its business, which have been not granted, expired, suspended or not renewed at no additional cost to RA.*
- (d) *Right to withdraw, if the entire process not completed within 120 days from the CoC approval.*
- (e) *M/s. Nitin Castings Ltd., is proposing to settle Rs. 7.51 Crores to SBI of which Rs. 5.00 Crores by cash and Rs. 2.51 Crores by Preferential Shares proposed to be issued by Corporate Debtor which is not acceptable and not workable.*
- (f) *The amount offered in the Resolution Plan (Rs. 7.51 Crores) vis-a-vis SBI's claim of Rs. 27.80 Crores means a haircut of over 73% is not acceptable.*



(g) Total claims on the Corporate Debtor run to Rs. 41.45 Crores. The total amount of the financial plan envisages for settling the claims of Financial Creditors, Operational Creditors, Workers dues, Unsecured Creditors amount offered by M/s. Nitin Castings Ltd., is Rs. 10.55 Crores, which is very low.

***In view of what is stated above, IT IS RESOLVED to request the Resolution Professional to reject the resolution plans received as unacceptable.***

6. Having noticed that the 'resolution plans' the 'Committee of Creditors' unanimously rejected the plans on 18<sup>th</sup> September, 2019. Thereafter as 270 days was coming to an end on 24<sup>th</sup> September, 2018, the 'Resolution Professional' filed the application for liquidation.

7. In the aforesaid situation, the 'resolution plan' by one of the Director of the 'Corporate Debtor' (appellant herein) having also considered on merits as reflected in clause (c) and (d), apart from ineligibility under Section 29A(g), no interference is called for.

8. Learned counsel for the appellant(s) though brought to our notice a decision of this Appellate Tribunal in '**S.C. Sekaran vs. Amit Gupta & Ors.** – *Company Appeal (AT)(Ins.) No. 495 & 496 of 2018*'. In the said case, this Appellate Tribunal by judgment dated 29<sup>th</sup> January, 2019 observed :

*"7. Section 391 of the Companies Act, 1956 has since been replaced by Section 230 of the Companies Act, 2013, which is as follows:*

**“230. Power to compromise or make  
arrangements with creditors and members**

- (1) *Where a compromise or arrangement is proposed—*
- (a) between a company and its creditors or any class of them; or*
- (b) between a company and its members or any class of them,*
- the Tribunal may, on the application of the company or of any creditor or member of the company, or in the case of a company which is being wound up, of the liquidator appointed under this Act or under the Insolvency and Bankruptcy Code, 2016 as the case may be, order a meeting of the creditors or class of creditors, or of the members or class of members, as the case may be, to be called, held and conducted in such manner as the Tribunal directs.*

*Explanation.— For the purposes of this subsection, arrangement includes a reorganisation of the company’s share capital by the consolidation of shares of different classes or by the division of shares into shares of different classes, or by both of those methods.*

- (2) *The company or any other person, by whom an application is made under subsection (1), shall disclose to the by affidavit—*

*(a) all material facts relating to the company, such as the latest financial position of the company, the latest auditor's report on the accounts of the company and the pendency of any investigation or proceedings against the company;*

*(b) reduction of share capital of the company, if any, included in the compromise or arrangement;*

*(c) any scheme of corporate debt restructuring consented to by not less than seventy-five per cent. of the secured creditors in value, including—*

*(i) a creditor's responsibility statement in the prescribed form;*

*(ii) safeguards for the protection of other secured and unsecured creditors;*

*(iii) report by the auditor that the fund requirements of the company after the corporate debt restructuring as approved shall conform to the liquidity test based upon the estimates provided to them by the Board;*

*(iv) where the company proposes to adopt the corporate debt restructuring guidelines specified by the Reserve Bank of India, a statement to that effect; and*

*(v) a valuation report in respect of the shares and the property and all assets, tangible and*

*intangible, movable and immovable, of the company by a registered valuer.*

- (3) *Where a meeting is proposed to be called in pursuance of an order of the Tribunal under sub-section (1), a notice of such meeting shall be sent to all the creditors or class of creditors and to all the members or class of members and the debenture-holders of the company, individually at the address registered with the company which shall be accompanied by a statement disclosing the details of the compromise or arrangement, a copy of the valuation report, if any, and explaining their effect on creditors, key managerial personnel, promoters and non-promoter members, and the debenture-holders and the effect of the compromise or arrangement on any material interests of the directors of the company or the debenture trustees, and such other matters as may be prescribed:*

*Provided that such notice and other documents shall also be placed on the website of the company, if any, and in case of a listed company, these documents shall be sent to the Securities and Exchange Board and stock exchange where the securities of the companies are listed, for placing on their website and*



*shall also be published in newspapers in such manner as may be prescribed:*

*Provided further that where the notice for the meeting is also issued by way of an advertisement, it shall indicate the time within which copies of the compromise or arrangement shall be made available to the concerned persons free of charge from the registered office of the company.*

- (4) *A notice under sub-section (3) shall provide that the persons to whom the notice is sent may vote in the meeting either themselves or through proxies or by postal ballot to the adoption of the compromise or arrangement within one month from the date of receipt of such notice:*

*Provided that any objection to the compromise or arrangement shall be made only by persons holding not less than ten per cent of the shareholding or having outstanding debt amounting to not less than five per cent. of the total outstanding debt as per the latest audited financial statement.*

- (5) *A notice under sub-section (3) along with all the documents in such form as may be prescribed shall also be sent to the Central Government, the income-tax authorities, the Reserve Bank of India, the Securities and Exchange Board, the Registrar, the*

*respective stock exchanges, the Official Liquidator, the Competition Commission of India established under sub-section (1) of section 7 of the Competition Act, 2002, if necessary, and such other sectoral regulators or authorities which are likely to be affected by the compromise or arrangement and shall require that representations, if any, to be made by them shall be made within a period of thirty days from the date of receipt of such notice, failing which, it shall be presumed that they have no representations to make on the proposals.*

- (6) *Where, at a meeting held in pursuance of sub-section (1), majority of persons representing three-fourths in value of the creditors, or class of creditors or members or class of members, as the case may be, voting in person or by proxy or by postal ballot, agree to any compromise or arrangement and if such compromise or arrangement is sanctioned by the Tribunal by an order, the same shall be binding on the company, all the creditors, or class of creditors or members or class of members, as the case may be, or, in case of a company being wound up, on the liquidator appointed under this Act or under the Insolvency and Bankruptcy Code, 2016, as the case may be, and the contributories of the company.*

(7) *An order made by the Tribunal under sub-section (6) shall provide for all or any of the following matters, namely:—*

- (a) *where the compromise or arrangement provides for conversion of preference shares into equity shares, such preference shareholders shall be given an option to either obtain arrears of dividend in cash or accept equity shares equal to the value of the dividend payable;*
- (b) *the protection of any class of creditors;*
- (c) *if the compromise or arrangement results in the variation of the shareholders' rights, it shall be given effect to under the provisions of section 48;*
- (d) *if the compromise or arrangement is agreed to by the creditors under sub-section (6), any proceedings pending before the Board for Industrial and Financial Reconstruction established under section 4 of the Sick Industrial Companies (Special Provisions) Act, 1985 shall abate;*
- (e) *such other matters including exit offer to dissenting shareholders, if any, as are in the opinion of the Tribunal necessary to effectively*

*implement the terms of the compromise or arrangement:*

*Provided that no compromise or arrangement shall be sanctioned by the Tribunal unless a certificate by the company's auditor has been filed with the Tribunal to the effect that the accounting treatment, if any, proposed in the scheme of compromise or arrangement is in conformity with the accounting standards prescribed under section 133.*

- (8) The order of the Tribunal shall be filed with the Registrar by the company within a period of thirty days of the receipt of the order.*
- (9) The Tribunal may dispense with calling of a meeting of creditor or class of creditors where such creditors or class of creditors, having at least ninety per cent. value, agree and confirm, by way of affidavit, to the scheme of compromise or arrangement.*
- (10) No compromise or arrangement in respect of any buy-back of securities under this section shall be sanctioned by the Tribunal unless such buy-back is in accordance with the provisions of section 68.*
- (11) Any compromise or arrangement may include takeover offer made in such manner as may be prescribed: Provided that in case of listed companies,*

*takeover offer shall be as per the regulations framed by the Securities and Exchange Board.*

- (12) *An aggrieved party may make an application to the Tribunal in the event of any grievances with respect to the takeover offer of companies other than listed companies in such manner as may be prescribed and the Tribunal may, on application, pass such order as it may deem fit. Explanation.—For the removal of doubts, it is hereby declared that the provisions of section 66 shall not apply to the reduction of share capital effected in pursuance of the order of the Tribunal under this section.”*

8. In view of the provision of Section 230 and the decision of the Hon’ble Supreme Court in ‘*Meghal Homes Pvt. Ltd.*’ and ‘*Swiss Ribbons Pvt. Ltd.*’, we direct the ‘Liquidator’ to proceed in accordance with law. He will verify claims of all the creditors; take into custody and control of all the assets, property, effects and actionable claims of the ‘corporate debtor’, **carry on the business of the ‘corporate debtor’ for its beneficial liquidation** etc. as prescribed under Section 35 of the I&B Code. The Liquidator will access information under Section 33 and will consolidate the claim

under Section 38 and after verification of claim in terms of Section 39 will either admit or reject the claim, as required under Section 40. Before taking steps to sell the assets of the ‘corporate debtor(s)’ (companies herein), the Liquidator will take steps in terms of Section 230 of the Companies Act, 2013. The Adjudicating Authority, if so required, will pass appropriate order. Only on failure of revival, the Adjudicating Authority and the Liquidator will first proceed with the sale of company’s assets wholly and thereafter, if not possible to sell the company in part and in accordance with law.”

9. In view of the aforesaid decision, we are of the view that the liquidator should act in terms of the aforesaid directions of the Appellate Tribunal and take steps under Section 230 of the Companies Act. If the members of the ‘Corporate Debtor’ or the ‘creditors’ approach the company through the liquidator for compromise or arrangement by making proposal of payment to all the creditor(s), the Liquidator on behalf of the company will move an application under Section 230 of the Companies Act, 2013 before the National Company Law Tribunal, in terms of the observations as made in ‘*S.C. Sekaran (Supra)*’. On failure, as observed above, steps should be taken for outright sale of the ‘corporate debtor’ so as to enable the employees to continue in service on such outright sale.

9. Both the appeals are disposed of with aforesaid observations and directions. No cost.

[Justice S.J. Mukhopadhaya]  
Chairperson

[ Justice Bansi Lal Bhat ]  
Member (Judicial)

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