

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 792 of 2018

IN THE MATTER OF:

Ajay Agarwal & Anr. ...Appellants

Vs.

Ashok Magnetic Ltd. & Ors. ...Respondents

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Vs.

Ashok Magnetic Ltd. & Ors. ...Respondents

Present: For Appellant: - Mr. Amit Sibal, Senior Advocate with Mr. Rajesh Bohra and Mr. Aditya Narayan, Advocates.

For Respondents: - Mr. Avrojyoti Chatterjee, Mr. Rajiv S. Roy, Mr. Abhijit Roy and Ms. Jayasree Saha, Advocates.

Mr. V. Nagarajan, Liquidator.

O R D E R

22.02.2019— The Appellants preferred these appeals against orders both dated 9th November, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), Single Bench, Chennai, in MA No. 478/2018 and MA No. 163/2018. By one of the impugned orders, the Adjudicating Authority accepted the stand taken by the 'Committee of

Creditors' and thereby rejected the 'Resolution Plan' submitted by Mr. Ajay Agarwal & Anr., members of the Board of Directors. In the other order, the Adjudicating Authority ordered for liquidation of 'M/s. Ashok Magnetics Limited'- ('Corporate Debtor').

2. Learned counsel appearing on behalf of the Appellant(s) submitted that 'M/s. Ashok Magnetics Limited'- ('Corporate Debtor') being a Small Scale Industry comes within the meaning of 'Micro, Small and Medium Enterprises', therefore, its promoters cannot be held to be ineligible under Section 29 A, for filing the 'Resolution Plan' in view of Section 240 A of the 'I&B Code'.

3. It further submitted that the Adjudicating Authority while observed that the 'Committee of Creditors' have not considered the 'Resolution Plan' submitted by the Appellants, held that remand will be futile as the plan cannot be considered. According to learned Senior Counsel, such finding is erroneous.

4. Learned counsel appearing on behalf of the two of the members of the 'Committee of Creditors' referred to the decision of the 'Committee of Creditors' as held in its meeting on 18th September, 2018 at 3.00 PM to suggest that the 'Resolution Plan' submitted by two Resolution Applicants including the Appellants were considered and were voted against by all members of the 'Committee of Creditors'. The relevant portion of the decision of the 'Committee of Creditors' aforesaid reads as follows:

“.... COC members along with the Resolution Professional discussed about the resolution plan and the revised offers given by the two resolution applicants and noted the following:

- a) Offers given by the two resolution applicants were too low, considering the security available including the non core assets, overall scenario and the factory being operational and is a going concern.*
- b) Both the Resolution Applicants have not given due or appropriate Enterprise value to the running factory at Eripakkam, Pondicherry.*

After discussion and deliberations RP put the two resolution plans submitted by above two prospective resolution applicants (Mr. Dorairaj Thillaraj and Mr. Ajay Agarwal jointly with Mr. Ashok Agarwal) into vote.

Both the resolution plans were voted against by all COC members and hence the RP declared that both the Resolutions Plans were rejected.”

5. Learned Senior Counsel appearing on behalf of the Appellants submits that even during the period of liquidation, the liquidator should ensure that the Company should remain the going concern and take steps in terms of Section 230 of the Companies Act, 2013. Reliance has

been placed on the decision of this Appellate Tribunal in **“S.C. Sekaran v. Amit Gupta & Ors.— Company Appeal (AT) (Insolvency) No. 495 & 496 of 2018”**.

6. It is further submitted that the Compromise, Arrangements and Amalgamations can be proposed between the Company and its members or any class of them in terms of Section 230 (1) (b).

7. Mr. V. Nagarajan, the ‘Resolution Professional’ (now Liquidator) appears in person and submits that he will act in accordance with the decision of this Appellate Tribunal in **“S.C. Sekaran v. Amit Gupta & Ors.”** (Supra) and if any Compromise or Arrangements is made between the creditors or the members or class of them, then application under Section 230 of the Companies Act, 2013 will be moved before the National Company Law Tribunal.

8. Heard learned counsel for the parties and perused the record.

9. In the present case, as this Appellate Tribunal find that the ‘Committee of Creditors’ have voted against the ‘Resolution Plan’ having found it not feasible and viable, this Appellate Tribunal is not deciding the first issue whether Board of Directors of ‘M/s. Ashok Magnetics Limited’- (‘Corporate Debtor’) or any of its members are ineligible in terms of Section 29A or not and whether the said provision will be applicable to the promoter(s) of the ‘M/s. Ashok Magnetics Limited’.

10. Further, this Appellate Tribunal do not agree with the observations made by the Adjudicating Authority that even if the case has not been considered on merit, remand will be futile. If a case is not considered by the 'Committee of Creditors' in accordance with law, it is the duty of the Adjudicating Authority to remand the matter to the 'Committee of Creditors' for reconsideration. However, as this Appellate Tribunal has observed that the 'Committee of Creditors' considered the matter and voted against the 'Resolution Plan', this Appellate Tribunal is not inclined to remand the matter to the 'Committee of Creditors'.

11. In "**S.C. Sekaran v. Amit Gupta & Ors.**" (Supra), this Appellate Tribunal having gone to the relevant provisions including Section 230 of the Companies Act, 2013 observed and directed the liquidator to proceed in accordance with law and observed as follows:

"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. The 'Liquidator' if initiates, will complete the process under Section 230 of the Companies Act within 90 days. For the purpose of counting the period of liquidation, the pendency of the appeal(s) preferred by the 'Eight Finance Pvt. Ltd.' that is from 12th July, 2018 and till date should be excluded. In the circumstances, while we are not inclined to interfere with the impugned order(s) both dated 25th June, 2018 direct the Liquidator to act in accordance with law and as observe above.

Both the appeal(s) stand disposed of with the aforesaid observations and directions. No costs.”

12. In view of the aforesaid decision and stand taken by the Appellants and the liquidator, the liquidator is directed to act in accordance with law and observations of this Appellate Tribunal in **“S.C. Sekaran v. Amit Gupta & Ors.”** (Supra). It will be open to the members of ‘M/s. Ashok Magnetics Limited’ or the creditors to contact the liquidator for Compromise or Arrangements in terms of Section 230. If it is found that the scheme is viable, feasible and maximise the assets of the ‘Corporate Debtor’ and balance the creditors, the liquidator will move application under Section 230 before the National Company Law Tribunal for appropriate order and directions. On failure, the liquidator will ensure to sell the ‘Corporate Debtor’ as a going concern in its totality, taking into consideration the interest of the employees of the ‘Corporate Debtor’.

13. Both the appeals stand disposed of with aforesaid observations and directions. No cost.

(Justice S.J. Mukhopadhaya)
Chairperson

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