

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 164 of 2018

(Arising out of Order dated 28th February, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, Mumbai in MA 12/2018 in CP No. 246/I&BP/NCLT/MAH/2017)

IN THE MATTER OF:

Lalit Mishra & Ors.

...Appellants

Vs

Sharon Bio Medicine Ltd. & Ors.

....Respondents

Present:

For Appellants: Mr. Alok Dhir, Ms. Varsha Banerjee, Mr. Milan Singh, Mr. Kunal Godhwani, Mr. Tarun Mehta and Ms. Stuti Vatsa, Advocates.

For Respondents: Mr. Sumant Batra, Ms. Honey Satpal, Ms. Srishti Kapur, Mr. Sanjay Bhatt and Mr. Abhishek Anand, Advocates for R-2 and Ms. Kiran Sharma, C.S.

Mr. Bishwajit Dubey, Mr. Kirat Nagra, Ms. Surabhi Khattar and Mr. Prafful Goyal, Advocates for Monitoring Agency.

Mr. Ankur Kashyap and Mr. Manan Mehta, Advocates for R-3.

Ms. Arushi Singh, Advocate.

Mr. Mustafa Mumtaj, Mr. P.V. Dinesh, Mr. Rajendra Beniwal and Mr. T.P. Sindhu, Advocates for R- 4 & 5.

J U D G M E N T**SUDHANSU JYOTI MUKHOPADHAYA, J.**

The Appellants- 'Lalit Mishra & Ors.' are the promoters of 'Sharon Bio Medicine Ltd.'- ('Corporate Debtor'). In the appeal they have challenged the order dated 28th February, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, Mumbai, under Section 30 (6) of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "I&B Code") read with Regulation 39(4) of the 'Insolvency and Bankruptcy Board of India (Insolvency Resolution Process of Corporate person) Regulations, 2016', whereby and whereunder, the 'Resolution Plan' submitted by the 3rd Respondent- 'Successful Resolution Applicant' has been approved.

2. The Appellants have challenged the order of approval of the 'Resolution Plan' on two counts namely—

- (i) The Appellants, promoters were the shareholders and for them no amount has been provided under the 'Resolution Plan'; and
- (ii) Some of the Appellants, promoters are also 'personal guarantors' who have been discriminated.

3. Learned counsel appearing on behalf of the Appellants submitted that the payment terms provided in the 'Resolution Plan' is in contravention to the applicable provisions of law. The 3rd Respondent- 'Successful

Resolution Applicant' has arbitrarily reduced or written off substantial liabilities of the promoters/ shareholders without any legal basis.

4. It was further submitted that the lenders have not been treated similarly and restructuring for its entire claims of the 'Corporate Debtor' is against the provisions of the 'I&B Code'.

5. It was submitted that the security interest which include the personal guarantees of the Appellants have been reduced to 'nil' and thereby the 'Resolution Plan' have been submitted against the provisions of Sections 133 and 140 of the 'Indian Contract Act'.

6. The submissions made on behalf of the Appellants have been disputed by the learned counsel appearing on behalf of the 'Resolution Professional' and the 3rd Respondent.

7. Section 4 of the 'Resolution Plan' deals with 'raising of funds under the proposed plan'. Under Clause 1 therein, the 'reduction of share capital' has been proposed and it is proposed that the Company undertakes a selective capital reduction of (i) the entire shareholding held by the Promoter Group and Secured Lenders; and (ii) up to 90% of the Equity Shares held by the public shareholders. It is mentioned that the minimum public shareholding requirement of 25% under Indian securities laws shall be adhered to.

8. The restructuring of the financial debt as part of the 'Resolution Plan' approved by the Adjudicating Authority under the 'I&B Code' does not envisage complete discharge of the liability of personal guarantors of the 'Corporate Debtor'. This will be evident from Clause 12 of Section 5 of the 'Resolution Plan' which deals with 'treatment of security'. Therein it is mentioned that all securities/ collaterals/ margin money/ fixed deposit with lien provided by the Company shall be deemed to be released immediately on Effective Date. It is subsequently mentioned that the personal guarantee provided by the existing promoters of the Company, shall result in no liability towards the 'Company' or the 'Resolution Applicants'. This 'treatment of security' and with regard to personal guarantee provided by the existing promoters of the Company is alleged to be in violation of Section 140 and Section 133 of the 'Indian Contract Act'.

However, the aforesaid submissions cannot be accepted, as on approval of the 'Resolution Plan', the claim of the entire stakeholders stand cleared and the 'Personal Guarantor' thereafter cannot claim that they have been discriminated. All the stakeholders have already been cleared by the 3rd Respondent- 'Successful Resolution Applicant'. It was open to them to say that the personal guarantee will not result into any liability towards the 'Company' or the 'Resolution Applicant'.

9. It was not the intention of the legislature to benefit the 'Personal Guarantors' by excluding exercise of legal remedies available in law by the creditors, to recover legitimate dues by enforcing the personal guarantees,

which are independent contracts. It is a settled position of law that the liabilities of guarantors is co-extensive with the borrower. This Appellate Tribunal held that the resolution under the 'I&B Code' is not a recovery suit. The object of the 'I&B Code' is, *inter alia*, maximization of the value of the assets of the 'Corporate Debtor', then to balance all the creditors and make availability of credit and for promotion of entrepreneurship of the 'Corporate Debtor'. While considering the 'Resolution Plan', the creditors focus on resolution of the borrower 'Corporate Debtor', in line with the spirit of the 'I&B Code'.

10. The present appeal has been preferred by the promoters, who are responsible for having contributed to the insolvency of the 'Corporate Debtor'. The 'I&B Code' prohibits the promoters from gaining, directly or indirectly, control of the 'Corporate Debtor', or benefiting from the 'Corporate Insolvency Resolution Process' or its outcome. The 'I&B Code' seeks to protect creditors of the 'Corporate Debtor' by preventing promoters from rewarding themselves at the expense of creditors and undermining the insolvency processes.

11. For the aforesaid reasons, it will be evident from the 'I&B Code' that the powers of the promoters as the members of the Board of Directors of the 'Corporate Debtor' are suspended. The voting right of the shareholders, including promoter shareholders, are suspended and shareholders' approval is deemed to have been granted for implementation of the 'Resolution Plan' as apparent from *explanation* to Section 30(2)(f) of the 'I&B

Code'. The promoters, being 'related parties' of the 'Corporate Debtor', have no right of representation, participation or voting in a meeting of the 'Committee of Creditors'.

12. Admittedly, the shareholders and promoters are not the creditors and thereby the 'Resolution Plan' cannot balance the maximization of the value of the assets of the 'Corporate Debtor' at par with the 'Financial Creditors' or 'Operational Creditors' or 'Secured Creditors' or 'Unsecured Creditors'. They are also ineligible to submit the 'Resolution Plan' to again control or takeover the management of the 'Corporate Debtor'.

13. In the aforesaid background, if no amount is given to the promoters/ shareholders and the other equity shareholders who are not the promoters have been separately treated by providing certain amount in their favour, the Appellant cannot claim to have been discriminated.

14. For the reasons aforesaid and as no case is made out, we dismiss the appeal. No cost.

[Justice S.J. Mukhopadhaya]
Chairperson

[Justice Bansi Lal Bhat]
Member (Judicial)

NEW DELHI

19th December, 2018

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