NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 137 of 2017

[Arising out of Order dated 11th July, 2017 passed by the Adjudicating Authority (National Company Law Tribunal), Chennai Bench, Chennai in Company Petition No. 509/(IB)/CB/2017]

IN THE MATTER OF:

Gaja Trustee Company Private Limited & Ors. ...Appellants

Vs.

Haldia Coke and Chemicals Private Limited ...Respondent

Present: For Appellant: - Mr. Sudipto Sarkar, Senior Advocate assisted by Mr. Abhijeet Sinha, Mr. Jatin Pore, Mr. Shashank Agarwal, Mr. Gurnishan Bir Singh Mann and Mr. Saikat, Advocates.

For Respondents: - Mr. Arun Kathpalia, Senior Advocate assisted by Ms. Pooja M. Saigal, Ms. Khyati Sharma and Mr. Samaksh Goyal, Advocates.

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

The Appellants- Shareholders of Haldia Coke and Chemicals Private Limited ('Corporate Debtor') have preferred the appeal against an order dated 11th July, 2017, passed by the Adjudicating Authority (National Company Law Tribunal), Division Bench, Chennai, whereby and whereunder the application preferred by the 'Corporate Applicant' ('Corporate Debtor') under Section 10 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "I&B Code") has been admitted,

the order of 'Moratorium has been passed and the 'Insolvency Resolution Professional' has been appointed with certain directions.

2. The questions arise for consideration in this appeal are:

i. Whether it is mandatory for the 'Board of Directors' to place the proposal before the shareholders in the 'Extra Ordinary General Meeting' (EoGM) before moving an application under Section 10 of the 'I&B Code' for initiation of 'Corporate Insolvency Resolution Process' against the Company itself ? and;

ii. Whether the decision of the 'Board of Directors' to file application under Section 10 of the 'I&B Code' for initiation of 'Corporate Insolvency Resolution Process' against the Company without approval of the EoGM is against the provisions of the' Articles of Association' of the Company and other provisions of law?

3. According to the Appellants, the application preferred by the person authorized by the 'Board of Directors' filed application under Section 10 of the 'I&B Code' is not maintainable for want of approval of the Shareholders'.

4. Learned Senior Counsel appearing on behalf of the Appellants submitted that the decision to file an application under Section 10 of the 'I&B Code' is vested with the 'shareholders' and the decision of the

'Board of Directors' is against the provisions of the Articles of Association and the Companies Act and regulations framed thereunder.

5. According to learned Senior Counsel for the Appellants, Section 5 (5) demarcates the difference between the application which is made by the 'Corporate Debtor' i.e. the company itself and those made by *"person having control and supervisions of the financial affairs of the 'Corporate Debtor'* or *"the persons who is in charge of managing the operations of the 'Corporate Debtor'".* Any application under Section 10 made on behalf of the 'Corporate Debtor' on the basis of the resolution of the Board of Directors, would be nothing but usurping the powers/ entitlement of the shareholders. According to him, Section 5(5) itself contemplates that a shareholders and other persons can be a 'Corporate Applicant'. Moreover, Section 5(5) (b) refers to the constitutional document of the company thereby indicates the 'Articles of Association' of the Company which is relevant.

6. It was further submitted that the shareholders are the persons with financial stake whose rights will be seriously impaired. In the present case, the Appellants' stake of equity share in the Company is 32% of the entire paid up capital. It is also material that the 'Financial Creditors' have also opposed the application filed by the Board of Directors under Section 10.

7. Referring to the objective of the Articles of Association of the Company, it was submitted that the said Articles of Association

provided certain matters as 'affirmative vote matters' is *inter alia* to put restrictions on the powers of the 'Board of Directors' in case of the specified matters. The effect being that without specific consent as mandated in the Articles of Association, the Board of Directors will not have any power in relation to the said matters. According to him, the Articles of Association are to be construed accordingly and the restrictions imposed therein are to be abided by the Board of Directors and any purported exercise of the powers by the Board of Directors, which is contrary to the restrictions as per the Articles of Association and/or not permitted thereunder, is clearly *ultra vires* and void.

8. It was further submitted that the purported decision of the 'Board of Directors' to file the application under Section 10 of the 'I&B Code' is contrary to the Articles of Association of the Respondent and is invalid and *non-est.*

9. Referring to Article 1.1.3 (d, e, h, i, n, q, r, t) of the Articles of Association, it was contended that the purported decision to file the application is squarely covered by affirmative vote matters for which, as per Article 9.1, prior written consent of the Appellants was mandatory. The Articles of Association of the Company were amended to reflect the provisions of the share subscription and shareholders' agreement dated 31st May, 2010 *inter alia,* executed amongst the Appellants and the Respondents, pursuant to which, the Appellants had invested sum of Rs. 1,25,00,00,000/- in the Respondents and the holding of the

Appellants constitute 32% of the entire paid up share capital of the Company.

10. Learned Senior Counsel appearing on behalf of the Respondents submitted that the appeal has been preferred by minority equity shareholder along with preferential shareholders. According to him, the 'Corporate Debtor' having committed defaults in terms of Section 3(12), the application under Section 10 by the 'Corporate Applicant' is maintainable. The entire purpose of exercise of filing the application under Section 10 is to ensure resolution of insolvency and to avoid liquidation; which mandate and object of the 'I&B Code'. It is obligating of the 'Resolution Professional' to preserve and protect the assets of the 'Corporate Debtor', and to ensure that the Company continuous as "going concern".

11. Learned Senior Counsel for the Respondents further submitted that the preamble of the enactment and the intent and object of the 'I&B Code' is maximization of value of assets of a 'Corporate Debtor' by first attempting a resolution, failing which liquidation of the Company. The Board of Directors of a Company are the best judge of the financial health of the company and are alone capable of taking an informed decision to maximize value of assets of the company. Such matters cannot be subjected to shareholders' approval in order to trigger the resolution process, since the entire purpose of expeditious attempt towards resolution may stand defeated.

12. It was further submitted that the 'Corporate Insolvency Resolution Process' is a statutory process and completely governed and guided by rigors of Section 10 of the 'I&B Code'. If the Adjudicating Authority, on examination of application under Section 10, finds that there has been a default in payment of debt and that the application is in conformity with the provisions of Section 10 of the 'I&B Code' and other applicable rules and forms and that the 'Corporate Applicant' is not otherwise ineligible under Section 11 of the 'I&B Code', it must admit the application so as to initiate 'Corporate Insolvency Resolution Process'.

13. Reliance placed on the decision of this Appellate Tribunal in ***"Unigreen Global Private Limited V/s. Punjab National Bank– Company Appeal (AT) (Insolvency) No. 81 of 2017"***.

14. According to him, for filing an application under Sections 7 or 9 or 10, there is no requirement of shareholders' approval. The 'Corporate Debtor' itself, acting through its Board of Directors, is competent to do so, which in the present case has taken resolution on 13th May, 2017 to move application under Section 10 of the 'I&B Code'.

15. Learned Senior Counsel for the Respondents submitted that the appended instructions to Form 6 (at Annexure VII) prescribes the document such as— Articles of Association or shareholders' agreement is required only for the 'Corporate Applicant' to submit. The application

having been preferred by the 'Corporate Debtor' itself, through Sh. M. Natarajan, CEO, who has been duly authorized by the Board of Directors resolution dated 13th May, 2017, the application under Section 10 is maintainable.

16. According to him, a Company acts through its 'Board of Directors' and in terms of Section 179 of the Companies Act, 2013, the Board of Directors of a Company is entitled to exercise all such powers, and to do all acts and things, as the Company is authorized to exercise to do.

17. Reliance was placed on the clarification issued by the Ministry of Corporate Affairs dated 25th October, 2017, with regard to the requirement of approval of shareholders for a 'Resolution Plan' qua the 'Insolvent Corporate Debtor'.

18. Further, according to Respondent, clause 1.1.3 and in particular sub-clause (r) of the definitions clause in the Articles of Association of the company and clause 9.1 of the Articles of Association, is entirely misplaced and is devoid of any merit, as what the Article seeks to do is to provide a reserved matter in the event the company opts for/resolves upon to initiate a voluntary winding up process, a concept which is entirely different and distinct from an 'Insolvency Resolution Process'.

19. According to him, a voluntary winding up must only lie if the shareholders approve the same and the same is also evident from the provisions of Section 59 of the 'I&B Code'. the two parts are treated

differently since part dealing with a voluntary winding up specifically provides for a shareholders' resolution, no such imposition exists for a 'Corporate Insolvency Resolution Process'.

20. It was further submitted that the 'Corporate Insolvency Resolution Process' is encapsulated in Chapter II whereas liquidation process is provided for in Chapter III of the 'I&B Code'. Further, the provisions of Voluntary Liquidation of Insolvency Code is provided under Chapter V of the 'I&B Code'. Pertinently, specific Rules/Regulations have been notified in the 'I&B Code' governing each such process. The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 and Application to Adjudicating Authority Rules, 2016 would govern the 'Corporate Insolvency Resolution Process'. The Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations 2016 would govern the liquidation process under Chapter III and the Insolvency and Bankruptcy Board of India (Voluntary Liquidation Process) regulations, 2017 would govern the voluntary liquidation process under Chapter V of the 'I&B Code'.

21. In regard to Article 9.1, it was submitted that the said Article is to be read with the definition clause of Articles of Association is to be interpreted to include Insolvency, the Article would be void/un-enforceable in view of Section 238 of the 'I&B Code'. A similar provision is also incorporated in Section 6, Companies Act, 2013 which stipulates

that the provisions of Act shall have effect notwithstanding anything contrary contained in the memorandum or Articles of a Company and that any provision contained in the memorandum, articles, agreement or resolution shall, to the extent to which it is repugnant to the provisions of this Act become or be void, as the case may be. The alleged reserve matter pertaining to liquidation, dissolution and winding up, will therefore, have no applicability for an action taken by the Board of Directors in the interest of the Company, its shareholders as well as creditors of the company by seeking to invoke 'Corporate Insolvency Resolution Process'.

22. It was submitted that the right to invoke a statutory remedy cannot be curtailed in the manner contemplated or asserted by the Appellant. Reliance was placed on ***"Surendra Kumar Dhawan and Anr. V/s. R. Vir and Ors.— (1977) Vol 47 Company Cases 276"*** and ***"O.P Gupta V/s. Shiv General Finance (P) Limited & Ors.— (1977) Vol. 47 Company Cases 279"***.

23. According to the Respondents, application under Section 10 of the 'I&B Code' being complete in all respects, was supported by a valid resolution of the Board of Directors of the Company, it was rightly admitted.

24. We have heard learned counsel for the parties and perused the record and relevant provisions.

25. Article 1.1.3 of Articles of Association defines "Affirmative Vote Matters", relevant of which reads as follows:

> *"1.1.3* ***"Affirmative Vote Matters"*** *means the following matters listed below whether proposed to be decided upon at the Board and/or at the Shareholders' meeting or in any other manner:*
>
> *(a) Any strategic alliance/ joint venture proposal to be entered into by the Company or any incorporation of a subsidiary;*
>
> *(b) To acquire through subscription, purchase or otherwise, securities, debentures or bonds in or of any other body corporate;*
>
> *(c) Any amendment to the provisions of the Memorandum or Articles or other constitutional documents of the Company;*
>
> *xxx xxx xxx*
>
> *(l) Creating any Encumbrance on the Assets of the Company over and above an aggregate amount exceeding Rs. 25,00,000/- (Rupees Twenty Five Lacs only);*
>
> *(m) Creation of any lien on the Shares held by the Promoters, or any assets of the Company valued in excess of 5% of the net worth of the Company;*

(n) Sale or disposal of the Company's assets which during the financial year of the Company have a fair market value of more than Rs. 50,00,000/-;

(o) Capital expenditure exceeding Rs. 5,00,00,000/- (Rupees Five Crores only) in any financial year other than as approved in the business plan;

(p) Approval of the annual financial statements, distribution of profits and coverage of losses of the Company;

(q) Amalgamation or re-organization or consolidation of the Company;

(r) A liquidation, dissolution or winding-up of the Company or any of its subsidiaries;

(s) Filing of all offering materials to be utilized in connection with any public offering of shares of the company;

(t) Any alteration of any rights attached to any share capital of the Company."

26. From clause (r) of Article 1.1.3 of the Articles of Association it is clear that liquidation, dissolution or winding-up of the Company or any of its subsidiaries to be placed for affirmative vote at the Shareholders meeting upon decision of the 'Board of Directors'.

27. Article 9.1 which also relate to "Affirmative Vote Matters", which reads as follows:

> *"**9. Affirmative Vote Matters***
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> *9.1 No action or decision shall be taken and/or no resolution shall be adopted at a Board meeting or a Shareholder meeting any committee thereof, or any of the employees, officers or managers or the Target Companies, in respect of any Affirmative Vote Matter save and except with the prior written consent of the Investors.*
>
> *For this purpose, any connected contracts or transactions shall be combined to determine the applicability of the limits specified in the Affirmative Vote Matters."*

28. From the aforesaid provisions, it is clear that no action or decision can be taken and/or no resolution can be adopted at a Board meeting or a Shareholders meeting any committee thereof, or any of the employees, officers or managers or the Target Companies, in respect of any 'Affirmative Vote Matter' save and except with the prior written consent of the Investors.

29. Article 9.2 mandate that the 'affirmative vote matters' specified in Article 9.1 shall be taken by the Company only at a 'general meeting', as quoted below:

> *"9.2 In the event the provisions of Article 9.1 hereof are rendered unenforceable under law, all decision in relation to any of the Affirmative Vote Matters specified in Article 9.1 shall be taken by the Company only at a general meeting."*

30. From the aforesaid provision, it is clear that for the purpose of liquidation, dissolution or winding-up of the Company or any of its subsidiaries, 'affirmative vote matters' is required to be taken by the Company only at a general meeting.

31. Learned Senior Counsel for the Respondents referred to Section 179 of the Companies Act, 2013 to suggest that the Company acts through its Board of Directors. However, as per 1st and 2nd proviso of Section 179, the Board of Directors of the Company is entitled to exercise all such powers is subject to the provisions contained in the memorandum or articles of the Company. Under sub-section (3) of Section 179, the Board of Directors have been provided with limited power to act on behalf of the Company and have not been empowered to file an application for 'Corporate Insolvency Resolution Process' under Section 10 which may result into liquidation of Company itself in

absence of proper 'Resolution Plan'. This is apparent from the relevant provision of Section 179 as quoted below:

> "***179. Powers of Board.*** — *(1) The Board of Directors of a company shall be entitled to exercise all such powers, and to do all such acts and things, as the company is authorised to exercise and do:*
>
> *Provided that in exercising such power or doing such act or thing, the Board shall be subject to the provisions contained in that behalf in this Act, or in the memorandum or articles, or in any regulations not inconsistent therewith and duly made thereunder, including regulations made by the company in general meeting:*
>
> *Provided further that the Board shall not exercise any power or do any act or thing which is directed or required, whether under this Act or by the memorandum or articles of the company or otherwise, to be exercised or done by the company in general meeting.*

(2) No regulation made by the company in general meeting shall invalidate any prior act of the Board which would have been valid if that regulation had not been made.

(3) The Board of Directors of a company shall exercise the following powers on behalf of the company by means of resolutions passed at meetings of the Board, namely: —

(a) to make calls on shareholders in respect of money unpaid on their shares;

(b) to authorise buy-back of securities under section 68;

(c) to issue securities, including debentures, whether in or outside India;

(d) to borrow monies;

(e) to invest the funds of the company;

(f) to grant loans or give guarantee or provide security in respect of loans;

(g) to approve financial statement and the Board's report;

(h) to diversify the business of the company;

(i) to approve amalgamation, merger or reconstruction;

(j) to take over a company or acquire a controlling or substantial stake in another company;

(k) any other matter which may be prescribed:

Provided that the Board may, by a resolution passed at a meeting, delegate to any committee of directors, the managing director, the manager or any other principal officer of the company or in the case of a branch office of the company, the principal officer of the branch office, the powers specified in clauses (d) to (f) on such conditions as it may specify:

Provided further that the acceptance by a banking company in the ordinary course of its business of deposits of money from the public repayable on demand or otherwise and withdrawable by cheque, draft, order or otherwise, or the placing of monies on deposit by a banking company with another banking company on such conditions as the Board may prescribe, shall not be deemed to be a borrowing of monies or, as the case may be, a making of

loans by a banking company within the meaning of this section.

Explanation I.—Nothing in clause (d) shall apply to borrowings by a banking company from other banking companies or from the Reserve Bank of India, the State Bank of India or any other banks established by or under any Act.

Explanation II. —In respect of dealings between a company and its bankers, the exercise by the company of the power specified in clause (d) shall mean the arrangement made by the company with its bankers for the borrowing of money by way of overdraft or cash credit or otherwise and not the actual day-to-day operation on overdraft, cash credit or other accounts by means of which the arrangement so made is actually availed of.

(4) Nothing in this section shall be deemed to affect the right of the company in general meeting to impose restrictions and conditions on the exercise by the Board of any of the powers specified in this section."

32. On initiation of 'Corporate Insolvency Resolution Process', the Board of Directors are suspended, it cannot exercise its power during the period of 'Moratorium'. If sub-section (4) of Section 179 is seen, it will be evident that the said Section 179 shall not be deemed to affect the right of the Company in general meeting to impose restrictions and conditions on the exercise by the Board of any of the powers specified in the said Section. Therefore, the Company has right in the general meeting to impose restrictions and conditions which will prevail over the powers of the Board as specified in sub-section (3) of Section 179.

33. In ***"John Tinson & Co. Pvt. Ltd. & Ors. V/s. Surjeet Malhan (Mrs) and Anr.–(1997) 9 SCC 651"*** , the Hon'ble Supreme Court held that "it is now a well-settled legal position that Articles of Association of a private company is a contract between the parties."

34. In ***"Naresh Chandra Sanyal V/s. Calcutta Stock Exchange Association Ltd.–1971 (1) SCC 50"***, the Hon'ble Supreme Court observed that subject to the provisions of the Companies Act, the Company and the members are bound by the provisions contained in the Articles of Association, as quoted below:

> *"14. Subject to the provisions of the Companies Act the Company and the members are bound by the provisions contained in the Articles of Association. The Articles regulate the internal management of the Company and define the*

powers of its officers. They also establish a contract between the Company and the members and between the members inter se. the contract governs the ordinary rights and obligations incidental to membership in the Company. In the absence of any provisions contained in the Indian Companies Act which prohibit a Company from forfeiting a share for failure on the part of the member to carry out an undertaking or an engagement the Articles of a Company which provide that in certain events membership rights of the shareholder including his right to the share will be forfeited are binding. The Articles of Association of the Exchange expressly provide that in the event of the member failing to carry out the engagement and in the conditions specified therein his share shall stand forfeited. Articles 22, 24, 26, 27 and 29 of the Exchange relating to forfeiture of shares in certain events are therefore valid."

35. The Hon'ble Supreme Court in ***"Life Insurance Corporation of India V/s. Escorts Ltd. and Others. – (1986) 1 SCC 264"*** held:

"A Company is, in some respects, an institution like as State functioning under its 'basis Constitution'

consisting of the Companies Act and the memorandum of Association. Carrying the analogy of constitutional law a little further, Gower describes "the members in general meeting" and the directorate as the two primary organs of a company and compares them with the legislative and the executive organs of a Parliamentary democracy where legislative sovereignty rests with Parliament, while administration is left to the Executive Government, subject to a measure of control by Parliament through its power to force a change of Government. Like the Government, the Directors will be answerable to the 'Parliament' constituted by the general meeting. But in practice (again like the Government), they will exercise as much control over the Parliament as that exercises over them. Although it would be constitutionally possible for the company in general meeting to exercise all the powers of the company, it clearly would not be practicable (except in the case of one or two - man - companies) for day-to-day administration to be undertaken by such a cumbersome piece of machinery. So the modern practice is to confer on the Directors the right to exercise all the company's powers except such as

general law expressly provides must be exercised in general meeting. Gower's Principles of Modern Company Law. Of course, powers which are strictly legislative are not affected by the conferment of powers on the Directors as section 31 of the Companies Act provides that an alteration of an article would require a special resolution of the company in general meeting. But a perusal of the provisions of the Companies Act itself makes it clear that in many ways the position of the directorate vis-a-vis the company is more powerful than that of the Government vis-a-vis the Parliament. The strict theory of Parliamentary sovereignty would not apply by analogy to a company since under the Companies Act, there are many powers exercisable by the Directors with which the members in general meeting cannot interfere. The most they can do is to dismiss the Directorate and appoint others in their place, or alter the articles so as to restrict the powers of the Directors for the future. Gower himself recognises that the analogy of the legislature and the executive in relation to the members in general meeting and the Directors of a Company is an over-simplification and states "to

some extent a more exact analogy would be the division of powers between the Federal and the State Legislature under a Federal Constitution." As already noticed, the only effective way the members in general meeting can exercise their control over the Directorate in a democratic manner is to alter the articles so as to restrict the powers of the Directors for the future or to dismiss the Directorate and appoint others in their place. The holders of the majority of the stock of a corporation have the power to appoint, by election, Directors of their choice and the power to regulate them by a resolution for their removal. And, an injunction cannot be granted to restrain the holding of a general meeting to remove a director and appoint another."

36. In view of the aforesaid decision of the Hon'ble Supreme Court and other Hon'ble Courts, we hold that the Article 1.1.3; 9.1 and 9.2 are binding on all the 'shareholders' as also on the 'Board of Directors' as also on 'the Company'. We have already held that the 'Board of Directors' of a Company is not empowered to file an application under Section 10 for its own liquidation or dissolution or 'Corporate Insolvency Resolution Process'. For the said reason, the application under Section 10 filed by the Board of Directors was not maintainable. The argument

that Section 59 of the 'I&B Code' is the only provision for liquidation, cannot be accepted as initiation of 'Corporate Insolvency Resolution Process' by the Company ('Corporate Debtor') against itself under Section 10 may result into its own liquidation. If the 'Resolution Process' starts and ultimately fails because of non-approval of the 'Resolution Plan', at that stage provisions of 'Articles of Association' cannot be given effect nor the approval of the shareholders can be taken.

37. An application under Section 7 of the 'I&B Code' or Section 9 cannot be equated with application under Section 10. On filing an application under Section 7 or Section 9, the Board of Directors may take steps for 'Corporate Insolvency Resolution Process' against other 'Corporate Debtor' but not against its own Company.

38. In the present case, as we find that no decision has been taken by the Shareholders in their 'Extra Ordinary General Meeting', we hold the application under Section 10 filed by the person authorized by the Board of Directors, was not maintainable.

39. For the reasons aforesaid, we set aside the impugned order dated 11th July, 2017 passed by the Adjudicating Authority in CP/509/(IB)/CB/2017 and allow the appeal.

40. In effect, order (s), passed by the Adjudicating Authority appointing any 'Interim Resolution Professional', declaring moratorium, freezing of account, and all other order (s) passed by the Adjudicating Authority pursuant to impugned order and action, if any, taken by the 'Interim Resolution Professional', including the advertisement, if any, published in the newspaper calling for applications all such orders and actions are declared illegal and are set aside. The application preferred under Section 10 of the I&B Code, 2016 is dismissed. Learned Adjudicating Authority will now close the proceeding. The 'Corporate Debtor' (company) is released from all the rigour of law and is allowed to function independently through its Board of Directors from immediate effect.

41. The Adjudicating Authority will fix the fee of the 'Resolution Professional', and the 'Corporate Debtor' will pay the fees of the 'Resolution Professional', for the period he has functioned. The appeal is allowed with aforesaid observation. However, in the facts and circumstances of the case, there shall be no order as to cost.

(Justice S.J. Mukhopadhaya)
Chairperson

(Justice Bansi Lal Bhat)
Member(Judicial)

NEW DELHI
19th July, 2018
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