

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI
Company Appeal (AT) (Insolvency) No. 156 of 2018

(Arising out of Order dated 13th March, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), Kolkata Bench, Kolkata in CP(IB) No. 363/KB/2017)

IN THE MATTER OF:

Sunil Jain

...Appellant

Vs

Punjab National Bank & Ors.

...Respondents

Present:

For Appellant: Mr. Rana Mukherjee, Senior Advocate with Mr. Gautam Singh, Advocate.

**For Respondents: Mr. Rajesh Kr. Gautam, Ms. Khushboo Aggarwal and Mr. Aakash Sehrawat, Advocates for R-1 (PNB).
Mr. Narendra Singh and Mr. Sunney Verma, Advocates for R-2.**

Mr. Joy Saha, Sr. Advocate with Mr. Avishek Guha, Advocate for RP. Mr. Arun Gupta, Resolution Professional in person.

Mr. Arun Kathpalia, Senior Advocate with Mr. Ranjan Kumar Pandey, Advocates.

Mr. Sandeep Bisht and Mr. Anuj Tiwari, Advocates for C. P. Ispat.

Mr. Harsh Jain, Mr. Puneet Jain and Mr. Arijit Mazumdar, Advocates for IDBI.

With

**Contempt Case (AT) No. 10 of 2018 in
Company Appeal (AT) (Insolvency) No. 156 of 2018**

(Arising out of Order dated 24th April, 2018 passed by this Appellate Tribunal in Company Appeal (AT) (Insolvency) No. 156 of 2018)

IN THE MATTER OF:

Sunil Jain

...Applicant

Vs

Amit Agarwal & Ors.

**....Contemnor/
Respondents**

Present:

For Applicant: Mr. Gautam Singh, Advocate.

**For Respondents: Mr. Rajesh Kr. Gautam, Advocate for R-1 (PNB).
Mr. Narendra Singh, Advocate for R-2.**

**Mr. Joy Saha, Sr. Advocate with Mr. Avishek Guha,
Advocate for RP. Mr. Arun Gupta, Resolution
Professional in person.**

**Mr. Arun Kathpalia, Senior Advocate with Mr.
Ranjan Kumar Pandey, Mr. Sandeep Bisht and Mr.
Anuj Tiwari, Mr. Aditya Dhar, Advocates for C. P.
Ispat.**

**Mr. Harsh Jain, Mr. Puneet Jain and Mr. Arijit
Mazumdar, Advocates for IDBI.**

With

Company Appeal (AT) (Insolvency) No. 180 of 2018

(Arising out of Order dated 13th March, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), Kolkata Bench, Kolkata in CP(IB) No. 363/KB/2017)

IN THE MATTER OF:

Prakash Chand Jain

...Appellant

Vs

Punjab National Bank & Ors.

....Respondents

Present:

**For Appellant: Mr. Rudreshwar Singh and Mr. Vinay Vats,
Advocates.**

For Respondents: Mr. Rajesh Kr. Gautam and Ms. Khushboo Aggarwal, Advocate for R-1 (PNB).

Mr. Joy Saha, Sr. Advocate with Mr. Avishek Guha, Advocate for RP. Mr. Arun Gupta, Resolution Professional in person.

Mr. Arun Kathpalia, Senior Advocate with Mr. Ranjan Kumar Pandey, Mr. Sandeep Bisht, Mr. Anuj Tiwari and Mr. Aditya Dhar, Advocates for C. P. Ispat.

Mr. Harsh Jain, Mr. Puneet Jain and Mr. Arijit Mazumdar, Advocates for IDBI.

With

Company Appeal (AT) (Insolvency) No. 481 of 2018

(Arising out of Order dated 11th July, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), Kolkata Bench, Kolkata in CP(IB) No. 363/KB/2017, CA (IB) Nos. 272, 583/KB/2018)

IN THE MATTER OF:

M V Projects

...Appellant

Vs

Divya Jyoti Sponge Iron Pvt. Ltd. & Ors.

....Respondents

Present:

For Appellant: Mr. Swapnil Gupta and Ms. Ankita Sinha, Advocates.

For Respondents: Mr. Rajesh Kr. Gautam, Advocate for R-1 (PNB).

Mr. Joy Saha, Sr. Advocate with Mr. Avishek Guha, Advocate for RP. Mr. Arun Gupta, Resolution Professional in person.

Mr. Arun Kathpalia, Senior Advocate with Mr. Ranjan Kumar Pandey, Mr. Sandeep Bisht and Mr. Anuj Tiwari, Advocates for C. P. Ispat.

Mr. Harsh Jain, Mr. Puneet Jain and Mr. Arijit Mazumdar, Advocates for IDBI.

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

All these appeals arise out of two different orders dated 13th March, 2018 and 11th July, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), Kolkata Bench, Kolkata, passed in common proceeding, and as such they were heard together and are being disposed of by this common judgment.

2. The Contempt application arises out of one of our order dated 24th April, 2018 which is alleged to have been violated by the Contemnors.

3. In the 'Corporate Insolvency Resolution Process' against 'Divya Jyoti Sponge Iron Private Limited'- ('Corporate Debtor'), the Adjudicating Authority by impugned order dated 13th March, 2018, approved the 'Resolution Plan' submitted by 'CP Ispat Private Limited'- ('Successful Resolution Applicant'). The same is under challenge by the Appellants- Mr. Sunil Jain and Mr. Prakash Chand Jain, two of the Shareholders/ Promoters.

4. 'M/s. MV Projects'- Appellant, in the other appeal one of the 'Operational Creditor', is aggrieved against the order dated 11th July, 2018 passed by the Adjudicating Authority in CA (IB) No. 583/KB/2018 in CP(IB) No. 363/KB/2017, whereby the Adjudicating Authority held that the 'Resolution Plan' having approved, the application filed by the 'Operational Creditor' is not maintainable.

Company Appeal (AT) (Insol.) No. 156 of 2018

5. Learned counsel for the Appellant- Mr. Sunil Jain submitted that the 'Interim Resolution Professional' has acted in violation of Section 21 of the 'I&B Code' and there were serious allegations against him. The 'Interim Resolution Professional' did not even consider nor paid the cost of basic essential services which were provided for keeping the 'Corporate Debtor' as a going concern. On contrary, the amounts are due to different 'Operational Creditor' for the goods supplied and services rendered to the 'Corporate Debtor' during the 'Insolvency Resolution Process'.

6. It was further submitted that Appellant- Mr. Sunil Jain, being a Promoter/Shareholder requested the members of the 'Committee of Creditors' to inform him the amount of overdues so that he can pay the same to Banks to avoid his ineligibility under Section 29A (c) of the 'I&B Code'. However, the members of the 'Committee of Creditors' did not take any action on such request.

7. It was further submitted that the 'Resolution Plan' so approved is not in accordance with law as the right of the shareholders extinguished in violation of Sections 56 & 57 of the Companies Act, 2013.

8. From the record, we find that Mr. Sunil Jain also filed a 'Resolution Plan', being a Promoter, but the same was rejected, he being ineligible under Section 29A (c) of the 'I&B Code'.

9. Learned counsel appearing on behalf of the 'Resolution Professional', while highlighted the aforesaid facts, submitted that during the meeting of the 'Committee of Creditors' when 'Committee of Creditors' discussed the eligibility of Mr. Sunil Jain, being a Promoter and Director of the 'Corporate Debtor' he was informed that the full amount claimed by the 'Financial Creditors' in terms of the 'I&B Code', as per claims filed with the 'Interim Resolution Professional', was the amount overdue and Mr. Sunil Jain was required to pay the same in order to become eligible and to submit a 'Resolution Plan'. During the meeting of the 'Committee of Creditors', Mr. Sunil Jain informed that he would not be able to pay the full claim amount to the 'Financial Creditors', as required in terms of Section 29A (c) of the 'I&B Code'. In this background, the 'Resolution Plan' has not been considered.

10. Learned counsel appearing on behalf of the 'Interim Resolution Professional' also submitted that the 'Corporate Debtor' is a closely held Private Limited Company and as such the entire shareholding of the

‘Corporate Debtor’ is distributed amongst the members of the Jain family and/or their associates. The shareholders of the ‘Corporate Debtor’ and their relationship with Mr. Sunil Jain are as follows:

Name of shareholder	Percentage of shareholding	Relationship with Shri Sunil Jain
Gouri Shankar Jain	0.02%	Father
Anil Jain	7.46%	Brother
Gouri Shankar Jain (HUF)	43.44%	Father is Karta
Renu Jain	10.74%	Relative
Rashmi Jain	7.09%	Brother's wife
Sweta Jain	3.87%	Relative
Parasnath Crushers Pvt. Ltd.	8.28%	Family controlled enterprise

11. It was further submitted by learned counsel for the ‘Resolution Professional’ that as on the date of admission, the ‘Corporate Debtor’ had only three Directors, one being Mr. Sunil Jain and the others Mr. Gouri Shankar Jain and Mr. Anil Jain.

12. In view of the stand taken by the ‘Resolution Professional’ and not disputed by the Appellant, we hold that the ‘Committee of Creditors’ rightly rejected the ‘Resolution Plan’ submitted by Appellant- Mr. Sunil Jain, he being ineligible in terms of Section 29A (c).

We have noticed that though time was allowed to Mr. Sunil Jain to pay the NPA amount of the ‘Corporate Debtor’ in terms of Clause (c) of Section 29A but he expressed his inability to pay the same.

13. So far as right of Shareholders are concerned, from the record we find that shareholders claim have been taken into consideration by

‘Successful Resolution Applicant’ in the ‘Resolution Plan’ submitted by him. In view of proposal of taking over the shares of the Promoters as approved by the Adjudicating Authority, it is not required to comply with the provisions of Sections 56 & 57 of the Companies Act, 2013 being a formality which can be completed even after the approval of the ‘Resolution Plan’, at the stage of implementation of the plan. We find no merit in the appeal preferred by Mr. Sunil Jain.

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14. From the record, it appears that Appellant- ‘Mr. Prakash Chand’ Jain also submitted a ‘Resolution Plan’ on 12th February, 2018. However, it was not entertained and thereby rejected by the ‘Committee of Creditors’, having filed after cutoff date i.e. on 2nd February, 2018.

15. Learned counsel appearing on behalf of the ‘Resolution Professional’ submitted that the Appellant- ‘Mr. Prakash Chand’ is acting in concert with erstwhile Management and, therefore, he was ineligible in terms of Section 29A of the ‘I&B Code’.

16. It is further submitted that the ‘Resolution Plan’ approved by the ‘Committee of Creditors’ is far superior in terms of maximization of value of assets of the ‘Corporate Debtor’. Against the upfront payment of Rs. 34.25 Crores to secured ‘Financial Creditor’, the Appellant- ‘Mr. Prakash

Chand' proposed a payment of Rs.35.62 Crores over a period of 30 months, and he is not in a position to infuse any amount in the company within the period of implementation.

17. It was submitted that the Information Memorandum was not obtained by Appellant- 'Mr. Prakash Chand' from the 'Resolution Professional', in spite of it, he applied knowing details of the Information Memorandum, including the liabilities and assets of the 'Corporate Debtor', which makes it clear that he acted in concert with the other Applicant, who is related party of the erstwhile management of the 'Corporate Debtor'.

18. However, we are not deciding the aforesaid issue. In the present case, as we find that the 'Committee of Creditors' found that the 'Resolution Plan' submitted by the 'Successful Resolution Applicant' is superior than the 'Resolution Plan' as submitted by the Appellant- 'Mr. Prakash Chand' while evaluating the suitability, feasibility and commercial viability of the 'Corporate Debtor', we find no ground to interfere with the impugned order.

Company Appeal (AT) (Insol.) No. 481 of 2018

19. Learned counsel for the Appellant- 'M/s. MV Projects' submitted that it is a sole proprietorship concern, which is a 'supplier of coal' for the business of the 'Divya Jyoti Sponge Iron Pvt. Ltd.'- ('Corporate

Debtor'). The supply of coal has been made to the 'Corporate Debtor' even after the initiation of the 'Corporate Insolvency Resolution Process' on 23rd August 2017 i.e. during the 'Insolvency Resolution Process' to keep the company as a going concern. The 'Resolution Professional' placed orders with the Appellant even after initiation of the 'Corporate Insolvency Resolution Process'. An amount of Rs. 26,68,298/- remained outstanding which is due and payable to the Appellant.

20. The 'Resolution Professional' has not filed any reply denying the claim aforesaid. As per the provisions of the 'I&B Code' and the Regulations framed, the 'Insolvency Resolution Cost' is payable in priority to other costs both in the case of success of Resolution and in the case of liquidation without any haircuts. The Adjudicating Authority by impugned order dated 11th July, 2018 has not addressed the aforesaid issue on the ground that the 'Resolution Plan' has already been approved.

21. Section 5(13) defines 'insolvency resolution process costs' and reads as follows:

“5. Definition— (13) *“insolvency resolution process costs” means—*

(a) the amount of any interim finance and the costs incurred in raising such finance;

(b) the fees payable to any person acting as a resolution professional;

- (c) any costs incurred by the resolution professional in running the business of the corporate debtor as a going concern;*
- (d) any costs incurred at the expense of the Government to facilitate the insolvency resolution process; and*
- (e) any other costs as may be specified by the Board;”*

22. Section 14 defines ‘Moratorium’ and sub-section (2) of Section 14 reads as follows:

14. Moratorium.—(1) *Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely:—*

- (a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;*
- (b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its*

assets or any legal right or beneficial interest therein;

(c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);

(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

(2) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.....”

23. As per Section 30(2), the ‘Resolution Professional’ is required to examine that each of the ‘Resolution Plan’ confirm the provisions as made therein. Relevant portion of sub-clause (a) of sub-section (2) of Section 30 reads as follows:

“30. Submission of resolution plan— (2) The resolution professional shall examine each

resolution plan received by him to confirm that each resolution plan—

(a) provides for the payment of insolvency resolution process costs in a manner specified by the Board in priority to the repayment of other debts of the corporate debtor;

24. Regulation 31 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 deals with ‘Insolvency Resolution Process Costs’ and reads as follows:

“31. Insolvency resolution process costs. –

“Insolvency resolution process costs” under section 5(13) (e) shall mean—

(a) Amounts due to suppliers of essential goods and services under Regulation 32;

[(aa) fee payable to authorized representative under sub-regulation (7) of regulation 16A;]

[(ab) out of pocket expenses of authorized representative for discharge of his functions under section 25;]

- (b) Amounts due to a person whose rights are prejudicially affected on account of the moratorium imposed under Section 14(1) (d);*
- (c) Expenses incurred on or by the interim resolution professional to the extent ratified under regulation 33;*
- (d) Expenses incurred on or by the resolution professional fixed under regulation 34; and*
- (e) Other costs directly relating to the corporate insolvency resolution process and approved by the committee.”*

25. In view of the aforesaid provision, if the Appellant has supplied the goods during the period of the ‘Corporate Insolvency Resolution Process’ to keep the company as a going concern, it was the duty of the ‘Resolution Professional’ to include such cost towards ‘Resolution Process Cost’ for payment in favour of Appellant for non-inclusion of the same, it can be held that the ‘Resolution Plan’ in question is in violation of Section 30(2) (a) of the ‘I&B Code’.

26. However, taking into consideration the fact that it is failure on the part of the ‘Resolution Professional’ who had not included the same nor looked into the matter, we do not want to put blame on ‘Successful Resolution Applicant’. However, to uphold the ‘Resolution Plan’ and to

hold that the plan is in accordance with law, we modify the plan and pass the following orders:

- (i) The Appellant will file application before the 'Corporate Debtor' through the 'Successful Resolution Applicant' enclosing the copies of evidence /invoices etc. in support of supply of goods (coal) during the period of 'Corporate Insolvency Resolution Process' i.e. during the date of admission onwards.
- (ii) The 'Corporate Debtor' alongwith the 'Interim Resolution Professional' will verify the same and will pay the total admitted dues without any cut within 30 days, failing which, the 'Resolution Plan' may be held to be in violation of Section 30(2) (a) of the 'I&B Code'.
- (iii) The 'Corporate Debtor' through the 'Successful Resolution Applicant' if refuses the claim or part thereof, will communicate the ground to the Appellant.
- (iv) If the refusal is not in accordance with law, it will be open to the Appellant to file an Interlocutory Application in this appeal to re-open the issue to decide whether the 'Resolution Plan' is in violation of Section 30(2) (a) of the 'I&B Code' or not.

27. In view of the findings above, we dismiss the Company Appeal (AT) (Insolvency) Nos. 156 and 180 of 2018 and allow the Company Appeal (AT) (Insolvency) No. 481 of 2018 preferred by Appellant- 'M.V. Projects' with aforesaid observations and directions.

28. As regards contempt petition is concerned, in view of order aforesaid and in absence of any deliberate and willful violation, we are not inclined to initiate any Contempt Proceeding. The Contempt Case (AT) No. 10 of 2018 is dismissed and is closed.

[Justice S. J. Mukhopadhaya]
Chairperson

[Justice Bansi Lal Bhat]
Member (Judicial)

NEW DELHI

24th April, 2019

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