NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 601 of 2019

IN THE MATTER OF:

Shweta Vishwanath Shirke & Ors. Appellants

Vs

The Committee of Creditors & Anr. Respondents

Present:

For Appellants: **Mr. Rajeev Ranjan, Senior Advocate with Mr. Sanklap Sharma, Mr. Aarif Akhtar, Advocates.**

For Respondents: **Mr. Siddharth Sharma, Advocate for Respondent No.1.**

Mr. Sandeep Bajaj, Mr. Soayib Qureshi, Mr. Deepanjan Dutta and Mr. Naman Tandon, Advocates for Liquidator.

Mr. A.K. Mishra, Advocate for Andhra Bank.

Mr. Pranav Vyas and Mr. Satendra K. Rai, Advocate for Respondent No.2, Resolution Professional.

With

Company Appeal (AT) (Insolvency) No. 612 of 2019

IN THE MATTER OF:

Andhra Bank Appellant

Vs

Sterling Biotech Ltd.
(Through the Liquidator) & Ors. Respondents

Present:

For Appellant: **Mr. Siddharth Sharma and Mr. A.K. Mishra, Advocates**

For Respondents: **Mr. Sandeep Bajaj, Mr. Soayib Qureshi, Mr. Deepanjan Dutta and Mr. Naman Tandon, Advocates for Liquidator**

Mr. Nitesh Rana and Mr. Adil Ali Khan, (SPP) for Enforcement Directorate (R-3)

Mr. Pranav Vyas and Mr. Satendra K. Rai, Advocate for Respondent No.2, Resolution Professional.

With

Company Appeal (AT) (Insolvency) No. 527 of 2019

IN THE MATTER OF:

Sundaresh Bhatt,
Resolution Professional for
Sterling Biotech Ltd. Appellant

Vs

Andhra Bank Respondent

Present:

For Appellant: **Mr. Pranav Vyas and Mr. Satendra K. Rai, Advocates.**

O R D E R

28.08.2019 The main grievance of the Appellant – 'Shweta Vishwanath Shrike & Ors' (employees of the 'Corporate Debtor') is that though the application under Section 12A of the Insolvency and Bankruptcy Code, 2016 (for short, 'the **I&B Code'**) was filed at the instance of the 'Promoter' approved with more than 90% voting share of the 'Committee of Creditors', but it was rejected by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, Mumbai on the ground that the 'Promoter' not eligible to file the 'resolution plan' under Section 29A cannot file the application under

Section 12A of the 'I&B Code'. The impugned order dated 8th May, 2019 passed by the Adjudicating Authority has also been challenged by the 'Andhra Bank' in Company Appeal (AT) (Ins.) No. 612 of 2019 and the 'Resolution Professional' in Company Appeal (AT) (Ins.) No. 527 of 2019, but on different grounds.

2. Learned counsel appearing on behalf of the 'Andhra Bank' submits that Section 29A is not applicable to an application filed under Section 12A for withdrawal of application under Section 7 filed by Andhra Bank, if the Committee of Creditors accept the same with more than 90% of the voting share.

3. The 'Resolution Professional' has challenged the order dated 8th May, 2019 insofar it relates to observations made by the Adjudicating Authority against Mr. Sundaresh Bhat ('Resolution Professional').

4. Notices were issued on the Respondents. The 'Andhra Bank', lead Bank of the 'Committee of Creditors', has already filed an appeal and challenged the impugned order.

5. Mr. Nitesh Rana, learned counsel for 'Enforcement Directorate'; Mr. Vishwanath, Advocate for 'SEBI'; Mr. C. Balooni, Assistant Director, Ministry of Company Affairs and Mr. Sukant Vats, Public Prosecutor, Central Bureau of Investigation, appear and submit that they are investigating the matter against the 'Corporate Debtor' and its promoters, Directors and officers and role of other public servants.

6. Learned counsel appearing on behalf of the 'Enforcement Directorate' submit that the assets of the 'Corporate Debtor' are based on the proceeds of the crime and therefore, it cannot be given to any person.

7. The question arises for consideration in these appeals is whether Section 29A of the 'I&B Code' is applicable to the applicant, if he intends to withdraw the petition under Section 7 or 9, if the Committee of Creditor, approves a proposal with 90% voting share, in terms of Section 12A.

8. Section 29A relates to ineligibility of a "resolution applicant", which is as follows:

> *"**29A. Persons not eligible to be resolution applicant.—** A person shall not be eligible to submit a resolution plan, if such person, or any other person acting jointly or in concert with such person—*
>
> *(a) is an undischarged insolvent;*
>
> *(b) is a wilful defaulter in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949;*
>
> *(c) has an account, or an account of a corporate debtor under the management or control of such person or of whom such person is a promoter, classified as non-performing asset in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949*

and at least a period of one year has lapsed from the date of such classification till the date of commencement of the corporate insolvency resolution process of the corporate debtor:

Provided that the person shall be eligible to submit a resolution plan if such person makes payment of all overdue amounts with interest thereon and charges relating to non-performing asset accounts before submission of resolution plan;

Provided further that nothing in this clause shall apply to a resolution applicant where such applicant is a financial entity and is not a related party to the corporate debtor.

Explanation I.—For the purposes of this proviso, the expression "related party" shall not include a financial entity, regulated by a financial sector regulator, if it is a financial creditor of the corporate debtor and is a related party of the corporate debtor solely on account of conversion or substitution of debt into equity shares or instruments convertible into equity shares, prior to the insolvency commencement date.

Explanation II.—For the purposes of this clause, where a resolution applicant has an account, or an account of a corporate debtor under the management or control of such person or of whom such person is a promoter, classified as non-performing asset and such account was acquired pursuant to a prior resolution plan approved under this Code, then, the provisions of this clause shall not apply to such resolution applicant for a period of three years from the date of approval of such resolution plan by the Adjudicating Authority under this Code;';

(d) has been convicted for any offence punishable with imprisonment ----

(i) for two years or more under any Act specified under the Twelfth Schedule; or

(ii) for seven years or more under any other law for the time being in force:

Provided that this clause shall not apply to a person after the expiry of a period of two years from the date of his release from imprisonment:

Provided further that this clause shall not apply in relation to a connected person referred to in clause (iii) of Explanation I;"

(e) is disqualified to act as a director under the Companies Act, 2013;

"Provided that this clause shall not apply in relation to a connected person referred to in clause (iii) of Explanation I;

(f) is prohibited by the Securities and Exchange Board of India from trading in securities or accessing the securities markets;

(g) has been a promoter or in the management or control of a corporate debtor in which a preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction has taken place and in respect of which an order has been made by the Adjudicating Authority under this Code;

"Provided that this clause shall not apply if a preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction has taken place prior to the acquisition of the corporate debtor by the resolution applicant pursuant to a resolution plan approved under this Code or pursuant to a scheme or plan approved by a financial sector regulator or a court, and such resolution applicant

has not otherwise contributed to the preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction;

(h) has executed an enforceable guarantee in favour of a creditor in respect of a corporate debtor against which an application for insolvency resolution made by such creditor has been admitted under this Code and such guarantee has been invoked by the creditor and remains unpaid in full or part;

(i) has been subject to any disability, corresponding to clauses (a) to (h), under any law in a jurisdiction outside India; or

(j) has a connected person not eligible under clauses (a) to (i)

Explanation.— For the purposes of this clause, the expression "connected person" means—

(i) any person who is the promoter or in the management or control of the resolution applicant; or

(ii) any person who shall be the promoter or in management or control of the business of the

corporate debtor during the implementation of the resolution plan; or

(iii) the holding company, subsidiary company, associate company or related party of a person referred to in clauses (i) and (ii):

Provided that nothing in clause (iii) of this Explanation I shall apply to a resolution applicant where such applicant is a financial entity and is not a related party of the corporate debtor:

Provided further that the expression "related party" shall not include a financial entity, regulated by a financial sector regulator, if it is a financial creditor of the corporate debtor and is a related party of the corporate debtor solely on account of conversion or substitution of debt into equity shares or instruments convertible into equity shares, prior to the insolvency commencement date;

'Explanation II.—For the purposes of this section, "financial entity" shall mean the

following entities which meet such criteria or conditions as the Central Government may, in consultation with the financial sector regulator, notify in this behalf, namely:—

(a) a scheduled bank;

(b) any entity regulated by a foreign central bank or a securities market regulator or other financial sector regulator of a jurisdiction outside India which jurisdiction is compliant with the Financial Action Task Force Standards and is a signatory to the International Organisation of Securities Commissions Multilateral Memorandum of Understanding;

(c) any investment vehicle, registered foreign institutional investor, registered foreign portfolio investor or a foreign venture capital investor, where the terms shall have the meaning assigned to them in regulation 2 of the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India)

Regulations, 2017 made under the Foreign Exchange Management Act, 1999;

(d) an asset reconstruction company registered with the Reserve Bank of India under section 3 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;

(e) an Alternate Investment Fund registered with the Securities and Exchange Board of India;

(f) such categories of persons as may be notified by the Central Government."

9. If any person, including the 'Promoter'/ 'Director' is ineligible in terms of any one or more clauses of Section 29A, he/she is not entitled to file any 'resolution plan' individually or jointly or in concert with another.

10. In so far Section 12A is concerned, it relates to withdrawal of the application filed by an "applicant" under Section 7 or Section 9 of the I&B Code, if the 'Committee of Creditors' with more than 90% voting share approves the proposal as is apparent from Section 12A and reads as follows:

"12A. Withdrawal of application admitted under section 7, 9 or 10. —

The Adjudicating Authority may allow the withdrawal of application admitted under section 7 or section 9 or section 10, on an application made by the applicant with the approval of ninety per cent. voting share of the committee of creditors, in such manner as may be specified."

11. In ***'Swiss Ribbons Pvt. Ltd. & Anr. vs. Union of India & Ors.*** - ***'2019 SCC Online SC 73'***, the Hon'ble Supreme Court of India considered the stages in which an application can be withdrawn including Section 12A observed and held :

"75. *Since the financial creditors are in the business of moneylending, banks and financial institutions are best equipped to assess viability and feasibility of the business of the corporate debtor. Even at the time of granting loans, these banks and financial institutions undertake a detailed market study which includes a techno-economic valuation report, evaluation of business, financial projection, etc. Since this detailed study has already been undertaken before sanctioning a loan, and since financial creditors have trained employees to assess*

viability and feasibility, they are in a good position to evaluate the contents of a resolution plan. On the other hand, operational creditors, who provide goods and services, are involved only in recovering amounts that are paid for such goods and services, and are typically unable to assess viability and feasibility of business. The BLRC Report, already quoted above, makes this abundantly clear.

76. Quite apart from this, the United Nations Commission on International Trade Law, in its Legislative Guide on Insolvency Law (the UNCITRAL Guidelines) recognises the importance of ensuring equitable treatment to similarly placed creditors and states as follows:

"Ensuring equitable treatment of similarly situated creditors

7. The objective of equitable treatment is based on the notion that, in collective proceedings, creditors with similar legal rights should be treated fairly, receiving a distribution on their

claim in accordance with their relative ranking and interests. This key objective recognises that all creditors do not need to be treated identically, but in a manner that reflects the different bargains they have struck with the debtor. This is less relevant as a defining factor where there is no specific debt contract with the debtor, such as in the case of damage claimants (e.g. for environmental damage) and tax authorities. Even though the principle of equitable treatment may be modified by social policy on priorities and give way to the prerogatives pertaining to holders of claims or interests that arise, for example, by operation of law, it retains its significance by UNCITRAL Legislative Guide on Insolvency Law ensuring that the priority accorded to the claims of a similar class affects all members of the class in the same manner. The policy of equitable treatment permeates many aspects of an insolvency law, including the application of the stay or suspension, provisions to set aside acts and transactions and recapture value for the insolvency estate, classification

of claims, voting procedures in reorganisation and distribution mechanisms. An insolvency law should address problems of fraud and favouritism that may arise in cases of financial distress by providing, for example, that acts and transactions detrimental to equitable treatment of creditors can be avoided."

77. *NCLAT has, while looking into viability and feasibility of resolution plans that are approved by the Committee of Creditors, always gone into whether operational creditors are given roughly the same treatment as financial creditors, and if they are not, such plans are either rejected or modified so that the operational creditors' rights are safeguarded. It may be seen that a resolution plan cannot pass muster under Section 30(2)(b) read with Section 31 unless a minimum payment is made to operational creditors, being not less than liquidation value. Further, on 5-10-2018, Regulation 38*

has been amended. Prior to the amendment, Regulation 38 read as follows:

*"**38. Mandatory contents of the resolution plan**.—(1) A resolution plan shall identify specific sources of funds that will be used to pay the—*

(a) insolvency resolution process costs and provide that the insolvency resolution process costs, to the extent unpaid, will be paid in priority to any other creditor;

(b) liquidation value due to operational creditors and provide for such payment in priority to any financial creditor which shall in any event be made before the expiry of thirty days after the approval of a resolution plan by the adjudicating authority; and

(c) liquidation value due to dissenting financial creditors and provide that such payment is made before any recoveries are made by the financial creditors who voted in favour of the resolution plan."

Post amendment, Regulation 38 reads as follows:

*"**38. Mandatory contents of the resolution plan**.—(1) The amount due to the operational creditors under a resolution plan shall be given priority in payment over financial creditors.*

(1-A) A resolution plan shall include a statement as to how it has dealt with the interests of all stakeholders, including financial creditors and operational creditors, of the corporate debtor."

The aforesaid Regulation further strengthens the rights of operational creditors by statutorily incorporating the principle of fair and equitable dealing of operational creditors' rights, together with priority in payment over financial creditors.

Section 12-A is not violative of Article 14

79. *Section 12-A was inserted by the Insolvency and Bankruptcy (Second Amendment) Act, 2018 with retrospective effect from 6-6-2018. It reads as follows:*

*"**12-A. Withdrawal of application admitted under Sections 7, 9 or 10**.—The adjudicating authority may allow the withdrawal of application admitted under Section 7 or Section 9 or Section 10, on an application made by the applicant with the approval*

of ninety per cent voting share of the Committee of Creditors, in such manner as may be specified."

80. The ILC Report of March 2018, which led to the insertion of Section 12-A, stated as follows:

"29.1. Under Rule 8 of the CIRP Rules, NCLT may permit withdrawal of the application on a request by the applicant before its admission. However, there is no provision in the Code or the CIRP Rules in relation to permissibility of withdrawal post admission of a CIRP application. It was observed by the Committee that there have been instances where on account of settlement between the applicant creditor and the corporate debtor, judicial permission for withdrawal of CIRP was granted [Lokhandwala Kataria Construction (P) Ltd. v. Nisus Finance and Investment Managers LLP [Lokhandwala Kataria Construction (P) Ltd. v. Nisus Finance and Investment Managers LLP, (2018) 15 SCC 589] ; Mothers Pride Dairy India (P) Ltd. v. Portrait Advertising and Marketing (P) Ltd. [Mothers Pride Dairy India (P) Ltd. v. Portrait Advertising and Marketing (P)

Ltd., 2017 SCC OnLine SC 1789] ; Uttara Foods and Feeds (P) Ltd. v. Mona Pharmachem [Uttara Foods and Feeds (P) Ltd. v. Mona Pharmachem, (2018) 15 SCC 587]]. This practice was deliberated in light of the objective of the Code as encapsulated in the BLRC Report, that the design of the Code is based on ensuring that "all key stakeholders will participate to collectively assess viability. The law must ensure that all creditors who have the capability and the willingness to restructure their liabilities must be part of the negotiation process. The liabilities of all creditors who are not part of the negotiation process must also be met in any negotiated solution." Thus, it was agreed that once CIRP is initiated, it is no longer a proceeding only between the applicant creditor and the corporate debtor but is envisaged to be a proceeding involving all creditors of the debtor. The intent of the Code is to discourage individual actions for enforcement and settlement to the exclusion of the general benefit of all creditors.

29.2. On a review of the multiple NCLT and NCLAT judgments in this regard, the consistent pattern that emerged was that a settlement may be reached amongst all creditors and the debtor, for the purpose of a withdrawal to be granted, and not only the applicant creditor and the debtor. On this basis read with the intent of the Code, the Committee unanimously agreed that the relevant rules may be amended to provide for withdrawal post admission if the CoC approves of such action by a voting share of ninety per cent. It was specifically discussed that Rule 11 of the National Company Law Tribunal Rules, 2016 may not be adopted for this aspect of CIRP at this stage [as observed by the Hon'ble Supreme Court in Uttara Foods and Feeds (P) Ltd. v. Mona Pharmachem [Uttara Foods and Feeds (P) Ltd. v. Mona Pharmachem, (2018) 15 SCC 587]] and even otherwise, as the issue can be specifically addressed by amending Rule 8 of the CIRP Rules."

(emphasis in original)

Before this section was inserted, this Court, under Article 142, was passing orders allowing withdrawal of applications after creditors' applications had been admitted by NCLT or NCLAT."

12. From Section 12A and the decision of the Hon'ble Supreme Court in ***'Swiss Ribbons Pvt. Ltd. & Anr.' (Supra),*** it is clear that the Promoters/Shareholders are entitled to settle the matter in terms of Section 12A and in such case, it is always open to an applicant to withdraw the application under Section 9 of the 'I&B Code' on the basis of which the 'Corporate Insolvency Resolution Process' was initiated.

13. In view of the aforesaid provisions of law, we hold that Section 29A is not applicable for entertaining/considering an application under Section 12A as the Applicants are not entitled to file application under Section 29A as 'resolution applicant'.

14. In the present case, the 'Corporate Insolvency Resolution Process' was initiated pursuant to an application under Section 7 filed by the 'Andhra Bank' (Appellant herein). The application under Section 12A having been approved by the 'Committee of Creditors' more than 90% of the voting share, it was not open to the Adjudicating Authority to reject the same and that too on a ground of ineligibility under Section 29A, which is not applicable.

15. In so far the assets of the 'Corporate Debtor' is concerned, if it is based on the proceeds of crime, it is always open to the 'Enforcement Directorate' to

seize the assets of the 'Corporate Debtor' and act in accordance with the 'Prevention of Money Laundering Act, 2002' (for short, **'the PMLA'**).

16. However, it will not come in the way of the individual such as 'Promoter' or 'Shareholder' or 'Director', if he pays not from the proceeds of crime but in his individual capacity the amount from his account and not from the account/assets of the 'Corporate Debtor' and satisfies all the stakeholders, including the 'Financial Creditors' and the 'Operational Creditors'. There is nothing on the record to suggest that the individual property of the 'Promoter' / 'Shareholder'/ 'Director' who proposed to pay the amount has been subjected to restraint by the 'Enforcement Directorate'. Therefore, even if the asset of the 'Corporate Debtor' is held to be proceeds of crime, the Adjudicating Authority cannot reject the prayer for withdrawal of application under Section 7, if the 'Promoter' / 'Director' or 'Shareholder' in their individual capacity satisfy the creditors.

17. For the reason aforesaid, while we hold that the order of 'Liquidation' was uncalled for, we set aside the impugned order dated 8th May, 2019 passed by the Adjudicating Authority and allow the Appellant (who filed the application of Section 7 – 'Andhra Bank') to withdraw the application.

18. In the result, the 'Corporate Insolvency Resolution Process' initiated against the 'Corporate Debtor' namely— 'M/s. Sterling Biotech Ltd.' stands set aside subject to the payment of the amount as payable by the 'Promoters'/Shareholders to all the stakeholders/financial creditors and

operational creditors in terms of Section 12A as approved with 90% voting share of the 'Committee of Creditors'. However, setting aside the order of initiation of 'Corporate Insolvency Resolution Process' will not amount to interference with any of the order passed by the 'Enforcement Directorate' with regard to the assets of the 'Corporate Debtor' and the proceedings under 'PMLA' will continue against the 'Corporate Debtor' etc. in accordance with law.

19. In view of the fact that the impugned order dated 8th May, 2019 is set aside, all the observations made against Mr. Sundaresh Bhat, 'Resolution Professional' also stand expunged.

20. All these appeals stand disposed of with liberty to the 'Enforcement Directorate', the 'Central Bureau of Investigation', the 'Ministry of Corporate Affairs', 'Securities and Exchange Board of India' and the other Authorities to continue/take any action against the Company, 'Promoter'/ 'Shareholder'/ 'Director' under the existing laws and will continue irrespective of the settlement made by the individual 'Promoter'/ 'Shareholder'/ 'Director' with the creditors under Section 12A of the 'I&B Code'.

21. So far as the fees and resolution cost of the 'Resolution Professional' are concerned, the 'Committee of Creditors' will determine the same and will be paid by 'Andhra Bank' on behalf of the 'Committee of Creditors' and may adjust the same with other members.

22. Till the 'terms and conditions' under Section 12A is complied, the 'Resolution Professional' will manage the company and ensure that the company remains a going concern and protect its assets.

All the appeals stand disposed of with aforesaid observations and directions.

[Justice S.J. Mukhopadhaya]
Chairperson

[Justice A.I.S. Cheema]
Member (Judicial)

[Kanthi Narahari]
Member (Technical)

/ns/sk