NATIONAL COMPANY LAW APPELLATE TRIBUNAL PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 1112 of 2020

IN THE MATTER OF:

1. Bipin Sharma
S/O Shri Kl Sharma
R/O 164-G, Pocket IV,
Mayur Vihar Phase -1
Delhi 110091 ...Appellant

VERSUS

1. Earth Infrastructure Limited
Through Its Insolvency Resolution Professional Having Its Registered Office At
B-100, Second Floor, Naraina Industrial Area,
Phase-1 Delhi South West Delhi 110028
...Respondent No. 1

2. Roma Unicon Designex Consortium
Having Its Office At
412, 4th Floor, Mangalam Paradise
Sector 3, Rohini, New Delhi 110034
Through Its Authorised Representative
...Respondent No. 2

Present:

For Appellant:	**Mr. Kumar Mihir, Advocate.**
For Respondents:	**Mr. Ashish Makhija, Mrs. Akanksha Vasudeva, Advocates for R-1. Mr. Abhishek Anand and Mr. Karan Kohli, Advocates for R-2.**

J U D G M E N T

(Date: 27.04.2022)

[Per.: Dr. Alok Srivastava, Member (Technical)]

The present appeal has been preferred under Section 61 of the Insolvency and Bankruptcy Code, 2016 (in short 'IBC') against the order dated 07.12.2020 (hereafter called 'impugned order') passed by the Adjudicating Authority (National Company Law Tribunal, New Delhi) in I.A. No. 1663 of 2020 in CP No. (IB)- 401 (ND)/2017.

2. The Appellant has claimed in the appeal that the Adjudicating Authority, while considering the approval of resolution plan of the Corporate Debtor/Earth Infrastructure Ltd., has admitted that the account of Zillion Infra Project Pvt. Ltd. (in short 'Zillion Infra') was declared as Non-Performing Asset (in short 'NPA') on 31.01.2018 and that a director of Zillion Infra who was also a director of Roma Unicon Designex Consortium, was ineligible to submit the resolution plan of the Corporate Debtor's Corporate Insolvency Resolution Process (in short 'CIRP'). He has claimed that CIRP were initiated against the Zillion Infra, which is currently pending before the Adjudicating Authority. Therefore, according to the Appellant, the Adjudicating Authority has taken an erroneous decision while holding that the Resolution Applicant is not debarred under Section 29-A of the IBC as one year had not elapsed from the date of declaration of NPA of Zilliion Infra account till the date of commencement of the CIRP of the Corporate Debtor. The Appellant has stated that the CIRP of the Corporate Debtor was initiated on 06.06.2018 and therefore, it was within the one-year period after declaration of NPA of Zillion Infra on 31.01.2018 and therefore, the

condition under Section 29A sub-clause (j) r/w Explanation – I does not apply in the present case making the Resolution Applicant eligible to submit a resolution plan. He has submitted that the Adjudicating Authority has failed to appreciate that the word "and" in Section 29-A (c) must be read as "or" as otherwise, a person whose account has been declared NPA today will be allowed to file resolution plan for any Corporate Debtor even before paying its full dues.

3. The Appellant has stated that the purpose of IBC is rehabilitation of the Corporate Debtor through a financially sound entity and should also go into the hands of persons who can provide able management for rehabilitation of the Corporate Debtor which would not be possible if the Resolution Applicant itself is operating an account which has been declared NPA due to mismanagement of operations. The Appellant has also claimed that he has a financial creditor who after becoming aware of the ineligibility of one of the Resolution Applicants and whose plan has been incorrectly approved by the Committee of Creditors (in short 'CoC'), has got a locus standi to file I.A. No. 1163 of 2020 and the appeal thereon.

4. The issues that arise in the appeal are primarily two fold: -

(i) Whether the Appellant who claims to be a financial creditor has locus standi to file the appeal and underlying application (before the Adjudicating Authority); and (ii) whether the Successful Resolution Applicant Roma Unicon Designex Consortium is eligible under section 29-A to submit a Resolution Plan for the Corporate Debtor/Earth Infrastructure Ltd. since the directors of Successful Resolution Applicant and are common with the director of Zillion Infra and Zillion Infra account was declared NPA on 31.01.2018 and hence, the condition of Section 29-A (j) r/w Explanation – I is infringed.

5. In arguments, Ld. Counsel for the Appellant has urged that the Appellant is a financial creditor of the Corporate Debtor/Earth Infrastructure Ltd. and is affected by the Successful Resolution Plan which has been filed by an ineligible Resolution Applicant; and therefore, is entitled to file I.A. No. 1663 of 2020 (before the Adjudicating Authority) and the present appeal before this Tribunal. He has also urged that Mrs. Rashmi Saxena, who is a director of Successful Resolution Applicant Roma Unicon Designex Consortium is also a director of Zillion Infra alongwith her husband Mr. Anand Saxena. The account of Zillion Infra was declared NPA on 31.01.2018 and the CIRP of the Corporate Debtor started on 06.06.2018 the Resolution Plan was submitted by the Successful Resolution Applicant on 31.07.2019. He has therefore, claimed that the Successful Resolution Applicant who was ineligible under Section 29-A (j) r/w Explanation-I has submitted the Successful Resolution Plan and therefore, Successful Resolution Plan being defective in this way, should be quashed and set aside.

6. Ld. Counsel for the Appellant further claimed that Mrs. Rashmi Saxena and Mrs. Shila Saxena were directors of the Roma Unicon Designex Consortium who resigned as directors of the consortium w.e.f 01.04.2019 and the Resolution Professional (in short 'RP') invited Expression of Interest (in short 'EOI') of the Corporate Debtor on 19.04.2019. Mrs. Rashmi Saxena and Mrs. Shila Saxena were reappointed directors of the Roma Unicon Designex Consortium on 10.05.2019 and the Roma Unicon Designex Consortium filed its resolution plan on 31.07.2019. He has further claimed that by Board Resolution Dated 27.07.2019 of the Roma

Unicon Designex Consortium Mrs. Rashmi Saxena was authorised to take all steps for filing the resolution plan of the Corporate Debtor. During this period, he has urged that Mrs. Rashmi Saxena was also associated with the management of Zillion Infra, and therefore, she was ineligible to file the resolution plan for the Corporate Debtor on 31.07.2019. The Ld. Counsel for the Appellant has argued that Explanation – I of Section 29-A of the IBC makes any connected person as given in Explanation – I of Section 29-A ineligible to submit a resolution plan and therefore, Mrs. Rashmi Saxena was not eligible under this provision to submit a resolution plan for the Corporate Debtor. He has further claimed that the Adjudicating Authority has not interpreted section 29-A appropriately by assuming that the "word" and in Section 29-A (c) should be read as "or" otherwise a person who is associated with the companies whose account has been declared NPA could even before paying the full outstanding dues will be allowed to file resolution plan of another company with which she is associated.

7. The Ld. Counsel for the Respondent No. 1/Erstwhile Resolution Professional has argued that the Appellant has filed multiple appeals on various grounds being aggrieved by different orders of the Adjudicating Authority and this is an action not permissible since he should have filed a single appeal corporating all the grounds. He has further argued that the present appeal has become infructuous because the resolution plan stands approved by the Ld. Adjudicating Authority and therefore, the prayers made in the appeal have lost relevance since the resolution plan is binding on all the stakeholders. He has further argued that the Appellate Authority has no power to substitute "and with "or" in sub-section (c) of section 29-A" and has cited the Judgment of Hon'ble Supreme Court in the matter of **Arcelormittal India Private Limited Versus Satish**

Kumar Gupta & Ors. [(2019) 2 SCC 1]. He has also adverted to the provision of section 25-A (3A) of the IBC which does not allow an individual financial creditor to assail the approval of resolution plan since the financial creditor in class of homebuyers has voted with more than 50% voting share for approval of the resolution plan. Regarding this issue, he has relied on the Judgment of Hon'ble Supreme Court in the matter of **Jaypee Kensington Boulevard Apartments Welfare Association & Ors. Versus NBCC (India) Ltd. & Ors., (2021 SCC Online SC 253).** He has further urged that the CoC has approved the resolution plan in its commercial wisdom and therefore such a resolution plan cannot be assailed by way of judicial intervention. He has relied in support on the Judgments of Hon'ble Supreme Court in the matter of **Maharasthra Seamless Limited Versus Padmanabhan Venkatesh & Ors. [(2020) 11 SCC 467]** and **Kalpraj Dharamshi & Anr. Versus Kotak Investment Advisors Ltd. & Anr., (2021 SCC Online SC 2040)** to claim that the business decision based on commercial wisdom of CoC cannot be called in question through judicial review.

8. The Ld. Counsel for the Respondent No. 2/ Roma Unicon Designex Consortium has argued that the provision of Section 29-A (c) have to be satisfied in full and interpreted strictly to arrive at ineligibility of any Resolution Applicant. He has further argued that the Adjudicating Authority has rightly held that the statutory requirements for prohibition under section 29-A (c) to operate against the Respondent No. 2 had not been fulfilled since one-year period as prescribed under Section 29-A (c) had not elapsed, and therefore, the Successful Resolution Applicant was fully eligible to submit a resolution plan.

9. The Ld. Counsel for the Respondent No. 2 has further urged that it has been wrongly contended by the Appellant that at the time of declaration of the account of Zillion Infra as NPA, the Respondent No. 2/Roma Unicon Designex Consortium was under the management and control of Mrs. Rashmi Saxena, whereas in fact Mrs. Rashmi Saxena was not director of Zillion Infra and the Respondent No. 2 was not under the control of Zillion Infra from the year 2018 onwards since there was no business relationship of the Successful Resolution Applicant with the Zillion Infra after 2018. In support of his contention, he has pointed out that Zillion Infra account was declared as NPA on 31.01.2018 and CIRP was initiated against the Corporate Debtor/Earth Infrastructure Ltd. on 06.06.2018 and thus, the statutory period of one year as stipulated in section 29-A (c) had not elapsed thereby making the Successful Resolution Applicant eligible to submit a resolution plan. In support he has cited the Judgment of Hon'ble Supreme Court in the case of **Swiss Ribbons Pvt. Ltd. & Anr. Versus Union of India & Ors., [(2019) 4 SCC 17]** wherein the Hon'ble Supreme Court has very clearly laid down that substandard asset should have remained NPA for a period of more than 12 months in order that a business entity associated with such a company could submit a resolution plan. He has also adverted to the Judgment of Hon'ble Supreme Court in the Case of **Arcelor Mittal India Private Limited (Supra)** to also explain on the intent of Section 29-A to state that "the stage of ineligibility attaches when the resolution plan is submitted by a resolution applicant." He has also claimed that any individual homebuyer or any association cannot maintain a challenge to the resolution plan once she/he has voted as part of financial creditor in class on the resolution plan and the resolution plan has been approved in such voting. He has finally stated that Mrs. Rashmi Saxena was not a director of M/s Zillion Infra on 31.07.2019 when the resolution plan

was submitted by the Respondent No. 2 for insolvency resolution of the Corporate Debtor.

10. In so far as the locus standi of the Appellant to file the instant appeal is concerned, the Appellant has claimed that he became aware of the ineligibility of one of the Resolution Applicants submitting plan for insolvency resolution of the Corporate Debtor and therefore, he acquired right under Section 60(5) to raise the issue before the Adjudicating Authority and also the right to file this Appeal as he found a material irregularity in exercise of the powers by the RP during the CIRP. He has further claimed that since there was a material irregularity in arriving at the eligibility of the Successful Resolution Applicant, it vitiated the resolution plan so submitted by this Resolution Applicant. Being aggrieved by this action of the RP, and thereafter approval of resolution plan by the CoC and the Adjudicating Authority submitted by the said RP, he derived the right to file Appeal under Section 61(3)(2) to prefer this appeal. Hence, we are of the view that the Appellant 'Bipin Sharma' has the right and entitlement to file this Appeal.

11. The Appellant has raised the issue of ineligibility of the Successful Resolution Applicant Roma Unicon Designex Consortium who submit the resolution plan as the director Mrs. Rashmi Saxena is ineligible under Section 29-A (c) and explanation – 1 provided therein to submit a resolution plan. The relevant provision under section 29-A (c) and Explanation-1 are reproduced as under:-

"Section 29-A (c): Persons not eligible to be resolution applicant.

xxx xxx xxx

(c) at the time of submission of the resolution plan 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 or the guidelines of a financial sector regulator issued under any other law for the time being in force, 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 [4][or completion of such transactions as may be prescribed, prior to the insolvency commencement date."

12. The Appellant has claimed that the word 'and' in Section 29-A (c) should be read as 'or'. He has also claimed that the authorised functionary of the Successful Resolution Applicant Mrs. Rashmi Saxena was a director in the company Zillion Infra alongwith her husband Mr. Anant Saxena and the account of Zillion Infra was declared as NPA on 31.01.2018, hence, Mrs. Rashmi Saxena was ineligible to submit the resolution plan of the Corporate Debtor since on the date of submissions of resolution plan i.e. 31.07.2019. His claim is that the condition that "a period of one year has elapsed from the date of such classification till the date of commencement of the CIRP" is a condition not necessarily to be complied and only the fact

that the account of Zillion Infra was declared NPA and Mrs. Rashmi Saxena was associated with Zillion Infra is a sufficient ground to make her ineligible to file the resolution plan.

13. We note that the account of Zillion Infra was declared NPA on 31.01.2018. (referred to Pg. 53 of the Appeal Paper Book) Mrs. Rashmi Saxena, who was one of the directors of Zillion Infra resigned as director on 01.04.2019. (referred to Pg. 60 of the Appeal Paper Book) This is clear from the record of Ministry of Corporate Affairs wherein the director Mrs. Rashmi Saxena of the company Zillion Infra is shown as between 01.04.1997 till 02.12.2009.

14. Regarding the fact that at the time of declaration of account of the Zillion Infra as NPA, the Respondent No. 2/ Roma Unicon Designex Consortium was under the management and control of Mrs. Rashmi Saxena, the record of MCA (Attached at Pg. 60 of Appeal Paper Book), we find that Mrs. Rashmi Saxena ceased to be a director of Zillion Infra on 02.12.2009 whereas, NPA of Zillion Infra account was declared on 31.01.2018. Moreover, the CIRP of the Corporate Debtor/Earth Infrastructure Ltd. was initiated on 06.06.2018 over four months after the declaration of Zillion Infra account as NPA. Also, the resolution plan for the Corporate Debtor was submitted by Mrs. Rashmi Saxena on behalf of Roma Unicon Designex Consortium on 31.07.2019 (at Pg. 34 of the Appeal Paper Book). Thus, it is clear that Mrs. Rashmi Saxena seized to be a director of Zillion Infra on 02.12.2009, and therefore, her entitlement to submit the resolution plan in the CIRP of the Corporate Debtor/Earth Infrastructure Ltd. is not hit by section 29-A (c) wherein a period of one year should not have elapsed from the date of declaration of NPA of a company (in the present case Zillion Infra) who is in the management and control of the Successful Resolution

Applicant, therefore, we find no strength in the arguments of the Ld. Counsel for the Appellant that Mrs. Rashmi Saxena, who submitted the resolution plan on behalf of the Roma Unicon Designex Consortium is ineligible under Section 29-A (c) to submit the resolution plan of the Corporate Debtor/Earth Infrastructure Ltd.

15. Regarding interpretation of the provision in section 29-A (c) and the Explanation-I of the said provision, the Ld. Counsel for the Appellant has relied on the Judgment of Hon'ble Supreme court of India in the matter of **Swiss Ribbons Pvt. Ltd. (Supra)** held as under : -

> *"71. What is clear from the aforesaid circular is that accounts are declared NPA only if defaults made by a corporate debtor are not resolved (for example, interest on and/or instalment of the principal remaining overdue for a period of more than 90 days in respect of a term loan). Post declaration of such NPA, what is clear is that a substandard asset would then be NPA which has remained as such for a period of twelve months. In short, a person is a defaulter when an instalment and/or interest on the principal remains overdue for more than three months, after which, its account is declared NPA. During the period of one year thereafter, since it is now classified as a substandard asset, this grace period is given to such person to pay off the debt. During this grace period, it is clear that such person can bid along with other resolution applicants to manage the corporate debtor. What is important to bear in mind is also the fact that, prior to this one-year-three-month period, banks and financial institutions do not declare the accounts of corporate debtors to be NPAs. As a matter of practice, they first try and resolve disputes with the corporate debtor, after which, the corporate debtor's account is declared NPA. As a matter of legislative policy therefore, quite apart from malfeasance, if a person is unable to repay a loan taken, in whole or in part, within this period of one year and three months (which, in any case, is after an earlier period where the corporate debtor and its financial creditors sit together to resolve defaults that continue), it is stated to be ineligible to*

become a resolution applicant. The reason is not far to see. A person who cannot service a debt for the aforesaid period is obviously a person who is ailing itself. The saying of Jesus comes to mind - - if the blind lead the blind, both shall fall into the ditch. The legislative policy, therefore, is that a person who is unable to service its own debt beyond the grace period referred to above, is unfit to be eligible to become a resolution applicant. This policy cannot be found fault with. Neither can the period of one year be found fault with, as this is a policy matter decided by the RBI and which emerges from its Master Circular, as during this period, an NPA is classified as a substandard asset. The ineligibility attaches only after this one year period is over as the NPA now gets classified as a doubtful asset."

16. The above mentioned principle explained by the Hon'ble Supreme Court is further reiterated and affirmed in its Judgment in the matter of **Arcelor Mittal India Private Limited (Supra)** as under :-

"43. According to us, it is clear that the opening words of Section 29A furnish a clue as to the time at which sub-clause (c) is to operate. The opening words of Section 29A state: "a person shall not be eligible to submit a resolution plan…". It is clear therefore that the stage of ineligibility attaches when the resolution plan is submitted by a resolution applicant. The contrary view expressed by Shri Rohatgi is obviously incorrect, as the date of commencement of the corporate insolvency resolution process is only relevant for the purpose of calculating whether one year has lapsed from the date of classification of a person as a nonperforming asset. Further, the expression used is "has", which as Dr. Singhvi has correctly argued, is in praesenti. This is to be contrasted with the expression "has been", which is used in subclauses (d) and (g), which refers to an anterior point of time. Consequently, the amendment of 2018 introducing the words "at the

time of submission of the resolution plan" is clarificatory, as this was always the correct interpretation as to the point of time at which the disqualification in sub-clause (c) of Section 29A will attach. In fact, the amendment was made pursuant to the Insolvency Law Committee Report of March, 2018. That report clearly stated:

> *"In relation to applicability of section 29A(c), the Committee also discussed that it must be clarified that the disqualification pursuant to section 29A(c) shall be applicable if such NPA accounts are held by the resolution applicant or its connected persons at the time of submission of the resolution plan to the RP."*

17. Hence, it is abundantly clear that the ingredients of sub-clause (c) of section 29-A do not come in the way of eligibility of the Successful Resolution Applicant to submit a resolution plan through its authorized representative Mrs. Rashmi Saxena.

18. We also follow the decision of the Hon'ble Supreme Court in the matter of **Jaypee Kensington Boulevard Apartments Welfare Association & Ors. (Supra)** wherein it is held as below :-

> *"164.4. Having regard to the scheme of IBC and the law declared by this Court, it is more than clear that once a decision is taken, either to reject or to approve a particular plan, by a vote of more than 50% of the voting share of the financial creditors within a class, the minority of those who vote, as also all others within that class, are bound by that decision. There is absolutely no scope for any particular person standing within that class to suggest any dissention as regards the vote over the resolution plan. It is obvious that if this finality and binding force is not provided to the vote cast by the authorised representative over the resolution plan in accordance with the majority decision of the class he is authorised to represent, a plan of resolution involving large*

number of parties (like an excessively large number of homebuyers herein) may never fructify and the only result would be liquidation, which is not the prime target of the Code. In the larger benefit and for common good, the democratic principles of the determinative role of the opinion of majority have been duly incorporated in the scheme of the Code, particularly in the provisions relating to voting on the resolution plan and binding nature of the vote of authorised representative on the entire class of the financial creditor/s he represents."

19. The issue of objections raised by certain homebuyers who form part of creditors in class to stand individually and object has also been considered by the Hon'ble Supreme Court in the matter of **Jaypee Infratech Ltd. (Supra)** and held that *'any individual homebuyer or any association of homebuyers cannot maintain a challenge to the resolution plan and cannot be treated as a dissenting financial creditor or an aggrieved person. Admittedly, the class of creditors of which Applicants are a part have already assented and approved a resolution plan and therefore, are estopped in law from preferring any objection or appeal to resolution plan which has been approved by class.'*

20. On the basis of the detailed discussion and reference to the Hon'ble Supreme Court Judgments in the aforementioned paragraphs of this Judgment, we are of the clear view that the Successful Resolution Applicant working through Mrs. Rashmi Saxena, one of its directors, was not ineligible to submit a resolution plan of the Corporate Debtor/Earth Infrastructure Ltd.. Moreover, the resolution plan has been approved by the financial creditors in class voting through their authorized representative. Therefore, we do not find any reason to interfere with the impugned order. The appeal, therefore, fails and is accordingly, dismissed.

21. In the facts and circumstances of the case, there is no order as to costs.

[Justice Ashok Bhushan]
Chairperson

[Dr. Alok Srivastava]
Member (Technical)

[Mrs. Shreesha Merla]
Member (Technical)

New Delhi
27th April, 2022

/ SC/