

NATIONAL COMPANY LAW APPELLATE TRIBUNAL AT CHENNAI
(APPELLATE JURISDICTION)

Company Appeal (AT) (CH) (INS) No. 228 of 2021

(Under Section 61 of Insolvency & Bankruptcy Code, 2016)

(Against the Order dated 25.03.2021 in IA No. 745, 968 & 1205/2020 & IA
(IBC)/99 & 119/2021 in C.P. (IB) No. 744/7/HDB/2018 passed by the
‘Adjudicating Authority’, National Company Law Tribunal, Hyderabad
Bench, Hyderabad)

In the matter of:

Everest Organics Ltd.,

A public limited company incorporated under the
Provisions of Companies Act, 1956

Plot No. 127 & 128, Lakeview Plaza

1st Floor, Amar Co-Op Society,

Near Kavuri Hills, Madhapur,

Hyderabad – 500 033.

Rep. by its Compliance Officer

Mrs. Rekha Singh

...Appellant

V

1. Leesa Lifesciences Pvt. Ltd.,

Represented by its Resolution Professional Mr. Jagadees

Kumar Morri, P2, Sy.No. 423 (P), 424(P) and 425 (P), Jadcherla

Mandal, Polepally, Mahabubnagar,

Telangana - 509203

...Respondent No.1

2. Committee of Creditors,

Leesa Lifesciences pvt. Ltd.,

P2, Sy.No. 423 (P), 424(P) and 425 (P), Jadcherla

Mandal, Polepally, Mahabubnagar,

Telangana - 509203

...Respondent No.2

3. PSN Medicare Pvt. Ltd.

Flat No. 101, Amar Estates, Gafoornagar,
Madhapur, Hyderabad - 500081

...Respondent No.3

Present:

For Appellant	:	Mr. Kailash Nath, Advocate For Mr. G. Kalyan, Advocate Mr. Chakravarthy, Advocate
For Respondent No. 1	:	Mr. Suryanarayana, Advocate
For Respondent No. 2	:	Mrs. Vidyalakshmi Vipin, Advocate
For Respondent No.3	:	Dr. K. Lakshmi Narasimha, Advocate

JUDGMENT

(VIRTUAL MODE)

Per: Kanthi Narahari Member (T)

Brief Facts of the Case:

1) The present appeal is filed by the Appellant against the Impugned Order dated 25th March 2021 passed by the 'Adjudicating Authority' (NCLT, Hyderabad Bench) in IA No.968 of 2020 in CP No.744 of 2018, whereby the Adjudicating Authority directed the COC to consider ineligibility of 3rd Respondent under Section 29A of the Code.

2) The Learned Counsel for the Appellant submitted that the Appellant and the 3rd Respondent herein are Resolution Applicants for the Corporate Debtor, having submitted their Resolution Plans pursuant to the expression of interest issued by the Resolution Professional. While so, the promoters of the 3rd Respondent were found disqualified under Section 29A of the Code, on account of the Judgment of the Hon'ble NCLT, Hyderabad Bench, dated 18.08.2020.

3) Aggrieved by the said disqualification, the 3rd Respondent filed IA/968/2020 before the Adjudicating Authority. The Adjudicating Authority vide Impugned order dated 25.03.2021 directed the COC to take a call on the ineligibility of the 3rd Respondent under Section 29A (e) of the Code and also to consider the revised plan to be submitted by the 3rd Respondent.

4) The Learned Counsel for the Appellant contended that the Impugned Order passed by the Adjudicating Authority without considering the fact that the Appellants Application in IA/119/2021 challenging the rejection of its (Appellant) Resolution Plan by the COC is pending before the Adjudicating Authority.

5) In the meeting of the COC dated 30th March 2021 the SBI, the Lead Financial Creditor with 90.98% of the voting rights has decided without any basis that the 3rd Respondent is not disqualified under Section 29A of the Code.

6) The Learned Counsel for the Appellant contended that the Adjudicating Authority failed to appreciate the fact that the Committee of Creditors at no point in time objected to the decision of the Resolution Professional in holding that the 3rd Respondent is disqualified under Section 29A of the Code and submitted in their pleadings before the Adjudicating Authority that they would abide by the decision of the Adjudicating Authority with regard to the eligibility of the 3rd Respondent under Section 29A of the Code.

7) The main grievance of the Appellant is that the COC has no power to consider the ineligibility of the 3rd Respondent under Section 29A. The

Adjudicating Authority ought not to have directed the COC to consider the ineligibility.

8) In view of the aforesaid reasons, the Learned Counsel prayed this Bench to set aside the Impugned order of the Adjudicating Authority dated 25th March 2021 and allow the Appeal.

RESPONDENT'S SUBMISSIONS:

9) The 1st Respondent filed detailed counter to the Appeal and submitted that the Appellant and the 3rd Respondent submitted their respective Resolution Plans before this Respondent on 05th September 2020 pursuant to extension for the submissions of Resolution Plans from 24th August to 5th September 2020 along with the Affidavit under Section 29A of the Code stating that the prospective Resolution Applicants are eligible to submit the resolution plan for the Corporate Debtor. After submission of the plans this Respondent became aware that the 3rd Respondent though an eligible resolution applicant as an independent entity, as a Director on the Board whose actions have been held as illegal by the NCLT for contravention of Provisions of Section 397, 398 of the Companies Act, 1956. After considering and in the light of Provisions of Section 29A and 30 of the Code read with respective rules and regulations made thereunder, the 3rd Respondent is ineligible under Section 29A of the Code to submit resolution plan for resolution of the Insolvency of the Corporate Debtor. This Respondent informed the Members of the COC about the said ineligibility of Respondent No.3 and the legal opinions

obtained from various professionals. Considering the submissions made by this Respondent the members of COC did not consider the Resolution Plan submitted by Respondent No.3

10) However, this Respondent placed before the members of the COC the revised Resolution Plan submitted by the Appellant at the 11th meeting of COC held on 26.02.2021 for its consideration. However, the SBI one of the members of the COC having majority voting rights of 90.98% rejected the Resolution Plan submitted by the Appellant and directed Respondent No.1 herein to file an application before the Adjudicating Authority to initiate the process of liquidation of the Corporate Debtor. In view of the direction of COC this Respondent filed an application in IA/99/2021 to initiate the liquidation proceedings of the Corporate Debtor under Section 33 of the Code.

11) While so, the 3rd Respondent whose Resolution plan was declared as ineligible by this Respondent filed an IA/968/2020 before the Adjudicating Authority challenging the decision of this Respondent and the Hon'ble Adjudicating Authority on 25.03.2021 disposed of the said Application directing the COC to take a call whether the 3rd Respondent is really ineligible under Section 29A(e) of IBC.

12) The Learned Counsel further submitted that as per the directions of the Adjudicating Authority, the Members of the COC directed this Respondent to place before the COC the revised Resolution Plan submitted by 3rd Respondent.

The Members of the COC in its 13th meeting held on 15.05.2021 approved the Resolution Plan submitted by the Respondent No.3 with 90.98% vote.

13) The Counsel appearing for the 2nd Respondent submitted and took the preliminary objection stating that the Appellant is not a party to the Proceedings before the Adjudicating Authority and the impleading application filed by the Appellant was dismissed by the Adjudicating Authority and the Appellant has not challenged the dismissal of impleading application. The plan of the Appellant was rejected in the 11th COC meeting by the Lead Financial Creditor considering the commercial viability and voted for filing an application for Liquidation. The Hon'ble Adjudicating Authority rightly directed the COC (this Respondent) to consider the ineligibility criteria of the 3rd Respondent in accordance with law. It is further stated that the order of the RP with regard to passing of the Order regarding ineligibility of the 3rd Respondent has not been set aside by the Learned Adjudicating Authority, however it directed the COC to consider the ineligibility. It is further submitted that the COC has all the powers to ascertain the eligibility/ineligibility if placed before them. As per Section 30 of the I&B Code, 2016 the said Provision clearly states that the COC shall approve the Resolution Plan when the applicant is eligible. The decision of this Respondent is in accordance with law.

14) The Counsel appearing for the 3rd Respondent submitted that the reasons given by the Resolution Professional with regard to ineligibility of this

Respondent, it is submitted that the reasoning given by the RP is totally devoid of any merit, contrary to law. It is submitted that the RP has not given any reasons as to how this Respondent is ineligible under Section 29A of the IBC. The reason given by the RP does not attract any of the ineligibility ordained in terms of Section 29A of the Code.

15) The name of this Respondent has been included in the Provisional prospective Resolution Applicants and this Respondent stand at serial number 1 in the list.

16) It is submitted that the Resolution Plan has been submitted by this Respondent as a company i.e. PSN Medicare Pvt. Ltd. and not any individual. The plan has been submitted by the Company represented by its Authorized Representative i.e. whomsoever the Company authorises to file its Plan. Since the Resolution plan was submitted by the Company and none of the ineligibility criteria as adumbrated under Section 29A of the Code is attracted and hence the decision of the RP was illegal. The mere observation by the NCLT in proceedings before it under Section 397, 398 of the Companies Act, 1956 does not fall within the ambit of Section 29A of the IBC so as to disentitle this Respondent from being considered. If the RP given any notice to this Respondent with regard to any defect, this Respondent would have cured the said defect.

17) The Hon'ble Adjudicating Authority rightly directed the 2nd Respondent to consider the ineligibility of this Respondent's Plan and the 2nd

Respondent considered this Respondent's Plan as eligible SRA. It is further submitted that the Resolution Professional has no power or jurisdiction to decide the ineligibility criteria. The Learned Counsel reiterated the stand, that the Appellant's application seeking impleadment has been dismissed and became final therefore, the Appellant has no locus standi to file this Appeal and challenge the order of the Adjudicating Authority dated 25th March 2021 passed in IA/968/20221. In view of the reasons the Learned Counsel submitted that the appeal is devoid of merits and liable to be dismissed.

Analysis/Appraisal:

18) Heard the Learned Counsel appearing for the respective parties perused the pleadings and documents. The short point for consideration is whether the order passed by the Adjudicating Authority is in accordance with law or not? For better appreciation, the order of the Adjudicating Authority is reproduced hereat.

“IA No. 968/2020 is filed by PSN Medicare Private Limited with a request to direct the COC to consider his revised plan which he would be submitting which RP has rejected him declaring to be ineligible U/s. 29A(e) of IBC.

We have heard learned counsel for the Applicant, learned counsel for the RP and RP in person.

Keeping open objection as taken by RP and directing COC to take a call whether Applicant is really ineligible U/s. 29A(e) of IBC, we direct the COC and RP to consider the revised plan to be submitted by the Applicant within 7 days from

today.

COC is allowed to take call on all aspects including ineligibility and commercial viability of the plan.

With these, IA No.968/2020 stands disposed of.

List all the pending IAs on 29.04.2021.”

19) From the order it is seen that the 3rd Respondent challenged the decision of the Resolution Professional rejecting its Plan for the reason that the 3rd Respondent is ineligible under Section 29A(e) of IBC. The Learned Adjudicating Authority taking into consideration the aspects, directed the COC to take a call whether applicant i.e. the 3rd Respondent herein is really ineligible under Section 29A(e) of IBC. The Adjudicating Authority kept open regarding the objections taken by the RP to be considered by the COC. This Tribunal is of the view that the Adjudicating Authority rightly considered keeping in mind the principles of natural justice to afford an opportunity to the person (legal entity) for reconsideration of the decision taken by the RP. One of the grievance of the 3rd Respondent is that the RP has not afforded any opportunity to cure the defect, however, the RP suo moto rejected the Application of the 3rd Respondent holding it as ineligible under Section 29A. In view of the reasons, the Learned Adjudicating Authority rightly directed the COC to consider the objections as taken by the RP. Further, the Learned Adjudicating Authority also directed the COC and RP to consider the revised Plan to be submitted by the 3rd Respondent. We do not find any infirmity or illegality in the order.

20) The stand of the appellant is that the COC has no power to consider the ineligibility of the persons and the Learned Adjudicating Authority ought not to have directed the COC to consider the ineligibility of the 3rd Respondent. In this regard, this Tribunal would like to refer to the applicable Provisions of Law.

21) Section 30 of I&B Code, 2016 empowers for submission of Resolution Plan. Sub Section 1 of Section 30 reads as under:

“A Resolution Applicant may submit a resolution plan (along with an affidavit stating that he is eligible under Section 29A) to the Resolution Professional prepared on the basis of the information Memorandum. Sub Section 2 of Section 30 states that “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 cause in a manner specified by the Board in priority to the (payment) of other debts of the Corporate Debtor, (b) provides for the payment of debts of operational creditors in such manner as may be specified by the Board which shall not be less than the amount to be paid to such creditors in the event of a Liquidation of the Corporate Debtor under Section 53.

The relevant proviso in this regard is sub section 4 of section 30 which states as under:

“the Committee of Creditors may approve a resolution plan by (a) vote of

not less than (sixty six percent) of voting share of Financial Creditors, after considering its feasibility and viability, (the manner of distribution proposed, which may take into account the order of priority amongst Creditors as laid down in sub section 1 of section 53, including the priority and value of the security interest of a Secured Creditors) and such other requirements as may be specified by the Board.

The Proviso to this Sub Section further states as under:

“Provided that the committee of creditors shall not approve a resolution plan submitted before the commencement of the insolvency and Bankruptcy code, (amendment) ordinance, 2017 (ord.7 of 2017) where the resolution Applicant is ineligible under Section 29A and may require the resolution Professional to invite a fresh resolution Plan where no other resolution plan is available with it.

22) Regulation 39 of the I&B (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, the Regulation provides for approval of Resolution Plan. Sub Regulation 2 of Regulation 39 empowers the Resolution Professional who shall submit to the committee all Resolution Plans which comply with the requirements of the Code and Regulations made thereunder along with the details of the transactions. Sub Regulation 3 of Regulation 39 empowers the committee to evaluate the resolution Plans received under Regulation 2 as per evaluation matrix, record its deliberations and the feasibility and viability of each Resolution Plan and vote on all such Resolution Plans simultaneously. Further the

Regulations prescribes the procedure to be adopted for voting and approval. Sub Regulation 4 of Regulation 39 reads as under:

“The Resolution Professional shall endeavour to submit the resolution Plan approved by the Committee to the Adjudicating Authority at least 15 days before the maximum period for completion of Corporate Insolvency Resolution Process under Section 12 along with a compliance certificate in (Form H of the schedule and the evidence of receipt of performance security required under sub regulation (4A) of Regulation 36B).”

FINDINGS:

23) From the above Provisions of Law, it is clear that the Code (IBC, 2016) and the Regulations empowers the Committee of Creditors approving the Resolution Plan and also empowers that it shall not approve a Resolution Plan where the Resolution Applicant is ineligible under Section 29A. In this case, the Adjudicating Authority directed the COC to consider whether the 3rd Respondent is really ineligible under Section 29A(e) of the IBC and therefore directed the COC, which has the power to approve the Resolution Plan and also consider the Resolution Applicant’s ineligibility under Section 29A. In accordance with the above Provisions of Law and the Regulations made thereunder, the COC has the power to consider the eligibility/ineligibility of the

Resolution Applicant whether they are eligible/ineligible under Section 29A(e) of the Code. The stand of the 3rd Respondent is that the Resolution Professional did not afford any opportunity to cure the defect and Suo moto rejected on the ground of ineligibility which is mere technicality. However, this Tribunal is not inclined to delve into those issues. This Tribunal is considered only with respect to whether the Adjudicating Authority has passed the order directing the COC to consider the ineligibility of the 3rd Respondent is in accordance with law or not. This Tribunal is of the view that as per the above Provisions of Law, the COC has power to take a decision with regard to approval of the Resolution Plan. Further in accordance with the Regulations, the Committee has power to evaluate the Resolution Plans received by the Resolution Professional. As per Sub Regulation 4 of Regulation 39, the COC has power to approve the plan and after approving the Plan by the Committee the Resolution Professional shall submit to the Adjudicating Authority. Therefore, this Tribunal is of the view that the COC has power to decide and approve the Resolution Plan of the Resolution Applicants. Further, the COC also can consider the eligibility/ineligibility of the Resolution Applicants under Section 29(A)(e) of the Code.

CONCLUSION:

24) This Tribunal in unequivocal terms states that the order passed by the Adjudicating Authority has no legal infirmity or illegality. Thus, the Appeal is devoid of any merit. Accordingly, the Appeal is dismissed, however, without cost.

**[Justice M. Venugopal]
Member (Judicial)**

**[Kanthi Narahari]
Member (Technical)**

**05.01.2022
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