

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL AT CHENNAI**

**(APPELLATE JURISDICTION)**

**Company Appeal (AT) (CH) (INS) No. 07 of 2021**

**(Under Section 61 of the Insolvency and Bankruptcy Code, 2016)**

**(Arising out of the Order dated 12.01.2021 in M.A.32 of 2020 in CP/565/IB/2017**

**passed by the Adjudicating Authority, National Company Law Tribunal,**

**Division Bench-I, Chennai)**

**In the matter of:**

**Mr. S. Irudaya Nathan**

**...Appellant**

S/o. Selvaraj,  
Scheme Proponent of M/s Air Carnival Pvt Ltd,  
No.7/8, Licy Villa, Palaniappa Nagar,  
Ramanathapuram,  
Coimbatore 641 015,  
Tamilnadu.

**V**

**Mr. G. V. Ravikumar**

**...Respondent**

Liquidator of M/s Air Carnival Pvt Ltd,  
34-36-38, New Hospital Road,  
Gopichettipalayam,  
Erode-638 452,  
Tamil Nadu.

**Present**

For Appellant : P. James Victor Rajkumar, Advocate  
For Respondent : Mr. B. Ramana Kumar, Advocate  
For Liquidator : Mr. G. V. Ravikumar, (Liquidator)  
(appearing in person)

**JUDGMENT  
(VIRTUAL MODE)**

**Venugopal M (J)**

**Background:**

1. The Appellants have projected the present 'Appeal' as an 'affected person' being dissatisfied with the order dated 12.01.2021 in MA/32/2020 in

CP/565/IB/2017 filed by the 'Respondent'/'Liquidator' (under Section 35(n) and 60(5) of the IBC Code read with Section 230 of the Companies Act, 2013) passed by the 'Adjudicating Authority' (National Company Law Tribunal, Division Bench-1, Chennai).

2. The 'Adjudicating Authority' (National Company Law Tribunal, Division Bench-1, Chennai) while passing the 'Impugned Order' dated 12.01.2021 in MA/32/2020 in CP/565/IB/2017 at paragraphs No.9 to 12 had observed the following:

9. "It is to be noted here that the above Order passed by this Tribunal was also confirmed by the Hon'ble NCLAT by its order dated 09.12.2020 passed in **Muhamad Yavar Dala -Vs- Kavitha Surana, Liquidator of M/s. Forward Shoes (India) Pvt. Ltd.** in *Company Appeal (AT)(Insolvency) No. 384 of 2020* wherein the views taken by this Tribunal were affirmed and it was held that when Order of liquidation is passed it would amount to discharge of the officers/employees/workmen of the Corporate Debtor, except when and to the extent of the business of the Corporate Debtor to be continued during the Liquidation Process by the Liquidator. Apart from this once CIRP is initiated under IBC, the management vests in IRP/RP and if Liquidation Order gets passed the Powers and Duties of the Liquidator as in Section 35 of IBC vest with Liquidator. Without liquidator taking steps, no such application to obtain Certificate of MSME could have been filed by the Appellant. Further, it went on to hold that the Applicant/Appellant could not have moved the Authorities for Certificate under MSME bypassing the Liquidator and such action must be held as illegal.

10. Thus, the facts of the above case viz. **Muhamad Yavar Dala** (*supra*) squarely cover the case on hand. As to the present case, it is seen that the Scheme proponents have obtained the MSME Registration Certificate only on 03.10.2020, which is a fact borne on record. The said MSME Registration was obtained bypassing the Liquidator and also without the knowledge of the Liquidator and in the said circumstances, the said action of the Scheme proponents in obtaining the MSME Registration certificate is held to be illegal.

11. Further, moving on to the next issue as to whether the Scheme Proponents suffer disqualification under Section 29-A of IBC, 2016. The Scheme proponents in their Affidavit filed under Section 29-A of IBC, 2016 have stated that the ineligibility under 29-A of IBC, 2016 would not apply to them because they have submitted the Scheme as per the directions given by Hon'ble NCLAT dated 26.02.2019. The said statement made by the Scheme proponents is required to be brushed aside in view of the fact that when similar sought of an Application was filed under Section 230 of Companies Act, 2013 by the Ex- promoters and Directors of the Corporate Debtor, the Hon'ble NCLAT in the matter of "**Jindal Steel and Power Limited -Vs- Arun Kumar Jagatramka**", in *Company Appeal (AT) No. 221 of 2018* in para 9, 10, 11 and 12 has held as follows;

9. The next question arises for consideration is as to whether 1<sup>st</sup> Respondent-Arun Kumar Jagatramka (Promoter), can be said to be ineligible under Section 29A of the I&B Code and can ask for Financial Scheme of Comprise and Arrangement for itself in terms of Section 230 and 232 of the Companies Act of the I&B Code.

10. As noticed above, the Hon'ble Supreme court in **Swiss Ribbons Pvt. Ltd. & Anr. Vs. Union of India & Ors. – Writ Petition (Civil) No.99 of 2019** held that the 'primary focus of the legislation is to ensure revival and continuation of the corporate debtor by **protecting the**

**corporate debtor from its own management** and from a corporate death by liquidation’.

11. The aforesaid judgement makes it clear that even during the period of Liquidation, for the purpose of Section 230 to 232 of the Companies Act, the ‘Corporate Debtor’ is to be saved from its own management, meaning thereby the promoters, who are ineligible under Section 29A, are not entitled to file application for Compromise and Arrangement in their favour under Section 230 to 232 of the Companies Act. Proviso to Section 35(f) prohibits the Liquidator to sell the immovable and movable property or actionable claims of the ‘Corporate Debtor’ in Liquidation to any person who is not eligible to be a Resolution Applicant, quoted below:-

*“35. Powers and duties of Liquidator.- (1) Subject to the directions of the Adjudicating Authority, the liquidator shall have the following powers and duties, namely:--*

*(f) subject to section 52, to sell the immovable and movable property and actionable claims of the corporate debtor in liquidation by public auction or private contract, with power to transfer such property to any person or body corporate, or to sell the same in parcels in such manner as may be specified:*

*Provided that the liquidator shall not sell the immovable and movable property or actionable claims of corporate debtor in liquidation to any person who is not eligible to be a resolution applicant.”*

12. **From the aforesaid provision, it is clear that the Promoter, if ineligible under Section 29A cannot make an application for Compromise and Arrangement for taking back the immovable and movable property or actionable claims of the ‘Corporate Debtor’.**

12. Thus, the Hon’ble NCLAT in para 12 of the said Judgement has categorically held that the Promoter, if ineligible under Section 29A of the IBC 2016 cannot make an application for Compromise and Arrangement for taking back the immovable and movable property or actionable claims of the ‘Corporate Debtor’. In the facts of the present case, it is clear that the Scheme

has been proposed by the Ex-Directors and Promoters of the Corporate Debtor and thereby in view of the Judgment mentioned *supra*, it is no longer *res integra* that a creditor / member who is ineligible under Section 29A of the IBC, 2016 is disqualified to be a proponent of the Scheme under Section 230 of the Companies Act, 2013.”

and resultantly, dismissed the miscellaneous application without cost.

3. Questioning the validity, propriety, correctness and the legality of the ‘Impugned Order’ dated 12.01.2021 passed by the ‘Adjudicating Authority’ (National Company Law Tribunal, Division Bench-1, Chennai) in MA/32/2020 in CP/565/IB/2017, the Learned Counsel for the ‘Appellant’ scheme proponent submits that the ‘Appellant’ is a ‘Promoter’/‘Director’ as well as ‘Member’ holding 96% shares in M/s.Air Carnival Private Limited (which is under ‘Liquidation’) and that the Respondent was appointed as the ‘Liquidator’ on 20.12.2018.

**Appellant’s Submissions:**

4. The Learned Counsel for the Appellant brings to the notice of this ‘Tribunal’ that as against the ‘Liquidation Order’, another member and two other stakeholders had jointly preferred an ‘Appeal’ before this ‘Appellate Tribunal’ in CA(AT)(INS) No.191-193 of 2019 and further that the ‘Appellate Tribunal’ through an Order dated 26.02.2019 had directed the ‘Liquidator’ to take steps under Section 230 of the Companies Act.

5. As against the said 'Judgment' of this 'Appellate Tribunal', the Respondent filed a Civil Appeal Nos.5115 to 5117 of 2019 before the Hon'ble Supreme Court of India which uphold the Judgment of this 'Appellate Tribunal' and dismissed the 'Appeal' on 08.07.2019. As such, the Respondent, is liable to take steps as per the direction of this 'Appellate Tribunal'.

6. It is represented on behalf of the 'Appellant' that the 'Respondent' had commenced initiating the steps under Section 230 of the Companies Act, 2013, by making an advertisement on 14.07.2019, inviting 'Compromise Scheme Proposal' from the 'Members'/'Stakeholders' of the 'Corporate Debtor' Company. In the interregnum, the 'Appellant' (as a member of the 'Corporate Debtor') had placed a 'Compromise Proposal' in a 'sealed cover' addressed to the Respondent through Registered Post on 24.05.2019, before the Respondents advertisement, which was acknowledged by the Respondent. However, the Respondent, never raised any objection or require to resubmit the proposal.

7. According to the 'Appellant', the Respondent filed MA/32/2020 dated 10.12.2019 before the 'Adjudicating Authority', praying for issuance of an order to conduct a 'Committee of Creditor's meeting, to consider the said 'Compromise Proposal'. In fact, the 'Respondent'/'Liquidator', in regard to the eligibility criterion raised some irrelevant issues and both the Respondent/Liquidator and the

‘Adjudicating Authority’ interfered with the ‘Authority’ of the ‘Committee of Creditors’ and the Miscellaneous Application came to be dismissed.

8. The Learned Counsel for the Appellant urges before this ‘Tribunal that the ‘Appellate Tribunal’ had directed the Respondent to take steps in terms of the ingredients of Section 230 of the Companies Act, 2013 only, however, in negation of the direction issued by this ‘Appellate Tribunal’, the Respondent preferred ‘Miscellaneous Application’ under Section 35(n) and 60(5) r/w Regulation 32 of the IBBI (LP) Regulations, 2016.

9. The Learned Counsel for the Appellant proceeds to point out that Section 230 of the Companies Act, 2013 allows the ‘Liquidator’ to file an application to obtain a direction to conduct ‘Committee of Creditors’ Meeting’ and that the ‘Tribunal’ shall pass an order for a ‘Meeting’. Furthermore, when a ‘Compromise Proposal’ is placed as per Section 230 of the Companies Act, 2013, the scheme proponent is playing role on a ‘Resolution Applicant’ as per Insolvency and Bankruptcy Code and further that the ‘Liquidator’ is playing role of a ‘Resolution Professional’ as per I & B Code.

10. The Learned Counsel for the Appellant comes out with an argument that Section 29(A) of the Insolvency and Bankruptcy Code is ‘inapplicable’ to the ‘Appellant’ and indeed, Section 29(A) of the Code was amended with retrospective effect from 23.11.2017. However, the ‘CIRP’ had commenced on

02.11.2017 and therefore, the ingredients of Section 29(A) of the Code are not applicable. Added further, even the second condition of Section 29(A)(C) of the Code is not satisfied and as such, this Provision is not applicable to the 'Appellant'/'Compromise Scheme Proponent'. The other contention put forward by the Learned Counsel for the 'Appellant' is that as per notification No. IBBI/2019-20/GN/REG053, dated 06.01.2020, w.e.f. 06.01.2020, a proviso was inserted into Section 2B of IBBI(LP) Regulations, 2016 – (a person who is not eligible under the IBC to submit a Resolution Plan for Insolvency Resolution of the Corporate Debtor, shall not be a party in any manner to such compromise or arrangement and this is applicable only after 06.01.2020. But the 'Appellant' had furnished his 'Compromise Proposal' on 24.05.2019, which fact was concealed by the 'Liquidator' before the 'Adjudicating Authority'.

11. The Learned Counsel for the Appellant submits that it is not necessary for the 'Liquidator' to seek an 'Affidavit' under Section 29A of the Insolvency and Bankruptcy Code, when the compromise arrangement was made under Section 230 of the Code, moreover, the proviso to Section 2B of IBBI (LP) Regulations, 2016 ineligible criteria is not applicable to the 'Appellant'/Scheme Proponent. Besides these, the 'Adjudicating Authority' cannot travel beyond the purview of an 'Application' and pass an order outside the relief that was claimed by the 'Applicant' in a particular 'Miscellaneous Application'.

12. The Learned Counsel for the Appellant contends that the 'Liquidator' had obtained an 'Affidavit' from the 'Appellant' by exercising 'coercion' and the said act is in violation of law and further it is not necessary to conduct the meeting of the 'Committee of Creditors', as he prayed for.

13. The Learned Counsel for the Appellant points out that there is no 'Auction Proceeding' and that the 'Appellant' is not a Bidder and therefore, under Section 29A of the I & B Code, an 'Affidavit' is not necessary for the present case.

**Appellant's Citations:**

14. (i) The Learned Counsel for the Appellant refers to the decision in State Bank of India v Electro Steels Limited [CA(IB) No.202 & 203/KB/2018, CP(IB)No. 361/KB/2017] wherein the 'Adjudicating Authority' had observed that NCLT cannot make a decision to hold that the Resolution Applicants/Scheme Proponents are eligible or ineligible, and the objections would be considered by the 'Committee of Creditors' for an independent decision in regard to application of section 29A of the Code.

(ii) The Learned Counsel for the Appellant adverts to the 'Judgment' of this 'Tribunal' in Rajputana Properties Pvt. Ltd. V. Ultra Tech Cement Ltd. and Ors. [IA No.594 of 2018 in CA(AT) (Ins) No.188 of 2018] wherein it was observed and held that:

- a. “While scrutinizing the resolution plan under Section 30(2), the RP cannot hold or decide as to who is ineligible under Section 29A. Neither to scrutinize the eligibility of Resolution applicants.
- b. As per section 30(2), the RP is required to examine whether resolution plan confirms the provisions as mentioned therein but he cannot disclose it to any other person.
- c. The resolution applicants are entitled to be present when the resolution plans are opened and placed before the CoC as per section 30(5). At this stage (at the time of opening the proposal cover), they may point out whether one or other resolution applicant is ineligible in terms of section 29A or not.”

**GIST OF COUNTER OF THE RESPONDENT/LIQUIDATOR:**

15. According to the Respondent/Liquidator one Murali Sundaram an employee of M/s. Air Carnival Private Limited (under ‘Liquidation’) had filed an application under Section 9 of the Insolvency and Bankruptcy Code and that the ‘CIRP’ was allowed on 02.11.2017. Furthermore, in the CoC Meeting that took place on 02.05.2018, to liquidate the ‘Corporate Debtor’ because of the fact that the operation of the Airlines had stopped on 09.04.2017 and that the sole Aircraft of the ‘Corporate Debtor’ was taken away by the Lessor. Besides this, there was no license to run the aircraft. Therefore, the ‘Committee of Creditors’ felt that a possibility of any Resolution Plan was remote because of the reason that there was no aircraft

and license to run the aircraft. In short, the 'Committee of Creditors' took a pragmatic view for liquidation of 'Corporate Debtor'.

16. It is represented on behalf of the Respondent that in the case of 'Committee of Creditors Meeting' dated 02.05.2018, the Liquidator had stated that the properties of the 'Corporate Debtor', even though the documents of the properties were in the name of 'Promoter'/'Director' Mr. S. I. Nathan were shown in the Audited Financial Statement of the 'Corporate Debtor', in the case of the meeting, Promoter Mr. S. I. Nathan had asked the 'Committee of Creditors' meeting to consider the properties which are in his name to be considered as property of the 'Corporate Debtor'. Indeed, the Respondent filed MA 646 of 2018 before the 'Tribunal' that a 'Resolution' passed in the 'Committee of Creditors' meeting for Liquidation of the 'Corporate Debtor' before the 'Adjudicating Authority' and that a Liquidation Order was passed on 20.12.2018.

17. It is the stand of the Respondent/Liquidator that the Promoters projected an 'Appeal' before the 'Appellate Tribunal' against the order of Liquidation passed by the 'Adjudicating Authority'. In fact, the 'Appellate Tribunal' on 26.02.2019 had uphold the order of Liquidation and had instructed the 'Liquidator' to take steps under Section 230 of the Companies Act, failing which steps were to be taken for the outright sale of the 'Corporate Debtor'. An appeal was filed before the Hon'ble Supreme Court dated 16.04.2019 against the Judgment of the 'Appellate

Tribunal’ and that the Hon’ble Supreme Court dismissed the ‘Appeal’ filed by the ‘Liquidator’ on 08.07.2019.

18. The plea of the Respondent is that the order passed by the ‘Adjudicating Authority’ in MA/32/2020 in CP/565/IB?2017 thus in no way make the Promoter eligible for promotion of ‘Compromise Proposal’ and the restrictions in Section 29(A) of the Insolvency and Bankruptcy Code will apply to the Promoter also that as per Section 62(1) of the Code, the Liquidator was empowered to take 45 days duration to prefer an appeal before the Hon’ble Supreme Court. But the Promoter had submitted a ‘compromise proposal’ to the Liquidator even before he could commence the procedure under Section 230 of the Companies Act, 2013. In reality, the Liquidator took steps pursuant to the directions issued by the ‘Appellate Tribunal’ under Section 230 of the Companies Act, 2013 by giving a public announcement on 14.07.2019, inviting compromise proposal/arrangements from all stakeholders.

19. The categorical stand of the Respondent is that the Respondent/Liquidator cannot be pressurized by the Promoter and in fact, the Respondent/Liquidator could not act upon the ‘compromise proposal’, till the completion of the ‘Appeal’ preferred before the Hon’ble Supreme Court. The public announcement was issued by the ‘Liquidator’ by commencing the procedure, in terms of the directions issued by the ‘Appellate Authority’. In this connection, the

Respondent/Liquidator in its counter before this 'Tribunal' has averred that Section 29(A) of the Insolvency and Bankruptcy Code was amended that retrospective effect from 23.11.2017 and that the 'Compromise Proposal' was given on 24.05.2019 by the 'Promoter'. Indeed, the decision of the 'Tribunal' was taken on 12.01.2021, which is subsequent to the date of amendment of Section 29(A) of the Code.

20. Added further, the 'Promoter' is ineligible to file a 'Compromise Proposal' by means of an amendment of Section 29(A) of the Code and that the account was declared as non-performing asset as on 29.06.2017 and that the 'CIRP' took place on 02.11.2017. Even before the commencement of 'CIRP' the account was declared as 'non-performing asset' and that the Respondent/Liquidator had not secured an affidavit from the Promoter to the effect that they are eligible to furnish the 'Compromise Proposal'. However, the 'Tribunal' had mentioned in its order dated 28.02.2020 as under:

“As it is required, let the same be obtained from the proponents of the Scheme taking into consideration the representation made by the Learned Counsel for the Liquidator for the Liquidator as well as considering the decisions of the Hon'ble NCLAT in the matter of M/s.Jindal Steel & Power Ltd-Vs-ArunkumarJagatrimba(Gujarat NRE Cake Ltd) in CA(AT)No.221 of2018, let an affidavit be filed by the proponents of the Scheme as submitted by the proponents within a period of ten days from today.”

The Respondent/Liquidator in the Counter has referred to the Judgment of the Hon'ble Supreme Court in Arun Kumar Jagatramka V Jindal Steel and Power Ltd. Vide Civil Appeal No.9664 of 2019 that Writ Petition No.(C) No.269 of 2020 and With Civil

Appeal No.2719 of 2020 dated 15.03.2021 wherein it was observed that the Promoters are not empowered to submit 'Compromise Proposal' under Section 230 of the Companies Act, 2013 and under Section 29(A) of the Code.

21. It is projected on the side of the Respondent/Liquidator that the 'Suspended Directors' had obtained an MSME Certificate dated 03.10.2020 in an illegal and clandestine fashion, which is void abinitio and deserves to be ignored. In fact, the 'Directors'/'Promoters' has no authority to sign the application during the period of liquidation and though the knowledge of the liquidator and their action to perjury. To put it precisely, the 'Tribunal' in its order had pointed out that obtaining 'MSME' Registration Certificate without the involvement of the 'Liquidator' was held to be illegal and abuse of law. In this regard, the Respondent/Liquidator has adverted to the decision of this 'Tribunal' in Md. Yavar Dala V S. Kavitha Surana dated 09.12.2020 wherein this 'Tribunal' had dismissed the case by stating that obtaining the MSME Certificate was an illegal one and the said decision is squarely applicable to the facts of the present case before this 'Tribunal'.

**APPELLANT'S RESUME OF REJOINDER:**

22. According to the 'Appellant' Regulation 32 of IBBI (Liquidation Process) Regulations, 2016 relating to 'Sale of Assets', etc. is to the effect that the 'Liquidator' may sell: (a) sell an asset on a standalone basis; or (b) sell – (a) the assets in a slump sale; (b) a set of assets collectively, or (d) the assets in parcel and this

Regulation applies only for the realization of the assets of the 'Corporate Debtor' and not for a 'compromise proposal'.

23. In the present case, there is no such compromise failure, when the Respondent projected the 'Miscellaneous Application' before the 'Adjudicating Authority'. As a matter of fact, the 'Appellant' had sent his 'scheme of arrangement' on 24.05.2019 along with required enclosures. As on the date of placing the compromise scheme, the 'Promoter' is eligible as per the Code as well as under IBBI Regulations.

24. It is the plea of the 'Appellant' that the 'Respondent' had admitted that the Bank account was declared as 'NPA' on 29.06.2017 and that the 'CIRP' commenced on 02.11.2017, viz. before the 'Amendment'. By referring to Section 29A of the I&B Code, the 'Appellant' has taken a stand that there are two conditions which are to be both fulfilled (i) classified as NPA (ii) a period of one year had lapsed from NPA till CIRP and further it is the plea of the 'Appellant' that there was no lapse of one year i.e. 'CIRP' had commenced within four months from 'NPA'.

25. As per Section 230 (1) of the Companies Act, 2013, when a 'Compromise Proposal' is proposed by the Member of a company through its 'Liquidator', who is appointed under the I&B Code, 2016 with effect from 15.11.2016, can make an application under this provision alone with a prayer to

conduct the CoC meeting. However, the 'Respondent'/'Liquidator' and the 'Adjudicating Authority' had not followed the said procedure in the 'instant Case'.

26. Section 30 (2) (e) of the I & B Code does not empower the 'Resolution Professional' to determine whether the 'Resolution Plan' does or does not violate the Provisions of Law. The 'Adjudicating Authority' can decide whether the 'Resolution Plan' is in breach of any Provision of Law (including Section 29(A) of the Code) after hearing 'Arguments' from the 'Resolution Applicant' as well as the 'Committee of Creditors', after which an 'Appeal' can be filed from the decision of the 'Adjudicating Authority' to the 'Appellate Authority' under Section 61 of the Code.

27. In *State Bank of India v Electro Steels Ltd.* (vide CA (IB) No.202 & 203/KB/2018 CP(IB) No.361/KB/2017, the 'Adjudicating Authority' opined that it cannot make a decision to hold that the 'Resolution Applicants' are eligible or ineligible and the objections would be considered by the 'Committee of Creditors' for an independent decision as regards the application of Section 29(A).

28. In the present case, the 'Liquidator' is playing the role of a 'Resolution Professional', since the 'compromise proposal' is placed before him, which is equivalent to a 'Resolution Plan'. Further the 'Resolution Applicants' are entitled to be present when the 'Resolution Plans' are opened and placed before the 'Committee of Creditors' as per Scton 30(5) of the Code. At this juncture, they may

point out whether one or other 'Resolution Applicant' is ineligible in terms of Section 29(A) of the Code or not.

**RESPONDENT'S CONTENTIONS:**

29. The Learned Counsel for the Respondent/Liquidator submits that the direction in the 'Judgment' of this 'Tribunal' in Company Appeal No. (AT)(INS) Nos.191, 192 and 193 of 2019 dated 26.02.2019, [after adverting to the Judgment of this 'Tribunal' dated 29.01.2019 in S.C. Sekaran v Amitgupta and Ors. in Company Appeal (AT) (INS) 495 and 496 of 2018 at Paragraph 5] runs to the effect at Paragraph 6 that... "we are of the view that the liquidator should act in terms of the aforesaid directions of the Appellate tribunal and take steps under Section 230 of the Companies Act. If the members of the 'Corporate Debtor' or the 'Creditors' approach through the liquidator for compromise or arrangement by making proposal of payment to all the creditor(s), the Liquidator on behalf of the company will move an application under Section 230 of the Companies Act, 2013 before the National Company Law Tribunal, in terms of the observations as made in SC Sekaran (supra)....."

and this cannot be construed as specific direction to accept the proposal of the 'Corporate Debtor' nor it confers any special rights or privileges to the 'Corporate Debtor' / 'Promoters' over the law in force which is applicable to all.

30. According to the Learned Counsel for the Respondent/Liquidator, it is the duty of the Respondent/Liquidator to provide equal opportunity to all the stakeholders under Section 230 of the Companies Act, 2013 and therefore, a public announcement for inviting compromise/arrangements from any or all of the stakeholders was given on 14.07.2019, in terms of the ingredients of the Insolvency and Bankruptcy Code.

31. The Learned Counsel for the Respondent/Liquidator projects an argument that the 'Appellant' is ineligible under Section 29A of the Code, and therefore, he is disqualified to be a proponent of the claim as per Section 230 of the Companies Act, 2013.

32. The Learned Counsel for the 'Respondent'/'Liquidator' comes out with a plea that the 'Appellant' wanted to take custody of all the properties and business by paying only 50% of the total claim which is against law. Moreover, it is the version of the Respondent that the Promoters should not enter into the 'Corporate Debtor' through 'backdoors'. Also, that in the instant Case, 'Promoter' has managed to obtain a MSME Certificate on their own without the knowledge of the 'Respondent'/'Liquidator' and the same is an illegal one.

### **DISCUSSIONS:**

33. At the outset, this 'Tribunal' points out It comes to be known that the 'Respondent'/'Liquidator' /'Applicant' had preferred MA/32/2020 in

CP/565/2017 before the 'Adjudicating Authority' (National Company Law Tribunal, Chennai) wherein, on 02.11.2017, the 'Insolvency Application was allowed Exparte'. Further, in MA/646/2018 in CP/567/2017 (filed by the 'Resolution Professional') the 'Adjudicating Authority' appointed the 'Resolution Professional' Mr.G.V.Ravikumar) as 'Company Liquidator'. However, the 'Appellate Tribunal' on 26.02.2019 had varied the order of the 'Adjudicating Authority' (Tribunal) and directed the 'Respondent'/'Liquidator'/'Applicant' to approach the 'Tribunal' by filing a 'Petition' in terms of Section 230 of the Companies Act, on receipt of any scheme of 'arrangement'/'compromise' from the members of the Company. As such, the MA/32/2020 in CP/565/2017 was filed by the 'Respondent'/'Liquidator' as an 'Applicant'.

34. A cursory perusal of the MA/32/2020 in CP/565/2017 filed by the 'Respondent'/'Liquidator' (as an Applicant) before the National Company Law Tribunal, Chennai shows that the 'Respondent'/'Liquidator' had prayed for the following reliefs:

- (i) issuance of an order in directing him to call for, conduct and to hold a meeting of the Secured Creditor(s) Financial Creditor(s) of the 'Corporate Debtor' – in – Liquidation
- (ii) passing of an order in directing the 'Applicant'/'Liquidator' to call for, conduct and to hold a meeting of the unsecured creditor (s) Operational Creditor(s)/Employee(s)/Statutory Authorities of the Corporate Debtor in 'Liquidation' as per schedule.

- (iii) Passing of such an order(s) as the 'Tribunal' may deem fit in terms of Section 230(3) of the Companies Act for causation of Notice of Meeting.

35. It is the crystalline stand of the 'Appellant' before this 'Tribunal', that Section 29A of the I&B Code was amended with retroactive effect from 23.11.2017. However, the 'CIRP' had commenced on 02.11.2017, before the amendment. As such Section 29A of the I&B Code is not applicable to the 'Appellant'. Moreover, the second condition of the Section 29(A)(C) of the Code is not satisfied.

36. The other plea of the 'Appellant' is that to the Section 2B IBBI (Liquidation Process) Regulations, 2016 a proviso was inserted dated 06.01.2020 vide Notification No.IBBI/2019-20/GN/REG053 (w.e.f.06.01.2020) and in the present case, the 'Appellant' submitted his 'compromise proposal' on 24.05.2019. Furthermore, the 'Tribunal' can decide whether the 'Resolution Plan' is in breach of violation of any law (including Section 29A of the Code) only after hearing the arguments from the 'Proponent'/'Resolution Applicant' as well as the 'Committee of Creditors'. Besides this, the 'Respondent'/'Liquidator' had not completed the process of steps to be taken in terms of Section 230 of the Companies Act, 2013.

37. It must be borne in mind that the 'Respondent' is the 'Liquidator' of the 'Corporate Debtor'/M/s. Air Carnival Pvt. Ltd. As a matter of fact, the order of 'Liquidation' was passed on 20.12.2018 and that the date of compromise as per Section 230 of the Companies Act was on 25.05.2019. To put it precisely, only after the 'Liquidation Order', the 'Compromise Proposal' was given.

38. As per the preamended definition Section 29A of the I & B Code, the 'Promoters' could be the 'Resolution Applicant(s)' per contra, under the new definition 'Promoters' are not included in the definition of 'Resolution Applicant' as they are not mentioned in Clause (H) of Section 25(2) of the Code. The restriction under Section 29A of the Code shall apply when an ineligible person or any other person acting jointly with such person submits a 'Resolution Plan'. The restriction shall also apply if such person is a connected person to a 'Resolution Applicant' as defined in explanation to Section 29A of the Code.

39. In fact, the list of persons who are ineligible to submit 'Resolution Plan' is an exhaustive one and among other things covers an undischarged insolvent, a wilful defaulter, any person having non-performing loan as per 'Reserve Bank of India' guidelines, a person convicted of an offence punishable for two or more years a person, disqualified to act as Director and a person prohibited by 'SEBI' from trading in securities or accessing the securities. The 'term' 'connected persons' as defined in explanation means, any person who is the 'promoter' or in the management or control of the Resolution Applicant or any person who shall be the 'Promoter' or in management or control of the business of the 'Corporate Debtor' during the implementation of 'Resolution Plan' or the holding Company, subsidiary Company, Associate Company or related party of a person referred to in clauses (i) & (ii) of Section 29A of the Code.

40. The reason for an 'amendment' is not to shower power on the 'Liquidator' to sell any immovable and movable property or actionable claims of the 'Corporate Debtor' to an individual, who is ineligible to put forward a 'Resolution Plan' as mentioned in Section 29A of the Code.

**Tribunal's Power:**

41. Undoubtedly, the sanctioning 'Tribunal' has wide powers and is to see that the proposed scheme of 'Compromise and arrangement' is not to be in breach of any provision of Law and especially, the same is not contrary to 'public policy'. The fact of the matter is that a 'Tribunal' can scan the scheme from the Judicial perspective. Any 'compromise or arrangement' approved by 'majority of creditors' will be binding on all the Creditors, only if the said compromise or arrangement is sanctioned by the 'Court'/'Tribunal'.

42. Be it noted, that in Law, after the 'Liquidation Order', the 'Committee of Creditors' cannot come together as a 'Body'. It cannot be lost sight of the fact that the 'Corporate Debtor' in the present case is under 'Liquidation'. Section 30(2) pertains to 'Resolution Plan' in the 'Corporate Insolvency Resolution Process'. In this connection, it is pertinent for this 'Tribunal' to make a significant mention that the 'Respondent'/'Liquidator' has taken an emphatic stand that the 'Appellant'/'Proponent' of the Scheme by paying only 50% of the whole claim had ventured to take custody of all the properties which is impermissible in law.

43. Any person who is either promoter or in the management or control of the business of the 'Corporate Debtor' is ineligible by default under the I&B Code. The Provisions of Section 29A of the Code came into force from 23.11.2017 and further that the requirements of Section 29A of the Code applies to 'CIRPs' initiated after 23.11.2017.

**IBBI (LP) Regulation:**

44. It is useful to point out that 2(B)(1) of 'Insolvency and Bankruptcy Board of India' (Liquidation Process) Regulations, 2016 'Compromise or arrangement' enjoins that

“where a compromise or arrangement is proposed under section 230 of the Companies Act, 2013 (18 of 2013), it shall be completed within ninety days of the order of liquidation under sub-sections (1) and (4) of section 33;

[Provided that a person, who is not eligible under the Code to submit a resolution plan for insolvency resolution of the corporate debtor, shall not be a party in any manner to such compromise or arrangement].”

Besides this, the stock reality is that the I&B Code 2016, is meant that 'defaulting promoters' of their Companies can be displaced.

**Assessment:**

45. As far as the present case is concerned, since the 'Liquidation' order was passed on 20.12.2018 in MA/646/2018 by the 'Adjudicating Authority' and that the 'Resolution Professional' Mr. G.V. Ravikumar was appointed as 'Liquidator' ('Respondent' in the 'instant Appeal'). Added further the 'Compromise

Proposal' was given on 24.09.2019 by the 'Promoter' and in reality, the Section 29A of the Code was amended with a retrospective effect from 23.11.2017 and in view of the fact that the retrospective amendment to Section 29A of the Code applies to the 'Promoter(s)', they are ineligible to project a 'compromise proposal'/ 'arrangement' for taking back the immovable and movable properties or actionable claims of the Corporate Debtor in the considered opinion of this 'Tribunal'.

**Liquidator:**

46. It is to be remembered that Section 34 of the I & B Code, 2016 deals with 'Appointment of Liquidator' and 'fee to be paid'. Section 34(2) of the Code enjoins that on the 'appointment of a Liquidator', under this Section all powers of the 'Board of Directors', Key Managerial Personal and the partners of 'Corporate Debtor' as the case may be, shall cease to have effect and shall be vested in the 'Liquidator'.

**Liquidator's Position:**

47. Section 35 of the Code provides for 'Powers and Duties of Liquidator'. For the orderly completion of the 'Liquidation' Section 35 of the I & B Code is meant for. When the 'Liquidator' is appointed he shall hold the 'Liquidation Estate' as a fiduciary for the benefit of all 'Creditors'. Further, 'Liquidator' is empowered to take necessary steps by applying to the 'Adjudicating Authority' to obtain necessary orders or directions that may be necessary for the 'Liquidation' of

the 'Corporate Debtor' and to report the progress of the 'Liquidation Process' in a manner as may be specified by the 'Board'. He may also take all such actions, steps, etc. that may be necessary for 'Liquidation', Distribution of Assets and in discharge of his duties and obligations and functions as 'Liquidator'. The 'Liquidator' will verify claims of all 'Creditors', take into custody and control of assets, property effects and actionable claims of the 'Corporate Debtor', carry on the business of 'Corporate Debtor' for its beneficial Liquidation, etc. as specified under Section 35 of the Code. In short, without the 'Respondent'/'Liquidator' taking necessary steps, no such application to secure a 'MSME Certificate' was to be filed and suffice it for this 'Tribunal' to point out that in the 'instant Case', the proponents of the scheme obtaining a 'MSME Registration Certificate' on 03.10.2020 without the knowledge of the 'Liquidator' and either ignoring or brushing aside him are clearly unsustainable in the eye of Law.

48. To put it succinctly, the 'Liquidator' is required to adhere to the procedure prescribed under the Code and before taking steps to sell the 'Corporate Debtor's Assets' (Company) he will take necessary steps as per Section 230 of the Companies Act and that the 'Adjudicating Authority' if situation so warrants is to pass appropriate orders. Before approval of an arrangement or scheme, the 'Adjudicating Authority' by following the principles can allow the 'Liquidator' to form

the 'Committee of Creditors' for its opinion to find out whether the arrangement of scheme is viable/feasible one and having correct financial matrix.

49. In the event of failure of revival, it is open to the 'Adjudicating Authority' and the 'Liquidator' firstly to proceed with the sale of Company's assets in entirety and thereafter, if not possible, to sell the Company in part and of course, in the manner known to Law. If the 'Liquidator' initiates necessary action, he will complete the process as per Section 230 of the Companies Act, 2013, within 90 days.

50. Dealing with the stand of the 'Appellant' that the 'Liquidator' cannot seek an 'Affidavit' under Section 29A of the I & B Code, when the 'compromise arrangement' was made as per Section 230 of the Companies Act, 2013, this 'Tribunal' relevantly points out that the 'Adjudicating Authority' (National Company Law Tribunal, Division Bench-1, Chennai) on 28.02.2020 had directed the 'Liquidator' to secure an 'Affidavit' from the proponents of the scheme to the effect that they were not 'disqualified' as per Section 29A of the I & B Code. As such, no fault can be found with the 'Respondent'/'Liquidator' when he secured an 'Affidavit' from the 'Promoter' and subsequently filing the same before the 'Tribunal'. Moreover, the 'Adjudicating Authority' by virtue of the 'Order' dated 15.09.2020 had provided an opportunity to the proponents of the scheme to project their point of view before it by justifying the contents of 'Affidavit'.

51. Be that as it may, in view of the detailed discussions, on a careful consideration of respective contentions advanced on either side and on overall assessment of the whole gamut of the entire facts and circumstances of the present case, this 'Tribunal' comes to an inescapable conclusion that the 'Adjudicating Authority' (National Company Law Tribunal, Division Bench-1, Chennai) in the 'Impugned Order' dated 12.01.2021 in MA/32/2020 in CP/565/IB/2017 (filed by the 'Respondent'/'Liquidator'/'Applicant') came to the right conclusion that the scheme was proposed by the Ex-directors and promoters of 'Corporate Debtor' and further that a 'Creditor'/'Member' who is ineligible under Section 29A of the I & B Code, 2016 was disqualified to be a proponent of the scheme as per Section 230 of the Companies Act, 2013, which requires no interference in the hands of this 'Tribunal' sitting in 'Appeal'. Looking at from any angle, the 'Appeal' is devoid of merits.

**Result:**

In fine, the 'Company Appeal' (AT)(CH)(INS) No. 07 of 2021 is dismissed. No costs. IA/22/2021 (Stay) is closed.

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

**[V. P. Singh]  
Member (Technical)**

**26.07.2021  
SE**