

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL, PRINCIPAL BENCH,
NEW DELHI**

Company Appeal (AT) (Ins) No. 1124-1125 of 2020

IN THE MATTER OF:

MR. VINEET KHOSLA

Shareholder and (ex) Director

Margra Industries Ltd.

A-501 The Villas, DLF,

Phase – II, Gurgaon

Tel: +91 9811054400

Email: khosla.vineet@gmail.com

.... Appellant

Vs.

**M/S EDELWEISS ASSET RECONSTRUCTION
COMPANY LTD.**

Edelweiss House Off C.S.T. Road, Kalina

Santa Cruz (East)

Mumbai – 4000098

Tel: +91 8879789517

Email: sandip.pradhan@edelweissfin.com

....Respondent No. 1

MARGRA INDUSTRIES LTD.

Acting Through:

The Liquidator Mr. Paramjeet Singh Bhatia

Liquidator- Margra Industries Ltd.

IBBI Regn No. IBBI/IPA-001/IP-P00961/2017-
2018/11582

Tel: 00919920128849

Email: bhatiaparam.s@gmail.com

....Respondent No. 2

MR. RAJENDER KUMAR GIRDHAR

Interim Resolution Professional

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....Respondent No. 3

MR. PARAMJEET SINGH BHATIA

Liquidator- Margra Industries Ltd.

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Connaught Place, New Delhi – 110001

Tel: 00919920128849; 011-45101111
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....Respondent No. 4

ARCK RESOLUTION PROFESSIONALS LLP

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Connaught Place, New Delhi- 110001
Tel: 011-45101111
Email: insolvency@arck.in

....Respondent No. 5

Present:

For Appellant:- Mr. Salman Khurshid, Sr. Adv. with Mr. Deepak Khosla, Advocates

For Respondent:- Mr. Neeraj Malhotra, Sr. Adv. with Ms. Vidhisha Haritwal, Mr. RP Agarwal, Ms. Manisha Agarwal, Mr. Ujjaval Kumar and Nimish Kumar, Advocates for R1
Mr. Abhishek Anand, Advocates for R2
Mohan Sharma, Liquidator

J U D G M E N T

Jarat Kumar Jain: J.

Ld. Adjudicating Authority (National Company Law Tribunal, New Delhi, Principal Bench) vide order dated 15.10.2020 allowed the Application CA No. 121 of 2020 in IB 866(PB)/2018 and directed for liquidation of the Corporate Debtor M/s Margra Industries Ltd. and vide order dated 10.11.2020 dismissed the Suspended Director's Application CA No. 307 of 2020 seeking recall of the admission order dated 15.03.2019, against these orders the Appeals are filed.

2. Brief and relevant facts of these Appeals are that Ld. Adjudicating Authority vide order dated 15.03.2019 admitted the Application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (IBC) filed by the Edelweiss Asset Reconstruction Company Ltd. (R-1) against the M/s Margra Industries Ltd. (Corporate Debtor) and Mr. Rajendra Kr. Girdhar was appointed as Interim Resolution Professional (IRP) and moratorium was declared in terms of the Section 14 of the IBC. The Admission order was

challenged by the Suspended-director (Vineet Khosla) of the Corporate Debtor before this Appellate Tribunal in CA (AT) (Ins) No. 441 of 2019. The Appeal was dismissed on merits vide order dated 06.09.2019.

3. On receipt of claims and their verification/collation, the Committee of Creditors (COC) was constituted by the IRP on 24.04.2019. The CoC in its first meeting held on 30.04.2019 resolved for appointment of IRP Rajendra Kumar as RP. During the process of CIRP the Expression of Interest (EOI) was issued thrice with the extended period sought from the Adjudicating Authority. During the extended period Mr. RP Khosla had submitted its EOI on 10.08.2019, however, the same had been found ineligible and non-compliant with the requirements of the invitation of EOI. The CIRP period was ended on 22.09.2019. However, RP has filed the Application for extension of CIRP period by 90 days beyond 180 days. The same was allowed vide order dated 11.10.2019 and CIRP period extended upto 22.12.2019. In extended period M/s Sarvesh Export Pvt. Ltd. submitted a resolution plan on 21.11.2019 and corrigendum to a resolution plan on 20.12.2019, however, the same was found non-compliant to the requirements of the Request for Resolution Plan and provisions of IBC by the RP.

4. The CoC in its 09th meeting held on 21.12.2019 after discussions concluded that there are no other avenues left but to explore the liquidation process for Corporate Debtor. Accordingly, resolutions were passed by the CoC with 92.29% voting share. Therefore, in accordance with Regulation 27 of the Insolvency and Bankruptcy Board of India (Corporate Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (CIRP Regulations), the RP had appointed two registered valuers to determine the

liquidation value of the Corporate Debtor in accordance with Regulation 35 of CIRP Regulations.

5. RP had submitted the estimated liquidation value of assets of the Corporate Debtor based on the valuation reports obtained from valuers, is approximately Rs. 18,40,85,597/-. Thereafter, RP filed an Application CA No. 121 of 2020 under Section 33(1) for issuance of direction of liquidation of the Corporate Debtor Company i.e. M/s Margra Industries Ltd. On 15.10.2020 the Application was allowed by ordering liquidation of the Corporate Debtor and Mr. Paramjeet Singh Bhatia was appointed as Liquidator.

6. Before passing of the order of Liquidation on 02.01.2020 the Appellant "Suspended Director" moved an Application seeking recall of admission order dated 15.03.2019 on the ground that the claim is barred by limitation. Ld. Adjudicating Authority held that limitation issue is a question of fact and law. This issue should have been raised at the time of admission or at least in the Appeal before the Appellate Tribunal. Moreover, the matter now is pending for completion of liquidation of Corporate Debtor. Now the Admission order on the ground of limitation cannot be recalled. Thus, by the impugned order dated 10.11.2020 the Application is dismissed.

7. Being aggrieved with the order of liquidation and dismissal of Application for recall of admission order, the Appellant has filed present Appeals.

Submission in CA (AT) (Ins) No. 1125 of 2020.

8. Ld. Sr. Counsel for the Appellant submitted that the Adjudicating Authority is competent to recall its admission order dated 15.03.2019. The

same is obtained by playing fraud and misrepresentation that the Application under Section 7 of IBC is within limitation. Ld. Adjudicating Authority has failed to consider this aspect of the matter.

9. Ld. Sr. counsel for the Appellant cited the Judgment of Hon'ble Supreme Court in the case of United India Insurance Co. Ltd. Vs. Rajendra Singh & Ors. AIR 2000 SC 1165 and AV Papayya Sastry Vs. Government of A.P. AIR 2007 SC 1546 and argued that every court/tribunal has power to recall its order which is obtained by practicing fraud.

10. Ld. Sr. Counsel for the Appellant further submitted that the Section 7 Petition is apparently time barred, the date of default is 29.07.2000 whereas the Petition has filed on 12.06.2018 i.e. after almost 18 years from the date of default. It is true that the issue of limitation was not raised when the order of initiation of CIRP was passed and against that order the Appeal has been decided by this Appellate Tribunal because at that time it was not clear whether the provisions of Limitation Act would be applied to IBC proceedings or not. Hon'ble Supreme Court in the case of Gaurav Hargovindbahi Dave Vs Asset Reconstruction Company (India) Ltd. & Anr. Civil Appeal No. 4952 of 2019 decided on 18.09.2019, Jignesh Shah & Anr. Vs. Union of India & Anr. WP (C) No. 455 of 2019 decided on 25.09.2019 and Sagar Sharma vs. Phoenix Arc Pvt. Ltd. Civil Appeal No. 7673 of 2019 decided on 30.09.2019 laid down that the provisions of Limitation Act would be applicable to IBC proceedings.

11. It is also submitted that the issue of limitation goes to the root of the jurisdiction of the Adjudicating Authority to decide a time barred claim. The Adjudicating Authority by virtue of Section 3 of limitation Act, was duty

bound to dismiss the Petition even if the objection had not been raised by the Appellant.

12. Ld. Sr. Counsel for the Appellant submitted that Ld. Adjudicating Authority while exercising the powers under Section 420 of the Companies Act, 2013. At any time within two years from the date of order can rectify any mistake apparent from the record or amend any mistake brought to it notice by the parties.

13. Per contra, Ld. Sr. Counsel for the Respondent No. 1 vehemently opposed the prayer and submitted that the Respondent No. 1 in its petition under Section 7 of IBC has mentioned true facts that DRT has passed a decree on settlement of parties and thereafter, issued recovery certificate and thereafter, time to time the Corporate Debtor has acknowledged the debt and in support the Respondent No. 1 has filed the documents. Therefore, it is incorrect to say that the Respondent No. 1 has played any fraud and obtained the admission order dated 15.03.2019. Therefore, Ld. Adjudicating Authority cannot recall its own order. Particularly, when the order dated 15.03.2019 is affirmed by this Appellate Tribunal vide order dated 06.09.2019. Thus, the order dated 15.03.2019 is merged with the Judgment of this Appellate Tribunal and now that order is not in existence. For this merger principle he placed reliance on the Judgments of Hon'ble Supreme Court in the case of Gojer Bros. Pvt. Ltd. Vs. Ratan Lal Singh Civil Appeal No. 128 of 1972, dated 01.05.1972 Para 9 and 11, Kunhayammed and Ors. Vs. State of Kerla and Ors. C.A. No. 12309 of 1996 Para 42 and 44(1) and Apya Captial Services Pvt. Ltd. Vs. Guardian Homes Pvt. Ltd. I.A. No. 2068 of 2021 in CA (AT) (Ins) No. 412 of 2020, dated 09.12.2021 Para 1, 10 to 13, 15.

14. It is also submitted that the powers under section 420 of the Companies Act, 2013 for rectifying any mistake apparent from the record or amend any order can be exercised within two years when the order against which no Appeal has been preferred. In this matter, the Appeal has already been decided by this Appellate Tribunal. Therefore, the Adjudicating Authority cannot exercise the powers under Section 420 of the Companies Act.

15. Ld. Sr. Counsel for the Respondent No. 1 also submitted that the Appellant has an efficacious remedy to challenge the Judgment of this Appellate Tribunal by which upheld the order of admission before the Hon'ble Supreme Court under Section 62 of the IBC. No reason has been assigned as to why the Appeal has not filed before the Hon'ble Supreme Court. The question of limitation is mixed question of law and fact and at this stage when the order of liquidation has been passed such issue of limitation cannot be legally entertained otherwise also the Application under Section 7 of IBC is filed within limitation.

Submissions in CA (AT) (Ins) No. 1124 of 2020

16. Ld. Sr. Counsel for the Appellant submitted that Ld. Adjudicating Authority without hearing any of the parties allowed the Application CA No. 121 of 2020 and by the impugned order dated 15.10.2020 ordered for liquidation of the Corporate Debtor and also appointed liquidator. In support of this argument he drew our attention towards the various order sheets between 17.01.2020 to 14.10.2020.

17. It is also submitted that Ld. Adjudicating Authority should have first decide the Application filed by the Appellant for recalling the admission order in which substantial issue of limitation has been raised, without

deciding the application passed the order of liquidation and committed material irregularity. Therefore, the order of liquidation is liable to be set aside.

18. Refuting the argument, Ld. Sr. Counsel for the Respondent No. 1 submitted that the CoC passed a resolution by 92.29% voting share for liquidation of the Corporate Debtor. Therefore, on the direction of CoC the RP has filed the Application for liquidation, the RP has represented the Corporate Debtor, therefore, it is not required for the Adjudicating Authority to hear the suspended directors of the Corporate Debtor. Ld. Adjudicating Authority after considering the material on record rightly passed the order of liquidation. Thus, there is no material irregularity in the order of liquidation dated 15.10.2020. The order is in consonance with the provisions of IBC. Hence there is no substance in these Appeals and Appeals are liable to be dismissed.

19. After hearing Ld. Counsels for the parties, we have gone through the record.

20. Issue for consideration before us in these Appeals are that:

(i) Whether the Adjudicating Authority is competent to recall the order of initiation of CIRP?

(ii) Whether the liquidation order suffers from material irregularity?

Issue No. (i)

Whether the Adjudicating Authority is competent to recall the order of initiation of CIRP?

21. Admittedly, vide order dated 15.03.2019 the Adjudicating Authority ordered for initiation of CIRP against the Corporate Debtor. This order was affirmed by this Appellate Tribunal in CA (AT) (Ins) No. 441 of 2019 vide

order dated 06.09.2019. Even in extended period of CIRP no resolution plan was received. Therefore, with the direction of CoC, the RP has filed an Application C.A. No. 121 of 2020 under Section 33(1) for liquidation of the Corporate Debtor. Ld. Adjudicating Authority vide order dated 15.10.2020 allowed the Application. Meanwhile, the Suspended director filed an Application CA No. 307 of 2020 seeking recall of the order dated 15.03.2019 i.e. order of initiation of CIRP. According to the Appellant the order dated 15.03.2019 obtained by fraud and misrepresentation as in the Petition the date of default was falsely made to get petition within limitation. Therefore, the order which is obtained by fraud can be challenged at any stage and the every court and tribunal has power to recall such order. In support they have cited the Judgment of Hon'ble Supreme Court in the case of United India Insurance Co. Ltd. Vs. Rajendra Singh & Ors. (Supra) and AV Papayya Sastry (Supra). Hon'ble Supreme Court in the subsequent Judgment has referred the earlier Judgment of United India Insurance Co. Ltd. and reiterated the same principle. Therefore, we are referring the relevant paras of subsequent Judgment i.e. AV Papayya Sastry (Supra) as under:-

22. It is thus settled proposition of law that a judgment, decree or order obtained by playing fraud on the Court, Tribunal or Authority is a nullity and non est in the eye of law. Such a judgment, decree or order - by the first Court or by the final Court has to be treated as nullity by every Court, superior or inferior. It can be challenged in any Court, at any time, in appeal, revision, writ or even in collateral proceedings.

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38. The matter can be looked at from a different angle as well. Suppose, a case is decided by a competent Court of Law after hearing the parties and an order is passed in favour of the applicant/plaintiff which is upheld by all the courts including the final Court. Let us also think of a case where this Court does not dismiss Special Leave Petition but after granting leave

decides the appeal finally by recording reasons. Such order can truly be said to be a judgment to which Article 141 of the Constitution applies. Likewise, the doctrine of merger also gets attracted. All orders passed by the courts/authorities below, therefore, merge in the judgment of this Court and after such judgment, it is not open to any party to the judgment to approach any court or authority to review, recall or reconsider the order.

39. The above principle, however, is subject to exception of fraud. Once it is established that the order was obtained by a successful party by practicing or playing fraud, it is vitiated. Such order cannot be held legal, valid or in consonance with law. It is non-existent and non est and cannot be allowed to stand. This is the fundamental principle of law and needs no further elaboration. Therefore, it has been said that a judgment, decree or order obtained by fraud has to be treated as nullity, whether by the court of first instance or by the final court. And it has to be treated as non est by every Court, superior or inferior.

22. The Hon'ble Supreme Court has laid down the principle that Once it is established that the order was obtained by a successful party by practicing or playing fraud, it is vitiated. Such order cannot be held legal, valid or in consonance with law. It is non-existent and non est and cannot be allowed to stand. This is the fundamental principle of law and needs no further elaboration. Therefore, it has been said that a judgment, decree or order obtained by fraud has to be treated as nullity, whether by the court of first instance or by the final court. Thus, we have to consider whether the Financial Creditor i.e. Respondent No. 1 has obtained the order dated 15.03.2019 by practicing fraud. Hon'ble Supreme court in the same Judgment at Para 26 defined the fraud which is as under:-

26. Fraud may be defined as an act of deliberate deception with the design of securing some unfair or undeserved benefit by taking undue advantage of another. In fraud one gains at the loss of another. Even most solemn proceedings stand vitiated if they are actuated by fraud. Fraud is thus an extrinsic collateral act which vitiates all judicial acts, whether in rem or in personam. The principle of 'finality of litigation' cannot be stretched to the extent of an absurdity that it can be utilized as an engine of oppression by dishonest and fraudulent litigants.

23. Now we have considered the allegations which are made in the Application filed by the Appellant whether it constitutes fraud.

9. That this very vital aspect escaping the attention of all the parties was, in great part, assisted by the false statement made by the petitioner/non-applicant in the list of dates (page C) of the prescribed form for invocation of the jurisdiction of this Hon'ble Tribunal, wherein, it was falsely set out that the cause of action arose on 05.04.2016, when it actually arose as far back on 24.09.2014.

At the cost of reiteration, it is most respectfully submitted that the date stipulated in the List of Dates is contradicted by the date of default stated in Part IV – 'Particulars of Financial Debt' – the date of default has been stipulated by the Petitioner Company itself as 29.07.2000.

10. Whereas, by suppressing the fact that there was no legally binding communication between the Company and the Petitioner/non-applicant after the letter dated 14.03.2014 written by the Petitioner/non-Applicant to the Company, this act of fraud gained traction, resulting in this issue not coming to the fore earlier.

24. The substance of the aforesaid allegations that the Respondent No. 1 in the Petition (Application) u/s 7 of IBC falsely set out that the cause of action arose on 05.04.2016 when it actually arose as far back on 24.09.2014. The Financial Creditor in the Application Part IV particulars of Financial Debt at serial No. 2 mentioned the date of default as July, 29th 2000 in Part V at serial No. 2 particulars of an order of Court, Tribunal or Arbitral Tribunal adjudicating on the dispute, in this column it is mentioned the details how the DRT passed a decree on settlement of parties, thereafter, issued recovery certificate and thereafter time to time the Corporate Debtor has acknowledged the debt and the Respondent No. 1 has filed the documents to construe the acknowledgement. It is not shown by the Appellant that in reply to the Petition they have challenged the particulars mentioned in the Petition and documents filed alongwith Petition. However, the Respondent No. 1 in his Written Submissions filed

before this Appellate Tribunal has clarified the dates when the Corporate Debtor had acknowledged the debt, which are as under:-

23.09.2014	EARC by its letter dated 23.09.2014 extended the time for payment of OTS amount upto 15.03.2015 in response to email dated 18.09.2014 of the CD.	Reply-Annex R-4/Pg. 40
01.11.2014 & 17.03.2015	Letters dated 01.11.2014 & 17.03.2015 written by the Corporate Debtor to EARC seeking further extension of time for payment of the amount and offered payment of Rs. 50 lacs.	Reply- Annex R-3/Pg. 37-38
15.05.2015	EARC letter dated 15.05.2015 granting extension upto 31.12.2015.	Reply- Annex R-4/Pg. 41
15.05.2015	CD made the payment of the sum of Rs. 50.00 Lacs to EARC	-Do-
01.12.2015	Letter of the CD dated 01.12.2015 requesting for a re-negotiated settlement at Rs. 4.50 Crore	Reply- Annex R-5/Pg. 42-43
10.12.2015	Reply of EARC to the above letter dated 01.12.2015 turning down the above request.	Reply- Annex R-6/Pg. 44
17.12.2015	Letter of the CD requesting EARC for a re-negotiated settlement of Rs. 5.15 Crore	Reply- Annex R-7/Pg. 45 – 46
17.12.2015	Letter by EARC accepting the above settlement <i>As per the re-negotiated settlement, upfront amount of Rs. 50.00 lacs was payable on or before 31.12.2015 and the balance of Rs. 4.65 crore was to be paid on or before 31.03.2016</i> CD failed to honour the above settlement	Reply- Annex R-8/Pg. 47
27.02.2016	Letter of the CD assuring EARC that it shall pay the re-negotiated amount of Rs. 5.15 crore by 31.03.2016 alongwith interest on Rs. 50.00 lacs for the default period i.e. an amount of about Rs. 2.00 lacs. CD failed to honour the above settlement	Reply-Annex R-9/Pg. 48 -49
05.04.2016	Letter by EARC revoking the above OTS dated 27.02.2016	Reply- Annex R-10/Pg. 50
12.06.2018	Section 7 Application filed by EARC which was registered as CP No. 866/2018	Appeal- Annex-5/Pg. 124 – 146

25. The Appellant has failed to convince us that the Respondent No. 1 has committed any act of deliberate deception with the design of securing some unfair or undeserved benefit by taking undue advantage of another. The Appellant has not shown any false document which was filed in support of the Petition under Section 7 of the IBC. Thus, the Appellant has failed to make out a case that the Respondent No. 1 has obtained order dated 15.03.2019 by practicing fraud.

26. Hon'ble Supreme Court in the aforesaid Judgments has settled the principle that every Court/Tribunal has power to recall the order obtained by practicing fraud. The Appellant has miserably failed to prove that the Respondent No. 1 has obtained the order dated 15.03.2019 by practicing fraud. Therefore, Ld. Adjudicating Authority has rightly held that they no jurisdiction to recall the admission order dated 15.03.2019.

27. At this stage, we have only examined the legality of the impugned order whether Adjudicating Authority is competent to recall admission order. Therefore, it is not required to examine whether the Petition under Section 7 of the IBC is within limitation or not. However, Ld. Sr. Counsel has argued on this issue and submitted that the order of admission as well as the order of liquidation may be set aside and the matter may be remitted back to the Adjudicating Authority for examining whether the Section 7 Application is within limitation or not.

28. Admittedly, the Appellant has not raised the issue of limitation before the Ld. Adjudicating Authority at time of order of initiation of CIRP and in the Appeal filed by the Appellant challenging the order before this Appellate Tribunal. In this regard, it is argued on behalf of the Appellant that at that time it was not clear whether the provisions of Limitation Act would be

applicable to IBC proceedings and the law of limitation is applicable to IBC proceedings was settled by the Hon'ble Supreme Court in the case of Gaurav Hargovindbahi Dave (Supra) decided on 18.09.2019.

29. We are unable to convince with the argument that Hon'ble Supreme Court on 18.09.2019 in the case of Jignesh Shah & Anr. (Supra) laid down that the provisions of Limitation Act would be applied to the IBC proceedings. Section 238-A of IBC inserted w.e.f. 06.06.2018 which provides that the provisions of Limitation Act shall, as far as may be, apply to the proceedings or Appeals before the Adjudicating Authority, the National Company Law Appellate Tribunal. Therefore, we find no force in the argument.

30. Admittedly, the issue of limitation is mixed question of fact and law, therefore, we are unable to convince with the argument of Ld. Sr. Counsel that such issue can be raised at any stage even before the Higher Court.

31. With the aforesaid discussion, we are of the view that in the facts of present case the Adjudicating Authority is not competent to recall the order of initiation of CIRP.

Issue No. (ii)

Whether the liquidation order suffers from material irregularity?

32. Admittedly, in this matter even after extended period beyond 180 days no resolution plan had been received. Therefore, CoC with 92.29% voting share passed the resolution for liquidation of the Corporate Debtor. Therefore, the RP filed the Application before the Adjudicating Authority for order of Liquidation.

33. It is argued on behalf of the Appellant that before passing of the order of liquidation no opportunity of hearing has been given to the Appellant.

The Appellant has not filed any objection before the Adjudicating Authority in regard to the Application filed by the RP for seeking order of liquidation. The order of liquidation can be set aside only when there is any material irregularity. The Appellant has failed to point out any material irregularity. Therefore, we find no ground to interfere in the order of liquidation.

34. It is informed that in compliance of the order of liquidation the factory premises of the Corporate Debtor has already been auctioned and possession has been handed over to the auction purchaser.

With the aforesaid, we find no ground to interfere in the impugned orders. Thus, the Appeals are dismissed. However, no order as to costs.

Interim orders passed by this Appellate Tribunal are vacated.

[Justice Jarat Kumar Jain]
Member (Judicial)

[Dr. Ashok Kumar Mishra]
Member(Technical)

New Delhi
07th January, 2022
SC