

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI
Company Appeal (AT) (Insolvency) No. 1103 of 2020

IN THE MATTER OF:

1. **Mr. Ashish Chaturvedi**
Ex – Director of A to Z Barter Private Limited
R/o – House No. MS – 8/302,
Kendriya Vihar, Sector – 56,
Gurgaon, Haryana – 122001 **....Appellant No. 1**

2. **Mr. Sanjay Kapoor**
Ex – Director of A to Z Barter Private Limited
R/o – M.N. – 18, Savitav Vihar,
Shakarpur Baramad, Shakarpur,
East Delhi, Delhi – 110092 **....Appellant No. 2**

VERSUS

1. **Inox Leisure Limited**
Registered Office at:
ABS Towers, Old Padra Road
Vadodara – 390007
And Corporate Office at:
5th Floor, Viraj Towers,
Next to Andheri Flyover,
Western Express Highway,
Andheri (East), Mumbai – 400093 **....Respondent No. 1**

2. **Mr. Anoop Kumar Goyal**
IBBI/IPA – 001/IP – P00563/2017 – 18/11039
Erstwhile Interim Resolution Professional
A to Z Barter Private Limited,
C – 14, Mansarovar Garden,
New Delhi – 110015
Also Office at:
Flat No. 403, B – 20,
Shiv Enclave, Shiv Marg,
Bani Park, Jaipur – 302016 **....Respondent No. 2**

3. **Mr. Sanjay Garg**
IBBI/IPA – 0001/IP – P01865/2019 – 2020/12919
Liquidator,
908, D – Mall, NSP,
Pitampura, Delhi – 110034 **....Respondent No. 3**

Present

For Appellants: Mr. Manoj Kumar Garg, Advocate.

For Respondents: Mr. K.D. Sharma and Mr. Anuj Kumar Pandey, Advocates for R-3.

**Judgment
(Date: 14.02.2020)
(Virtual Mode)**

{Per: Dr. Alok Srivastava, Member (Technical)}

This appeal has been filed by the Appellants under section 61 of the Insolvency and Bankruptcy Code 2016 (hereafter called 'IBC') assailing the order dated 9.11.2020 (hereafter called 'Impugned Order') passed by the Adjudicating Authority in IA No. 1253/2020 in IB-643/(ND)/2018. The Appellants are ex-directors of the suspended board of E-Z Barter Private Limited (corporate debtor) and Respondent No.1 is a limited company which is an operational creditor of the corporate debtor.

2. The case, as stated by the Appellant, is that an application under section 9 of IBC was admitted vide order of the Adjudicating Authority dated 5.12.2018 and CIRP was initiated against the Corporate Debtor along with appointment of Interim Resolution Professional. During the pendency of the Corporate Insolvency Resolution Process (CIRP), the IRP moved two applications under section 19(2) and section 60 (5) of the IBC alleging that Appellant Company Appeal (AT)(Insolvency) No. 1103 of 2020

had withdrawn a sum of Rs. 32 lakhs during the moratorium period during the CIRP though the Appellants claimed that they had given a postdated cheque to one Mr. Kewal Kishan as repayment of a loan and the said cheque was not given by them during the ongoing CIRP vide order dated 9.11.2020 the Adjudicating Authority allowed both the applications and vide Impugned Order in IA No. 1253 of 2020, the Adjudicating Authority has imposed a penalty of Rs. Five lakhs on each of the two ex-directors Ashish Chaturvedi and Sanjay Kapoor (Appellants in this appeal) to be deposited in the account of Government of India, Ministry of Corporate Affairs.

3. The application under section 19(2) which is to secure cooperation of ex-directors of the corporate debtor for providing records and other financial information relating to the Corporate Debtor to the Resolution Professional was listed before the Adjudicating Authority on 25.2.2020, 30.9.2020, 19.10.2020 and 2.11.2020 and on all these dates the ex-directors of the corporate debtor were directed to file reply to the said application. In the absence of any reply from the ex-directors/Appellants the Adjudicating Authority has invoked section 128 (6) of the Companies Act and levied penalty of Rs. Five lakhs each on the Appellants No. 1 and 2 and hence the Appellants have filed this appeal praying for setting aside of the impugned order.

4. In view of the fact that the corporate debtor is in liquidation, this tribunal ordered on 23.2.2020 to join the liquidator as Respondent No.3 in the appeal. Their liquidator was thereafter directed to file his reply-affidavit about the compliance of the order given by the Adjudicating Authority, particularly providing the

account books and related records to the IRP/RP.

5. The Learned Counsel for Appellants submits that the Adjudicating Authority has imposed penalty of 5 lakhs each on the Appellants exercising powers under section 128(6) of the Companies Act, 2013, though the Adjudicating Authority which is hearing the case under the IBC did not have jurisdiction to impose such a penalty under the Companies Act.

6. The Learning Counsel for Respondent has argued that, after being directed by this tribunal the liquidator sought physical documents, valuation report and financial information regarding the assets of the corporate debtor from the erstwhile resolution professional vide e-mails dated 11.1.2021 and 15.1.2021 (attached at pp.17-18 of the reply affidavit of the liquidator) and also from the Appellants by email communications dated 15.2.2021, 3.3.2021 and lastly email dated 9.3.2021 (attached at pp. 22-23 of the reply affidavit of the liquidator) after the directions of this tribunal given on 23.12.2020 and again on 31.5.2021. He has stated that the liquidator sought detailed financial information of the corporate debtor again vide emails dated 15.2.2021, 3.3.2021, 10.3.2021 and 16.3.2021 but did not receive any required information. In such a situation the liquidator filed his reply affidavit vide diary no. 27968 dated 9.7.2021 wherein he has stated failure in his efforts to elicit necessary financial information, account books and valuation report etc. from the Appellants. He has attached copies of all the related email communications as mentioned earlier with his Reply-Affidavit. The Learned Counsel for the liquidator has also mentioned that the Adjudicating Authority was apprised by him earlier of total non-cooperation

from the erstwhile directors of the Corporate Debtor (who are appellants in this appeal) while filing Preliminary report and first-quarter progress report under the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016. He has also stated in the Reply-Affidavit that despite the impugned order dated 9.11.2020, the erstwhile directors have neither paid the imposed penalty nor deposited the amount of Rs. 32 lakhs along with interest @ 12% per annum (as directed vide order dated 9.11.2020 in IA 2025 of 2020).

7. We have considered the arguments presented by both the parties and also perused the record.

8. It is evident from the Impugned Order in IA No. 1253/2020 dated 9.11.2020 that the ex-Directors of the Corporate Debtor viz. Mr. Ashish Chaturvedi and Mr. Sanjay Kapoor were provided multiple opportunities to submit their reply when the matter was listed before the Adjudicating Authority on 25.2.2020, 30.9.2020, 19.10.2020 and 2.11.2020. But they neither filed any reply nor provided any record of the Corporate Debtor. In such a situation, the Adjudicating Authority inferred that the suspended board of directors of corporate debtor did not maintain the records of the Corporate Debtor as mandated under the provisions of Section 128(5) of the Companies Act, 2013, and after invoking the provision under Section 128 (6) of the Companies Act, 2013, a penalty of Rs. 5 lakhs each was imposed on both the Appellants.

9. Upon directions of this Tribunal, the Liquidator filed his reply-affidavit vide Diary No. 27968 dated 9.7.2021 (supra). The contents of the reply-affidavit, which are stated in detail by the Ld.

Counsel for Liquidator in his arguments and which are included in Paragraph 6 of this judgment provide ample indication about the non-cooperation of the Appellants in providing requisite documents and records pertaining to the functioning of the corporate debtor which were requested by the erstwhile resolution professional, and later by the liquidator. Therefore, the resolution professional could not carry out his duties as required under the IBC for insolvency resolution of the corporate debtor and when the corporate debtor was sent into liquidation, the liquidator was unable to carry out the liquidation process in accordance with the provisions of Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016. Moreover, when the Adjudicating Authority provided multiple opportunities to the Appellants to clarify their position by filing their replies in IA 1253/2020 the Appellants were totally remiss in doing so..

10. The Liquidator has also stated in his reply affidavit in paras 10 and 11 that in another I.A No. 2025/2020 filed by the erstwhile Resolution Professional under section 66(1) read with section 60(5) of the IBC, the Adjudicating Authority had directed vide letter dated 9.11.2020 as follows:-

“.....We hereby direct the Respondents to deposit an amount of Rs. 32 lakhs alongwith interest @ 12% p.a. from the date of the withdrawal and deposit the payable amount to the accounts of the Corporate Debtor being maintained by the Resolution Professional within a period of 21 days from the date of this order and an affidavit of compliance shall be filed by the Respondent to the Registry....”

11. In compliance of this order, the liquidator sent communication to the erstwhile Directors to deposit the said amount of Rs. 32 lakhs along with interest, which was also not complied with. Thus the Appellants have not only not provided the records and financial documents relating to the corporate debtor to the erstwhile resolution professional and the liquidator despite being requested to do so many times, they have also not complied with the Adjudicating Authority's orders given on 09.11.2020. Such acts of total carelessness in complying with the requirements of law, amounting to defiance and disrespect of the legal process, cannot be condoned and needs to be dealt with strictly in accordance with the provisions of Chapter VII titled "OFFENCES AND PENALTIES" of the IBC.

12. With regard to the argument of the Learned Counsel of the Appellants that the Adjudicating Authority has imposed the penalty on the two ex-directors by invoking provisions of the Companies Act, 2013, and thus passed the Impugned Order by travelling beyond their jurisdiction, we are of the view that since the IA No. 1253/2020 was filed under the provisions of IBC, it would have served the requirement of law if any order regarding the penalty was imposed under the provisions of IBC. Moreover, it would have served the cause of natural justice if the Appellants were given an opportunity to be heard before imposition of any penalty. Chapter VII of the IBC which lays down "Offences and Penalties" under which officers of the Corporate Debtor can be penalized and/or punished with imprisonment is relevant in this regard.

13. In the light of the above, we direct that the case be

remanded to the Adjudicating Authority for taking a decision under the provisions of IBC after giving an opportunity to the Appellants to present their case and giving due consideration of the facts of the case in IA 1253/2020. With these directions, we set aside the Impugned Order whereby penalty of Rs. 5 lakhs each on the Appellants has been imposed and remand the matter to the Adjudicating Authority for passing necessary orders under the provisions of IBC.

14. All parties will bear their own costs.

(Justice Ashok Bhushan)
Chairperson

(Dr. Alok Srivastava)
Member (Technical)

New Delhi
14th February, 2022

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