

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) (Ins) No.606 of 2019

[Arising out of Order dated 09.05.2019 passed by National Company Law Tribunal, Kolkata Bench, Kolkata in Company Petition (IB) No.628/KB/2018 along with CA(IB) Nos.366 & 367/KB/2019]

IN THE MATTER OF:

Before NCLT

Before NCLAT

Hammond Power
Solutions Private Limited
D No.5-2/222/IP/B,
II, Floor, Icon Plaza,
Alwyn X Road, Miyapur,
Hyderabad – 500049
Telangana

Operational Creditor

Appellant

Versus

1. Mr. Sanjit Kumar
Nayak
Resolution Professional,
30E, Haramohan Ghosh
Lane, Suryadeep
Flat – 2B, Beliaghata,
Kolkata – 700085

Resolution Professional

Respondent No.1

2. The Committee of
the Creditors of
Marsons Limited
Through Allahabad
Bank,
113/1b, Chittaranjan
Avenue Branch,
Kolkata,
West Bengal – 700012
(Through its Chief
Manager)

COC

Respondent No.2

- | | | |
|---|--|-----------------|
| 3. Marsons Limited
Marsons House
Budge Budge Tunk
Road, Maheshtala
Kolkata – 700072 | Corporate Debtor | Respondent No.3 |
| 4. M/s. Yashoda Inn
Private Limited
(Lead Member)
16 Ganesh Chandra
Avenue, 7 th Floor,
Kolkata – 700013 | Successful Resolution
Applicant (SRA) | Respondent No.4 |
| 5. M/s Uneecops Solar
Private Limited
(2 nd Member)
First Floor,
C-185, Phase – 1
Naraina Industrial Area
New Delhi – 110028 | Successful Resolution
Applicant (SRA) | Respondent No.5 |

For Appellant:**Shri Alipak Banerjee, Advocates****Ms. Indranil Ghosh and Shri Palzer Moktan,
Advocates (for Intervenor)****For Respondents:****Shri Sanjit Kumar Nayak, RP (R-1)
Shri Ashish Aggarwal and Shri Gurcharan Singh,
Advocates (R- 4 & R-5)****J U D G E M E N T****(14th February, 2020)****A.I.S. Cheema, J. :**

1. The Appellant is one of the Operational Creditors who filed his claim before the Respondent No.1 – Resolution Professional during the course of Corporate Insolvency Resolution Process (CIRP – in short) of Respondent No.3 – Marsons Limited (Corporate Debtor). The Appeal has been filed against the

Resolution Plan approved which plan was submitted by the Respondents 4 and 5 as consortium of Resolution Applicants and which came to be approved by the Adjudicating Authority (National Company Law Tribunal, Kolkata Bench, Kolkata) in Company Petition (IB) No.628/KB/2018 along with CA(IB) Nos.366 & 367/KB/2019 on 9th May, 2019. The Resolution Plan, which has been approved, copy of the same has been filed by the Resolution Professional at Annexure – H with his Reply – Diary No.13489. Inter alia, the contention of the Appellant is that the Resolution Plan approved is not in compliance with the provisions of the Insolvency and Bankruptcy Code, 2016 (IBC – in short); that the provision of paying NIL amount to the Operational Creditors is not as per provisions of IBC and the law laid down in the Judgements of Hon'ble Supreme Court and this Tribunal; that the Operational Creditors deserved a similar treatment as Financial Creditors; that it is wrong on the part of Committee of Creditors (COC – in short) to approve a Resolution Plan which provided for payment only to members of the Committee and no other stakeholders.

2. The Operational Creditors – M/s. Navkar Transcare Pvt. Ltd. as well as one M/s. Veer Steel Processors have also sought to intervene raising similar grounds.

3. The Respondent No.1 – Resolution Professional has filed Reply (Diary No.13489) giving details as to how the CIRP proceeded and how the Respondents 4 and 5 submitted their Resolution Plan which were discussed in various meetings and there were submissions of revised Resolution Plans

and how ultimately revised plan as was sent on 14.03.2019 was approved by the Committee of Creditors on 14.03.2019. Resolution Professional has vide Annexure 'A' of the Reply in summarised format shown as to what was offered by the Respondents 4 and 5 in the earlier Resolution Plan dated 6th February, 2019 and what was ultimately submitted as revised Resolution Plan which came to be approved on 14th March, 2019. These two summaries have been filed as Annexure 'A' and 'B' of Reply Affidavit of the Resolution Professional and which read as under:-

ANNEXURE A						
SUMMARISED FORMAT OF RESOLUTION AMOUNT PAYMENT SCHEDULE						
Page 34 of the Resolution Plan dated 06/02/2019 filed before Committee of Creditors on 14/02/2019						
(Rs in Crores)						
Particulars	Resolution Debt	Resolution Amount	30 days	12 months	24 months	Total
Allahabad Bank[Secured Financial Creditors]	98.960	29.688	29.688	0.000	0.000	29.688
Workmen Dues	1.270	1.270	1.270	0.000	0.000	1.270
Loans	1.030	0.000	0.000	0.000	0.000	0.000
Statutory Dues	0.000	0.000	0.000	0.000	0.000	0.000
GST	0.890	0.890	0.000	0.445	0.445	0.890
Tax	1.100	1.100	0.000	0.550	0.550	1.100
Others	0.025	0.025	0.025	0.000	0.000	0.025
Op. Creditors	13.340	2.668	0.000	1.334	1.334	2.668
Total	116.615	35.641	30.983	2.329	2.329	35.641

ANNEXURE (B)						
SUMMARISED FORMAT OF RESOLUTION AMOUNT PAYMENT SCHEDULE						
Page 35 of the Resolution Plan dated 14/03/2019 filed before Hon'ble NCLT, Kolkata Bench						
(Rs in Crores)						
Particulars	Resolution Debt	Resolution Amount	30 days	12 months	24 months	Total
Allahabad Bank[Secured Financial Creditors]	99.86	34.00	31.00	1.00	2.00	34.00
Workmen Dues	0.95	0.95	0.00	0.00	0.00	0.00
Loans	1.0449	0.00	0.00	0.00	0.00	0.00
Statutory Dues	0.00	0.00	0.00	0.00	0.00	0.00
Op. Creditors	13.3492	0.00	0.00	0.00	0.00	0.00
Total	115.2101	34.9500	31.9500	1.0000	2.0000	34.9500

4. The above two Annexures make it clear that in the earlier Resolution Plan, the Respondents 4 and 5 proposed to pay Operational Creditors to the extent of Rs.2.668 Crores while in the revised Resolution Plan, the amount became zero. The Resolution Professional in Annexure – B has shown zero amount for the workmen's dues also. However, we are keeping in view what is shown in the approved Resolution Plan (Plan Pages.33 and 34) where the plan proposed to pay the workmen/employees after verifying documentary evidence and other aspects as mentioned in the concerned pages.

5. Respondents 4 and 5 have also filed their Reply (Diary No.13260) and opposed the Appeal and in substance are claiming that the Committee of Creditors took a commercial decision while accepting the Resolution Plan and the Resolution Plan meets requirements of the provisions of IBC and they are

relying on the observations of the Adjudicating Authority for accepting the Resolution Plan.

6. On 11th November, 2019 when this Appeal had come up before us, the parties made submissions and we had passed the following Order:-

“O R D E R

11.11.2019 Counsel for the Appellant and Counsel for Respondent Nos.4 and 5 state that in the Resolution Plan, there is reference to settling claims of the Operational Creditors. Counsel for Respondent Nos.4 and 5 states that the Resolution Professional needs to give calculation of the liquidation value which will water down for the Operational Creditors. He states that once the details are available, the Respondents 4 and 5 will be ready to stand by what they stated in the Resolution Plan as at Page 19 at Page 73 – Part B – financial proposal (Reply Diary No.13260).

Respondent No.1 – Resolution Professional is present. He is directed to file Affidavit giving the necessary particulars relating to the liquidation value of the Corporate Debtor and how the divisions are made keeping in view Section 30 read with Section 53 of IBC for calculating payments.

List the Appeal ‘for admission (after Notice)’ on **25th November, 2019.**”

7. Subsequently, the Respondent No.1 – Resolution Professional filed Affidavit (Diary No.16309) and referred to the Valuation Report containing fair value and liquidation value of the Corporate Debtor which were received by him and has stated that the average liquidation value of the Corporate Debtor is Rs.34,02,78,000/- (Rupees Thirty Four Crores Two Lakhs Seventy-Eight Thousand only). On 11th November, 2019, the Counsel for Respondents

4 and 5 had referred to Part B – Financial Proposal, relevant part of which is as under:-

“b. Priority of Dues to Operational Creditors over Financial Creditors [Section 30(2)(b)] –

The Resolution Amount is Rs.40.8490 Crores (which includes Liability of the Bank Guarantee amounting to Rs.5.899 Crores [in case the Bank Guarantee is invoked] as well as Deferred Payment of Rs.3.00 Crores to be paid within 2 Years from Date of NCLT Order), which is less than CIRP Cost, admitted claims of Secured Financial Creditors and Estimated Liability to Workmen aggregating to Rs.100.8160 crores.

Hence it is assumed that there is no Liquidation Value due to Operational Creditors. Workers are also classified as Operational Creditors for dues over and above the Dues for last 24 months.

In case, there is a Liquidation Value of the Operational Creditors, then the RA shall allocate/increase the Upfront Payment under the Proposal Resolution Plan (Note that the Proposed Covered Due Amount will be same) to such extent to pay the Operational Creditors to the extent of Liquidation Value in priority to any financial creditors and in any event be made before the expiry of 30 (thirty) days after the approval of a Successful Applicant by the NCLT.

In case, the Liquidation Value of the Operational Creditors is higher than the Amount decided to be paid by the RA, then the RA shall allocate/increase the Upfront Payment under the Proposed Resolution Plan to such extent (Difference between Resolution Plan Payment to Operational Creditors and the Liquidation Value of the Operational Creditors) to pay the Operational Creditors to the extent of Liquidation Value in priority to any financial creditors and in any event be made before the expiry of 30 (thirty) days after the approval of a Successful Applicant by the NCLT.”

8. In written submission filed by the Respondents 4 and 5 (Diary No.16548), it is claimed (in Para – 3.2) that considering the liquidation value and the divisions in terms of Section 30 and Section 53 of IBC and even as per the said calculations, the assets available for distribution to the Operational Creditors as per the aforesaid Sections would be NIL. Respondents 4 and 5 are then claiming that the Adjudicating Authority and this Appellate Tribunal have scope of limited interference in the business decisions of the majority of the Committee of Creditors. According to them, Adjudicating Authority or this Tribunal cannot enter into business decisions of the requisite majority of the Committee of Creditors as has been held in the Judgement in the matter of **“Committee of Creditors of Essar Steel India Limited Vs. Satish Kumar Gupta & Ors.”** (Civil Appeal No.8766-67 of 2019) in the Judgement dated 15th November, 2019.

9. The Appellant and the Intervenors are also relying on the same Judgement of the Hon’ble Supreme Court to claim that the Hon’ble Supreme Court has laid down as to the aspects which the Adjudicating Authority is required to look into while dealing with acceptance of such Resolution Plans and the scope of interference.

10. In the Judgement in the matter of “Essar Steel” (supra) in Paragraphs – 41 and 42, the Hon’ble Supreme Court dealt with the jurisdiction of the Adjudicating Authority and the Appellate Tribunal and held as under:-

“Thus, it is clear that the limited judicial review available, which can in no circumstance trespass upon a business decision of the majority of the Committee of Creditors, has to

be within the four corners of Section 30(2) of the Code, insofar as the Adjudicating Authority is concerned, and Section 32 read with Section 61(3) of the Code, insofar as the Appellate Tribunal is concerned, the parameters of such review having been clearly laid down in K. Sashidhar (supra).”

In Para – 44 of the Judgement, Hon’ble Supreme Court has then dealt with dues with regard to Operational Creditors under a Resolution Plan and observed in Para – 45 as follows:-

“However, as has been correctly argued on behalf of the operational creditors, the preamble of the Code does speak of maximisation of the value of assets of corporate debtors and the balancing of the interests of all stakeholders. There is no doubt that a key objective of the Code is to ensure that the corporate debtor keeps operating as a going concern during the insolvency resolution process and must therefore make past and present payments to various operational creditors without which such operation as a going concern would become impossible. Sections 5(26), 14(2), 20(1), 20(2)(d) and (e) of the Code read with Regulations 37 and 38 of the 2016 Regulations all speak of the corporate debtor running as a going concern during the insolvency resolution process. Workmen need to be paid, electricity dues need to be paid, purchase of raw materials need to be made, etc.”

[Emphasis supplied]

Then reference was made by Hon’ble Supreme Court of India to Judgement in the matter of **“Swiss Ribbons Pvt. Ltd. & Anr. vs. Union of India & Ors.”** (Writ Petition (Civil) No. 99 of 2018) and Para – 46 of the Judgement is important which is as follows:-

“46. This is the reason why Regulation 38(1A) speaks of a resolution plan including a statement as to how it has dealt with the interests of all stakeholders, including operational creditors of the corporate debtor. Regulation 38(1) also states that the amount due to operational creditors under a resolution plan shall be given priority in payment over financial creditors. If nothing is to be paid to operational creditors, the minimum, being liquidation value - which in

most cases would amount to nil after secured creditors have been paid - would certainly not balance the interest of all stakeholders or maximise the value of assets of a corporate debtor if it becomes impossible to continue running its business as a going concern. Thus, it is clear that when the Committee of Creditors exercises its commercial wisdom to arrive at a business decision to revive the corporate debtor, it must necessarily take into account these key features of the Code before it arrives at a commercial decision to pay off the dues of financial and operational creditors. There is no doubt whatsoever that the ultimate discretion of what to pay and how much to pay each class or sub- class of creditors is with the Committee of Creditors, but, the decision of such Committee must reflect the fact that it has taken into account maximising the value of the assets of the corporate debtor and the fact that it has adequately balanced the interests of all stakeholders including operational creditors. This being the case, judicial review of the Adjudicating Authority that the resolution plan as approved by the Committee of Creditors has met the requirements referred to in Section 30(2) would include judicial review that is mentioned in Section 30(2)(e), as the provisions of the Code are also provisions of law for the time being in force. Thus, while the Adjudicating Authority cannot interfere on merits with the commercial decision taken by the Committee of Creditors, the limited judicial review available is to see that the Committee of Creditors has taken into account the fact that the corporate debtor needs to keep going as a going concern during the insolvency resolution process; that it needs to maximise the value of its assets; and that the interests of all stakeholders including operational creditors has been taken care of. If the Adjudicating Authority finds, on a given set of facts, that the aforesaid parameters have not been kept in view, it may send a resolution plan back to the Committee of Creditors to re-submit such plan after satisfying the aforesaid parameters. The reasons given by the Committee of Creditors while approving a resolution plan may thus be looked at by the Adjudicating Authority only from this point of view, and once it is satisfied that the Committee of Creditors has paid attention to these key features, it must then pass the resolution plan, other things being equal.”

[Emphasis supplied]

It has been observed in Para – 80 and 81 of the Judgement as follows:-

“80. When it comes to the validity of the substitution of Section 30(2)(b) by Section 6 of the Amending Act of 2019, it is clear that the substituted Section 30(2)(b) gives

operational creditors something more than was given earlier as it is the higher of the figures mentioned in sub-clauses (i) and (ii) of sub-clause (b) that is now to be paid as a minimum amount to operational creditors. The same goes for the latter part of sub-clause (b) which refers to dissentient financial creditors. Mrs. Madhavi Divan is correct in her argument that Section 30(2)(b) is in fact a beneficial provision in favour of operational creditors and dissentient financial creditors as they are now to be paid a certain minimum amount, the minimum in the case of operational creditors being the higher of the two figures calculated under sub-clauses (i) and (ii) of clause (b), and the minimum in the case of dissentient financial creditor being a minimum amount that was not earlier payable. As a matter of fact, pre-amendment, secured financial creditors may cramdown unsecured financial creditors who are dissentient, the majority vote of 66% voting to give them nothing or next to nothing for their dues. In the earlier regime it may have been possible to have done this but after the amendment such financial creditors are now to be paid the minimum amount mentioned in sub-section (2). Mrs. Madhavi Divan is also correct in stating that the order of priority of payment of creditors mentioned in Section 53 is not engrafted in sub-section (2)(b) as amended. Section 53 is only referred to in order that a certain minimum figure be paid to different classes of operational and financial creditors. It is only for this purpose that Section 53(1) is to be looked at as it is clear that it is the commercial wisdom of the Committee of Creditors that is free to determine what amounts be paid to different classes and sub-classes of creditors in accordance with the provisions of the Code and the Regulations made thereunder.

81. As has been held in this judgment, it is clear that Explanation 1 has only been inserted in order that the Adjudicating Authority and the Appellate Tribunal cannot enter into the merits of a business decision of the requisite majority of the Committee of Creditors. As has also been held in this judgment, there is no residual equity jurisdiction in the Adjudicating Authority or the Appellate Tribunal to interfere in the merits of a business decision taken by the requisite majority of the Committee of Creditors, provided that it is otherwise in conformity with the provisions of the Code and the Regulations, as has been laid down by this judgment."

[Emphasis supplied]

9. The above is law as laid down by the Hon'ble Supreme Court with regard to treatment to be given to the Operational

Creditors in the Resolution Plans. It is apparent that the decision of the Committee “must reflect the fact that it has taken into account maximising the value of the assets of the Corporate Debtor and the fact that it has adequately balanced the interests of stakeholders including Operational Creditors”. Judicial review is available to see if the Committee of Creditors has taken into account the fact that the Corporate Debtor needs to be kept as a going concern; that there is necessity to maximise the value of the assets and that the interest of all stakeholders including Operational Creditors has been taken care of. Keeping this in view, if the record is seen, it is surprising to note from Annexure – A and B reproduced (supra) that the Respondents 4 and 5 who initially came up proposing to pay Rs.35.641 Crores after negotiations reduced the same to Rs.34.9500 Crores. In the process although earlier there was proposal to pay Operational Creditors 2.668 Crores, the figure converted to zero after negotiations with the COC. So much so for the trust law has put on the shoulders of the COC to protect interest of all stakeholders. It is clear from the Judgement of Hon’ble Supreme Court that the record should reflect that the Committee of Creditors has taken into account that Corporate Debtor needs to be kept a going concern; that maximising the value of assets is necessary and that the interest of all stakeholders including Operational Creditors has been taken care of. The Judgement says that

the Adjudicating Authority should look into “reasons given by the Committee of Creditors while approving the Resolution Plan”.

11. If the minutes of the Committee of Creditors dated 14.03.2019 is perused (copy of which has been filed by the Respondent No.1 with Annexure – C (Page 21 at 24), it can be appreciated that the meeting was held on 14th March, 2019 and the COC took up the revised Resolution Plan submitted on the same date and approved it. The observations of the COC with regard to Item No.4 and Item No.5 recorded in the minutes are as under:-

“Item No.4

RP has informed the CoC Members that the Corporate Insolvency Resolution Process of Marsons Limited (CD) will expire on 15/03/2019. On 14/03/2019, the matter was listed for further consideration and Hon’ble NCLT has fixed hearing date on 18/03/2019. Therefore, Resolution Plan approved by CoC members is to be submitted to Hon’ble NCLT, Kolkata Bench, Kolkata on 15/03/2019. The Revised Resolution Plan submitted on 14/03/2019, if accepted by CoC members, is to be submitted to Hon’ble NCLT, Kolkata Bench, Kolkata.

Item No.5

CoC members discussed the Revised Resolution Plan and satisfied with the following conditions:

- (i) That the Resolution Plan submitted by the Consortium of M/s. Yashoda Inn Private Limited and Uneecops Solar Private Limited is feasible and viable
- (ii) That the Resolution Plan submitted by the Consortium of M/s. Yashoda Inn Private Limited and Uneecops Solar Private Limited has provisions for effective implementation plan.

CoC Members have informed RP that the Revised Resolution Plan submitted on 14/03/2019 by the Resolution Applicant is approved in full.”

12. If the above minutes are perused, it can be hardly said that there are any reasons given by the Committee to demonstrate that it has taken care of interest of all stakeholders. Para – 46 of the Judgement in the matter of “Essar Steel” requires to see “the reasons given by the Committee of Creditors while approving a resolution plan” from point of view stated in the paragraph. The reasons for giving NIL to Operational Creditors is not reflected from record. We have already reproduced portion from Part B – Financial Proposal with regard to what the approved Resolution Plan states regarding dues to the Operational Creditors. The proposal is based on the assessment that there is no liquidation value due to Operational Creditors. Although it is not stated but there is reason to doubt that the Resolution Applicants were aware of the liquidation value. There is no dispute that so many of the Operational Creditors have been left high and dry giving them nil amount which Hon’ble Supreme Court has observed that giving NIL to Operational Creditors “would certainly not balance the interest of all stakeholders or maximise the value of assets of the Corporate Debtor if it becomes impossible to continue running its business as a going concern.”

13. For these reasons, we find that the Impugned Order accepting the Resolution Plan cannot be upheld. The Resolution Plan does not appear to have taken care of interest of all stakeholders including Operational Creditors and the decision of the COC also does not reflect that it has taken into account the fact that the Corporate Debtor needs to be kept as a going concern and that there is

need to maximise the value of the assets and that the interest of all the stakeholders including Operational Creditor has to be taken care of.

14. For the above reasons, we set aside the Impugned Order and remit the matter back to the Adjudicating Authority with a direction to send back the Resolution Plan to the Committee of Creditors to resubmit the Plan after satisfying the parameters as laid down by the Hon'ble Supreme Court in the Judgement in the matter of "Essar Steel", portions of which have been reproduced above, and IBC. The Adjudicating Authority may give specific time period to the Resolution Professional to place matter before Committee of Creditors for resubmitting the Resolution Plan after satisfying the parameters laid down by the Hon'ble Supreme Court and IBC. Further incidental Orders may also be passed.

On resubmission of the Resolution Plan, the Adjudicating Authority will deal with the same in accordance with law.

The Appeal is disposed accordingly. No costs.

[Justice A.I.S. Cheema]
Member (Judicial)

[Kanthi Narahari]
Member (Technical)

[V.P. Singh]
Member (Technical)

/rs/md