NATIONAL COMPANY LAW APPELLATE TRIBUNAL

PRINCIPAL BENCH, NEW DELHI.

Company Appeal (AT) (Insolvency) No. 387 of 2021

IN THE MATTER OF:

Directorate of Commercial Taxes,
Through Commissioner
Having its registered office at Main Building,
3rd Floor, Room No. 310, 14 Beliaghat Road,
Kolkatta-700015. West Bengal ...Appellant

Versus

Kharkia Steels Pvt. Ltd.
Having its registered office at
3A, Hare Street, Kolkata-700001
West Bengal ... Respondent No.1

Mr. Uday Narayan Mitra
LSI Resolution Private Limited,
SP Mukherjee Road,
Sagar Trade Cube, Second Floor,
Kolkata-700026.
West Bengal ... Respondent No. 2

AMRITVANI EXIM PRIVATE LIMITED
Having its registered office at
21B, Gurusaday Road,
Kolkata – 700019. ... Respondent No. 3

Present

For Appellant:- **Ms. Madhumitta Bhattacharjee and Ms. Srija Choudhury, Advocates**

For Respondent:- **Mr. Ratnanko Banerji, Sr. Advocate with Ms. Rajshree Kajaria, Mr. Manoj Bhuteria, Mr. Shashwat Anand and Mr. Adya Singh, Advocates for R.1 & 3.**

Mr. Utsav Mukherjee, Ms. Megha Tyagi and Ms. Deepti Babel, Advocates for R-2 (IRP)

J U D G M E N T

(Date: 22.03.2022)

(VIRTUAL MODE)

[Per.: Dr. Alok Srivastava, Member (Technical)]

The present appeal has been preferred by the Appellant assailing the order dated 21.9.2020 in IA (IB) No.680/KB/2020 passed by the Adjudicating Authority (NCLT, Kolkata) in CP (IB) No. 1440/KB/2018.

2. The Appellant has stated in the appeal that Respondent No. 1/Kharkia Steels Pvt. Ltd. is a dealer vide registration No. 192035057712 since 19.3.2008 and is liable to pay Entry Tax as levied under the West Bengal Tax of Entry on Goods into Local Areas Act, 2012, Value Added Tax and Central Sales Tax to the Appellant as a registered dealer. Due to non-payment of dues, there was an accumulated amount of Rs. 76,12,41,782/- that became due for payment to the Appellant by Respondent No. 1. The Appellant has further stated that on an application filed by Dena Bank/ Financial Creditor under section 7 of the Insolvency and Bankruptcy Code, 2016 (hereafter called 'IBC') Corporate Insolvency Resolution Process (hereafter called 'CIRP') was initiated against the Respondent No. 1/Corporate Debtor Kharkia Steels Pvt. Ltd. During the CIRP, the Resolution Professional (in short 'RP') sought Resolution Plan from prospective Resolution Applicants and the

submitted resolution plans were considered by the Committee of Creditors (in short 'CoC') and approved by a voting share of 82.75% in a meeting of the CoC on 4.4.2020. Thereafter, an application bearing IA No. 680/KB/2020 was submitted by the Resolution Professional for approval of the resolution plan approved by the CoC which was approved vide order dated 21.9.2020 by the Adjudicating Authority, and which is impugned in this appeal.

3. The Appellant has claimed that against an admitted operational debt of Rs. 76,12,41,782/- due for payment to the Appellant, the Successful Resolution Plan has made provision of only 0.16% of the admitted claim for payment. This, the Appellant has claimed, is not in keeping with the judgment dated 14.11.2018 of the NCLAT in the matter of **Binani Industries Ltd. and Ors vis. Bank of Baroda and Ors (MANU/NL/0284/2018)** wherein it is held that I&B Code aims to balance the interest of all stakeholders and does not maximize value for 'Financial Creditors' and the dues of 'Operational Creditors' must get at least similar treatment as compared to the dues of 'Financial Creditors'. The Appellant has also referred to the judgment of Hon'ble Supreme Court in the matter of **Committee of Creditors of Essar Steel India Limited vs. Satish Gupta and Ors. (CA No. 8766-67 of 2019)** to emphasize that the majority decision of the CoC should examine the 'feasibility and viability' of a Resolution Plan which should take into account all aspects of the Plan including the manner of distribution of funds among the various classes of creditors.

4. We heard the arguments advanced by the Learned Senior Counsels for both the parties and perused the record.

5. The Learned Counsel for the Appellant has argued that the Successful Resolution Plan does not consider the Operational and Financial Creditors' debts on parity which is necessary for considering the feasibility and viability of the Resolution Plan. The judgment of Hon'ble Apex Court in the matter of **Committee of Creditors of Essar Steel India Limited vs. Satish Gupta and Ors (supra)** also observes that the majority decision of the CoC should look at the feasibility and viability of the resolution plan which should take into account the manner of distribution of funds among the various classes of creditors. In the context of payment of electricity dues, the Hon'ble Apex Court observes that the Resolution Plan could be modified by the CoC so that the electricity dues ought to be paid in full so that carrying on of the business of Corporate Debtor does not become impossible for want of the essential element of electricity.

6. The Learned Counsel for Appellant has also argued that the appointment of registered valuers for ascertaining the liquidation value of the Corporate Debtor was not done in accordance with the requirement of Regulation 27 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (in short 'CIRP Regulations') whereby the appointment of registered valuers has to be done by the Resolution Professional within 47 days from the insolvency commencement date, which was not done in this case. She has further argued that

the total admitted claim of the Operational Creditor, which is Rs. 76.12 crores, pertains to the dues that relate to a long period which is much before the commencement of CIRP and was assessed by the State Tax Authorities and such an assessment can only be overturned through an appeal to the designated authority and not through a Resolution Plan which is approved by the Adjudicating Authority.

7. The Learned Counsel for Appellant has, therefore, urged that while the satisfaction of the CoC and the Adjudicating Authority has to be subjective in approving the proposed Resolution Plan, it cannot be arbitrary in approving the resolution plan wherein the operational creditors are provided payment of very meagre amount. She has also pointed out that the demand notice was issued to the Corporate Debtor, which was neither replied to nor any appeal was preferred against the said tax assessment and on grounds argued the appeal of the Directorate of Commercial Taxes should be allowed.

8. The Learned Senior Counsel for Respondent No. 1 has argued that the scope of the appeal is very limited because the CoC has approved the Successful Resolution Plan by 82.75% voting share, after exercising its commercial wisdom looking to the business propositions contained in the proposed Resolution Plan. He has stated that while the registered valuers were appointed two days later than the prescribed time limit for their appointment under the CIRP Regulations, this is a mere technical defect which does not cause any substantial difference in the liquidation assessment

process or vitiate the entire valuation process. The liquidation value of corporate debtor's assets was assessed as Rs. 6.52 crores and the share of Operational Creditors in the Successful Resolution Plan has been allocated in accordance with the provision of section 53 of the IBC. He has also urged that under the provision of section 30(2)(b) of the IBC, the share of Operational Creditors comes as 'NIL' and relying on the judgment of Hon'ble Supreme Court in the matter of the **Pratap Technocrats (P) Ltd. versus Reliance Infratel Ltd. (Monitoring Committee) [2021 10 SCC 623]** he has argued that the resolution plan as approved by the CoC complies with the requisite provisions of IBC and it so it has no legal infirmity. He has also referred to the judgment of the Hon'ble Apex Court in the matter of **India Resurgence ARC Private Limited vs. Amit Metaliks Ltd.& Another [2021 SCC Online SC 409]** to emphasize that the business decision taken in exercise of the commercial wisdom of Committee of Creditors cannot be interfered with unless creditors belonging to a class being similarly situated are denied fair and equitable treatment which is not so in the present case. He has also referred to para 20 in the **India Resurgence judgment (supra)** to argue that the proposition for payment of dues pertaining to pre-CIRP period is inapt and ill-conceived.

9. The Learned Counsel for Resolution Professional/ Respondent No. 2 has adopted the argument of the Learned Senior Counsel of Respondent No.1. He has cited the judgment of the Hon'ble Supreme Court in the matter of **Principal Commissioner of Income Tax vs. Monnet Ispat and Energy Limited (2018 18 SCC 786)** wherein the Hon'ble Supreme Court has held that by virtue of section 238 of IBC, the provisions of IBC will override

anything inconsistent contained any other enactment, including Income Tax Act and in such a view the Appellant's contention that the liability accrued due to state taxes prior to enactment of the IBC cannot be overridden by the resolution plan approved under the provisions of IBC is erroneous.

10. The two issues that arise in this appeal are :–

(i) Whether the commercial wisdom of the CoC has taken into account the feasibility and viability of the proposed resolution plan which does not treat the operational and financial debts on parity; and

(ii) Whether the process assessment of liquidation value is vitiated as the registered valuers were appointed beyond the stipulated time period stipulated in the CIRP regulations rendering the approval of resolution plan defective.

11. Section 30(2)(b), clauses (i) and (ii) read with section 53 of the IBC stipulates how allocation for the operational creditors is to be done in a resolution plan. The relevant provisions are as follows:-

"30. Submission of resolution plan. –

Xx xx xx xx

(2) The resolution professional shall examine each resolution plan received by him to confirm that each resolution plan –

Xx xx xx xx

(b) provides for the payment of debts of operational creditors in such manner as may be specified by the Board which shall not be less than –

(i) the amount that would have been paid to such creditors in the event of a liquidation of the corporate debtor under section 53; or

(ii) the amount that would have been paid to such creditors, if the amount to be distributed under the resolution plan had been distributed in accordance with the order of priority in sub-section (1) of section 53,

Whichever is higher, and provides for the payment of debts of financial creditors, who do not vote in favour of the resolution plan, in such manner as may be specified by the Board, which shall not be less than the amount to be paid to such creditors in accordance with sub-section (1) of section 53 in the event of a liquidation of the corporate debtor.

Explanation 1. — For removal of doubts, it is hereby clarified that a distribution in accordance with the provisions of this clause shall be fair and equitable to such creditors."

12. It is noted that the liquidation value of the Corporate Debtor has been estimated as Rs. 6.52 crores. In the event of liquidation of the corporate debtor the amount to be paid to operational creditors would be 'NIL' as the admitted claim of financial creditors is Rs.

411.16 crores. In this context, the resolution plan makes a provision of Rs. 0.14 crore for operational creditors. The resolution plan, and the allocations therein to various creditors and stakeholders, was discussed by the COC in its seventh meeting held on 6.3.2020 (minutes attached at pp. 165-170 of the Appeal Paperbook) and the following is recorded in the minutes:-

> "Agenda Item-4: <u>To discuss regarding the resolution plan submitted by the Resolution Applicant</u> :-
>
> Members had a discussion with the representatives from the Resolution Applicant's end (RA) regarding the resolution plan, the financials mentioned in the Plan are as follows:-

Distribution of Financial Outlay Rs. Crore			
Particulars	**Upfront Payment (within 15 days of Effective Date)**	**For Business Improveme-nt within 12 months of**	**Total**
IRP Cost	0.300		0.300
Workman/Employees	-		-
Operational Creditors (Other Workman/ Employees)	0.140		0.140
Secured Financial Creditors	8.220		8.220
Unsecured Financial Creditors	0.004		0.004
Sub-Total	8.664		8.664
Business Improvement		25.00	25.000

Total	8.664	25.00	33.664
Funded by			
Equity	0.500		0.500
Own contribution of RA (in the form of other instrument	8.164		33.164
Total	**8.664**	**25.00**	**33.664**

13. In the above scheme of distribution, operational creditors (other than workmen/employees) have been provided a total amount of Rs. 0.14 crore which is to be distributed among the operational creditors vide clause 5 of Section II - "Detailed Financial Proposal of the Resolution Applicant" of the resolution plan. The two operational creditors, namely Commissioner of Commercial Taxes and Damodar Valley Corporation have been provided settlement of their claims vide clause 6.6 of section II of the approved resolution plan (attached at page 87 of the Appeal Paperbook):-

"6.6 <u>Operational Creditors</u>

6.6.1 <u>Claims</u> –

(Amount Rs. in crores)

Claim filed by	Claim Admitted	Remarks
Commissioner of commercial Taxes, Government of West Bengal	76.13	. This amount relates to Assessed Dues u/s 46 of WB VAT Act, 2003. . Assessed dues comprising of Principal of Rs. 30.11 crore and

		Interest of Rs.46.12 crore.
Damodar Valley Corporation	18.71	. RA understands that the amount relates to non-payment of bill raised for supply of Power by the DVC. . The dues comprising of Principal outstanding of Rs. 10.28 crores and penalty for non-payment of dues of Rs.8.43 crores.
TOTAL CLAIM OF OTHER OPERATIONAL CREDITORS	**94.84**	

14. Thus we see that against a total admitted claim of the Appellant/Commissioner of Commercial Taxes, Government of West Bengal amounting to Rs. 76.13 crore, he has been paid an amount of Rs. 0.11 crore. This payment is included in para 6.6.5 of the approved Resolution Plan (at pg. 88 of the Appeal Paperbook), which is as follows:-

"*6.6.5 Distribution of payment:*

The settlement amount of Operational Creditors of Rs. 014 crore shall be paid to them in proportion to their respective admitted claim against total admitted claims under this head. The distribution & Payment timelines, thus, shall be as under.

(Rs. Crores)

Operational Creditors	***Claim admitted***	***Sharing %age***	***Settlement amount offered and to be paid upfront within a period of 13 days from the effective date***
Commissioner of Commercial Taxes, Government of West Bengal	*76.13*	*80.27%*	*0.11*
Damodar Valley Corporation	*18.71*	*19.73%*	*0.03*
Total	***94.84***	***100%***	***0.14***

The total payout under this head shall remain unchanged at Rs. 0.14 crore, irrespective further Claims admitted by RP. In case any further claim admitted under this head, the time line for payment and the Settlement amount of Rs.014 crore shall remain unchanged and shall be distributed in proportion to respective admitted claim against total admitted claims under the head.

The Operational Creditors shall be paid in priority over Financial Creditor under this plan.

Further, the Resolution Applicant confirms that the payments to Operational Creditors under this Resolution Plan is not be less than:

a) The amount to be paid to such creditors in the event of a liquidation of the Corporate Debtor under Section 53; or

b) The amount that would have been paid to such creditors, if the amount to be distributed under the resolution plan has been distributed in accordance with the order of priority in sub-section (1) of section 53.

whichever is higher."

15. We, therefore, find that the operational creditors have been paid an amount in accordance with section 30(2)(b) of the IBC, when the liquidation value of the Corporate Debtor was assessed as Rs. 6.52 crores. Hence the successful resolution plan is in consonance with the provisions of IBC, wherein the payment to the operational and financial creditors and other stakeholders is according to the commercial wisdom of the CoC.

16. We refer to the judgment of Hon'ble Supreme Court in the matter of **Ghanashyam Mishra & Sons Private Limited through the authorized signatory Vs Edelweiss Asset Reconstruction Company Ltd. through the Director and Ors. (2021 SSC Online SC 313)** wherein the Hon'ble Supreme Court has observed as follows regarding the significance of commercial wisdom of COC in taking a business decision in the approval of the proposed resolution plan,:

"Besides, the commercial wisdom of CoC has been given paramount status without any judicial intervention, for

ensuring completion of the stated processes within the timelines prescribed by the I&B Code. There is an intrinsic assumption that financial creditors are fully informed about the viability of the corporate debtor and feasibility of the proposed resolution plan. They act on the basis of thorough examination of the proposed resolution plan and assessment made by their team of experts. The opinion on the subject-matter expressed by them after due deliberations in CoC meetings through voting, as per voting shares, is a collective business decision. The legislature, consciously, has not provided any ground to challenge the "commercial wisdom" of the individual financial creditors or their collective decision before the adjudicating authority. That is made non-justifiable."

17. Again in the **Ghanashyam Mishra case (supra),** Hon'ble Supreme Court has observed in para 95 as below:-

"<u>Para 95</u>

(iii) *Consequently, all the dues including the statutory dues owed to the Central Government, any State Government or any local authority, if not part of their solution plan, shall stand extinguished and no proceedings in respect of such dues for the period prior to the date on which the adjudicating authority grants its approval under Section 31 could be continued".*

18. Furthermore, the Respondents find support of their case in the judgment in the matter of **Pratap Technocrats (P) Ltd. (supra)**, where Hon'ble Supreme Court has held as follows:-

"25. The resolution plan was approved by the CoC, in compliance with the provisions of IBC. The jurisdiction of the Adjudicating Authority under section 31(1) is to determine whether the resolution plan as approved by the CoC, complies with the requirement of section 30(2). NCLT is within its jurisdiction in approving a resolution plan which accords with IBC. There is no equity- based jurisdiction with NCLT under the provisions of IBC."

19. The judgment of Hon'ble Supreme Court in the matter of **India Resurgence ARC Pvt. Ltd. (supra),** wherein in para 14 the Hon'ble Supreme Court has held that 'business decision taken in exercise of the commercial wisdom of CoC does not call for interference unless creditors belonging to a class being similarly situated are denied fair and equitable treatment' also provides strength and support to the contention of the Respondents.

20. Insofar as the issue of the late appointment of registered valuers is concerned, admittedly they were appointed two days after the stipulated timeline given in the Regulation 35 and Regulation 27 of the CIRP Regulations. Regarding the appointment of professionals, Regulation 27 (1) states as hereunder:-

*"27. **Appointment of Professionals.***

(1) The resolution professional shall, within seven days of his appointment but not later than forty-seventh day from the insolvency commencement date, appoint two registered valuers to determine the fair value and the liquidation value of the corporate debtor in accordance with regulation 35."

21. There is no other allegation against the valuation done by registered valuers who were appointed to determine the fair and liquidation value of the corporate debtor in accordance with regulation 35 which calls in question the assessment of liquidation value. The mere fact that the appointment was done two days after the 47th day from the insolvency commencement date, does not make the process vitiated because no other irregularity has been urged by the Appellant in the process of valuation of the corporate debtor's assets. Moreover Form-H (attached at pp. 56-64 of the reply affidavit filed on behalf of Respondent No. 2) in which the compliance certificate under Regulation 39(4) of the CIRP Regulations is given, and which is obligatory to be submitted before the Adjudicating Authority, the fair value is mentioned as Rs. 8.68 crores and liquidation value as Rs. 6.52 crores. The Appellant did not raise any objection regarding assessment of the liquidation value before the Adjudicating Authority. We find that the Adjudicating Authority has accepted the compliance certificate submitted by the Resolution Professional during the consideration of the proposed resolution plan. We are, therefore, inclined to hold the view that there is no organic error in the calculation of liquidation value of the corporate debtor and, therefore, the payment proposed in the successful resolution plan keeping the liquidation value so arrived at cannot be found fault with.

22. The Ld. Counsel for Appellant has also claimed that the past dues relating to commercial taxes from the year 2008 should have been appealed before the designated authority and it cannot be

adjudicated by the Adjudicating Authority under the IBC. In this regard, we note section 238 of the IBC, which is as follows:-

> *"**238. Provisions of this Code to override other laws. –** The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law."*

23. Further, this tribunal has upheld the approval of resolution plan in respect of insolvency resolution of the corporate debtor Kharkia Steels Pvt. Ltd. in the following matters including the payments proposed to the operational creditors namely Directorate of Commercial Taxes and Damodar Valley Corporation in the matter of **Damodar Valley Corporation vs Kharkia Steels Pvt. Ltd. & Ors [Company Appeal (AT)(Ins) No. 1111 of 2020**] in its judgment dated 15.03.2022.

24. Therefore, in accordance with section 238, when the resolution plan is proposed under the provisions of IBC during the currency of CIRP and considered by the CoC and subsequently approved by the Adjudicating Authority, all these actions taking place during the currency of CIRP, section 238 provides full protection to the actions taken under IBC against any other law or instrument, which may be inconsistent with the provisions of IBC. Therefore, the payments of operational debt as proposed in the successful resolution plan is completely legitimate and having the force of law.

25. In view of the discussion in the aforementioned paragraphs, we hold the view that the Resolution Plan was approved by the CoC in its commercial wisdom and later by the Adjudicating Authority. The feasibility and viability of the resolution plan is established and the payments to operational creditors and financial creditors, particularly to the Appellant/Operational Creditor, is in accordance with the provisions of IBC. In such a situation, this appeal deserves to be dismissed and is disposed of accordingly.

26. In the facts of the case, there shall be no order as to costs.

(Justice Ashok Bhushan)
Chairperson

(Dr. Alok Srivastava)
Member (Technical)

New Delhi
22nd March, 2022

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