NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 1063 of 2022
&
I.A. No. 3101 of 2022

[Arising out of order dated 21.04.2024 passed by the Adjudicating Authority (National Company Law Tribunal, New Delhi Bench, Court – V), in IA (I.B.C)/2946/2021 & IA (I.B.C)/4103/2021 in C.P. (IB) No. 1295/ND/2019]

IN THE MATTER OF:

Rajat Metaal Polychem Pvt. Ltd.
26/4, F.F, Onkar Nagar-B,
Trinagar,
New Delhi – 110035. **...Appellant**

Versus

1. Mr. Neeraj Bhatia
Resolution Professional
Vinayak Rathi Steels Rolling Mills Pvt. Ltd.
Reg. No. IBBI/IPA – 001/IP-P00824/2017-2018/11400
P-27, 1st Floor, Malviya Navar,
New Delhi National Capital Territory of Delhi, 110017 **...Respondent No. 1**

2. Subhash Bhati & Ashok Kumar Bhati
Successful Resolution Applicant
Corporate Insolvency Resolution Process
Vinayak Rathi Steels Rolling Mills Pvt. Ltd. **...Respondent No. 2**

Present:

For Appellant : Mr. Mrinal Harsh Vardhan, Mr. Kailash Ram, Advocates.

For Respondents : Mr. Ashutosh Kumar, Advocate.

J U D G M E N T

ASHOK BHUSHAN, J.

This Appeal by Appellant an Operational Creditor of the Corporate Debtor has been filed challenging the Order dated 21.04.2022 passed by the Learned Adjudicating Authority (National Company Law Tribunal, New Delhi

Bench, Court – V), by which Order Adjudicating Authority has allowed the Application I.A. 2946/2021 filed by the Resolution Professional (`RP') for approval of the Resolution Plan. Operational Creditor who has not been proposed any amount in the Resolution Plan aggrieved by the Order has come up in this Appeal.

2. Brief facts necessary to be noticed for deciding the Appeal are:

i. The Corporate Debtor, Vinayak Rathi Steels Rolling Private Limited was put into Corporate Insolvency Resolution Process (`CIRP') was initiated by Order dated 16.06.2020, on an Application filed by Jammu and Kashmir Bank, the Financial Creditor.

ii. A public announcement was made on 19.06.2020, the Appellant filed its claim as Operational Creditor on 01.08.2020 for an amount of ₹1,54,64,626/-. RP admitted the amount of ₹93,00,564/-.

iii. Appellant filed an Application against rejection of the claim which Application was rejected on 23.09.2021 against the Order of dismissal of the Application, Comp. App. (AT) (Ins.) No. 797/2021 was filed by the Appellant which was allowed directing the Adjudicating Authority to consider the contention in I.A. No. 4040/2021, while hearing the Resolution Plan.

iv. I.A. No. 4103/2021 was filed by the Appellant for rejecting the Resolution Plan which Application also came to be dismissed by Order dated 21.04.2022.

v. The claim of the Financial Creditor which was admitted in the CIRP was ₹6013.50 Lakhs/-. The Resolution Applicant has proposed ₹2312.50 Lakhs to the sole Financial Creditor along with 100% CIRP Cost of

₹30,50,206/-. No amount was proposed to be paid to the Operational Creditor. Committee of Creditors (`CoC') approved the Resolution Plan which Resolution Plan came to be approved by the Adjudicating Authority by the Impugned Order.

3. We have heard Mr. Mrinal Harshvardhan, Learned Counsel for the Appellant and Mr. Ashutosh Kumar, Learned Counsel appearing for the Respondent.

4. Learned Counsel for the Appellant submits that the Adjudicating Authority committed an error in approving the Resolution Plan and rejecting the I.A. No. 4103/2021 filed by the Appellant in which Plan there was no consideration with regard to payment to Operational Creditor. It is submitted that as per the provisions of Section 30(2) and the CIRP Regulations, 2016, the Resolution Plan is required to address the claim of all stakeholders including the Operational Creditor. The CoC never considered the claim of the Appellant nor proposed any payment to the Appellant, the Resolution Plan deserves to be set aside on this above ground. Learned Counsel for the Appellant have placed reliance on the Judgment of this Tribunal in the matter of ***`Hammond Power Solutions Private Limited' Vs. `Mr. Sanjit Kumar Nayak & Ors.'*** in ***Comp. App. (AT) (Ins.) No. 606/2019.*** It is submitted that this Tribunal has set aside the Order of the Adjudicating Authority approving the Resolution Plan and remitted the matter back to the Adjudicating Authority to send back the Plan to the CoC to resubmit the Plan. It is submitted that in the present case also there being no consideration of the claim of the Appellant, the Operational Creditor the Plan approval Order deserves to be set aside.

5. Learned Counsel for the Respondent refuting the submissions of the Counsel for the Appellant submits that under Section 30(2) the Operational Creditor is entitled minimum of the amount which became payable to Operational Creditor in event of Liquidation of the Corporate Debtor. In the present case Liquidation amount which is payable to Operational Creditor in the event of the Liquidation being NIL. CoC did not commit an error in approving the Plan. It is submitted that Resolution Plan can be interfered with only when it violates provision of Section 30(2)(b) of the IBC. When the Operational Creditor could not have got any amount as per Section 30(2)(b), Adjudicating Authority did not commit any error in approving the Resolution Plan.

6. We have heard Counsel for the parties and perused the record.

7. Section 30(2)(b) provides as follows:

> ***30. Submission of resolution plan.***- *(2) The resolution professional shall examine each resolution plan received by him to confirm that each resolution plan-*
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> *(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-*
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> > *(i) the amount to be paid to such creditors in the event of a liquidation of the corporate debtor under section 53; or*
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> > *(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,*
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> *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 the 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.

Explanation 2. – For the purposes of this clause, it is hereby declared that on and from the date of commencement of the Insolvency and Bankruptcy Code (Amendment) Act, 2019, the provisions of this clause shall also apply to the corporate insolvency resolution process of a corporate debtor--

(i) where a resolution plan has not been approved or rejected by the Adjudicating Authority;

(ii) where an appeal has been preferred under section 61 or section 62 or such an appeal is not time barred under any provision of law for the time being in force; or

(iii) where a legal proceeding has been initiated in any court against the decision of the Adjudicating Authority in respect of a resolution plan;"

Section 30(2)(b) provides that payment of debts of the Operational Creditors shall not be less than the amount to be paid to such Creditor in the event of Liquidation of the Corporate Debtor under Section 53.

8. Hon'ble Supreme Court in the matter of ***`Committee of Creditors of Essar Steel India Ltd., Through Authorized Signatory' Vs. `Satish Kumar Gupta & Ors.'*** reported in ***(2020) 8 SCC 531,*** has categorically laid down that the scope of interference in decision of the CoC regarding the approval of the Resolution Plan. The Hon'ble Supreme Court has laid down that payment to different class of Creditors can be different payment and entitlement of Operational Creditor is not less than payment which becomes due in event the Corporate Debtor is liquidated. It has been held by the Hon'ble Supreme Court that so long as the provisions of the Code and Regulations having met, it is the commercial wisdom of the CoC which is to negotiate and accept the Resolution Plan which may involve differential

payment to different classes of Creditors. In Paragraphs 83, 88 & 93, following was laid down by the Hon'ble Supreme Court:

> ***"83.*** *Quite apart from the fact that the 2010 Report is an earlier report, which opined on the basis of the French system, that creditors are divided into two separate classes without any further sub-classification and that the advantage of such system is that it avoids potential conflict of interest among creditors in a particular class, the Report then goes on to state:*
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> *"4.5.3. Voting and Classes*
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> * * *
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> *"In some cases, classification makes it easier to treat the claims of major creditors, who may be persuaded to opt to receive a different treatment from the general class of unsecured creditors, where such treatment is necessary to render the plan feasible. In such cases, the treatment for these major creditors is generally on less favourable terms than other, similarly situated creditors. Finally, classification may be a useful means of overriding the vote of a class of creditors that votes against the plan where the class is otherwise treated in a fair and equitable manner. [This override, which has come to be known as a "cramdown" based on its effect, allows the court to conclude that a rejecting class should be compelled to accept the plan where the class is paid in strict accordance with the relative priority of creditor claims and will receive under the plan a distribution in an amount equal to or greater than such creditors would receive in a liquidation proceeding. The rationale is that these creditors cannot claim "foul" if their recovery is at least as good as they would have received if they had prevailed in having the enterprise liquidated.] "*

Even according to this Report, therefore, a "cramdown" on dissentient creditors would pass muster under an insolvency law if such creditors will receive, under a resolution plan, an amount at least equal to what such creditors would receive in a liquidation proceeding being "liquidation value".

88. *By reading para 77 (of Swiss Ribbons [Swiss Ribbons (P) Ltd. v. Union of India, (2019) 4 SCC 17]) dehors the earlier paragraphs, the Appellate Tribunal has fallen into grave error. Para 76 clearly refers to the UNCITRAL Legislative Guide which makes it clear beyond any doubt that equitable treatment is only of similarly situated creditors. This being so, the observation in para 77 cannot be read to mean that financial and operational creditors must be paid the same amounts in any resolution plan before it can pass muster. On the contrary, para 77 itself makes it clear that there is a difference in payment of the debts of financial and operational creditors, operational creditors having to receive a minimum payment, being not less than liquidation value, which does not apply to financial creditors. The amended Regulation 38 set out in para 77 again does not lead to the conclusion that financial and operational creditors, or secured and unsecured creditors, must be paid the same amounts, percentage wise, under the resolution plan before it can pass muster. Fair and equitable dealing of operational creditors' rights under the said regulation involves the resolution plan stating as to how it has dealt with the interests of operational creditors, which is not the same thing as saying that they must be paid the same amount of their debt proportionately. Also, the fact that the operational creditors are given priority in payment over all financial creditors does not lead to the conclusion that such payment must necessarily be the same recovery percentage as financial creditors. So long as the provisions of the Code and the Regulations have been met, it is the commercial wisdom of the requisite majority of the Committee of Creditors which*

is to negotiate and accept a resolution plan, which may involve differential payment to different classes of creditors, together with negotiating with a prospective resolution applicant for better or different terms which may also involve differences in distribution of amounts between different classes of creditors.

93. *In Miheer Mafatlal [Miheer H. Mafatlal v. Mafatlal Industries Ltd., (1997) 1 SCC 579] , the Court was dealing with schemes of amalgamation under Section 391 of the Companies Act, 1956. Under Section 392 of the said Act, the High Court is vested with a supervisory jurisdiction, which includes the power to give directions and make modifications in such schemes, as it may consider necessary, for the proper working of the said schemes. This power in Section 392 is conspicuous by its absence when it comes to the Adjudicating Authority under the Code, whose jurisdiction is circumscribed by Section 30(2). It is the Committee of Creditors, under Section 30(4) read with Regulation 39(3), that is vested with the power to approve resolution plans and make modifications therein as the Committee deems fit. It is this vital difference between the jurisdiction of the High Court under Section 392 of the Companies Act, 1956 and the jurisdiction of the Adjudicating Authority under the Code that must be kept in mind when the Adjudicating Authority is to decide on whether a resolution plan passes muster under the Code. When this distinction is kept in mind, it is clear that there is no residual jurisdiction not to approve a resolution plan on the ground that it is unfair or unjust to a class of creditors, so long as the interest of each class has been looked into and taken care of. It is important to note that even under Sections 391 and 392 of the Companies Act, 1956, ultimately it is the commercial wisdom of the parties to the scheme, reflected in the 75% majority vote, which then binds all shareholders and creditors. Even under Sections 391 and 392, the High Court*

cannot act as a court of appeal and sit in judgment over such commercial wisdom."

9. The Hon'ble Supreme Court while noticing the jurisdiction of the Adjudicating Authority and Appellate Tribunal has held that provisions investing jurisdiction in NCLT and NCLAT has not made the commercial wisdom exercise by CoC of not approving the Plan rejecting the same justiciable. Hon'ble Supreme Court held that Adjudicating Authority is circumscribed by Section 30(2). In Paragraphs 65 and 66 of the Judgment following has been held:

"Jurisdiction of the Adjudicating Authority and the Appellate Tribunal

65. *As has already been seen hereinabove, it is the Adjudicating Authority which first admits an application by a financial or operational creditor, or by the corporate debtor itself under Sections 7, 9 and 10 of the Code. Once this is done, within the parameters fixed by the Code, and as expounded upon by our judgments in Innoventive Industries Ltd. v. ICICI Bank [Innoventive Industries Ltd. v. ICICI Bank, (2018) 1 SCC 407 : (2018) 1 SCC (Civ) 356] and Macquarie Bank Ltd. v. Shilpi Cable Technologies Ltd. [Macquarie Bank Ltd. v. Shilpi Cable Technologies Ltd., (2018) 2 SCC 674 : (2018) 2 SCC (Civ) 288] , the Adjudicating Authority then appoints an interim resolution professional who takes administrative decisions as to the day to day running of the corporate debtor; collation of claims and their admissions; and the calling for resolution plans in the manner stated above. After a resolution plan is approved by the requisite majority of the Committee of Creditors, the aforesaid plan must then pass muster of the Adjudicating Authority under Section 31(1) of the Code. The Adjudicating Authority's jurisdiction is circumscribed by Section 30(2) of the Code. In this*

context, the decision of this Court in K. Sashidhar [K. Sashidhar v. Indian Overseas Bank, (2019) 12 SCC 150 : (2019) 4 SCC (Civ) 222] is of great relevance.

66. *In K. Sashidhar [K. Sashidhar v. Indian Overseas Bank, (2019) 12 SCC 150 : (2019) 4 SCC (Civ) 222] this Court was called upon to decide upon the scope of judicial review by the Adjudicating Authority. This Court set out the questions to be determined as follows: (SCC pp. 173-74 & 176, paras 32 & 37)*

> *"32. Having heard the learned counsel for the parties, the moot question is about the sequel of the approval of the resolution plan by CoC of the respective corporate debtor, namely, KS&PIPL and IIL, by a vote of less than seventy-five per cent of voting share of the financial creditors; and about the correctness of the view [Kamineni Steel & Power (India) (P) Ltd. v. Indian Bank, 2018 SCC OnLine NCLAT 654] taken by NCLAT that the percentage of voting share of the financial creditors specified in Section 30(4) of the I&B Code is mandatory. Further, is it open to the adjudicating authority/appellate authority to reckon any other factor [other than specified in Sections 30(2) or 61(3) of the I&B Code as the case may be] which, according to the resolution applicant and the stakeholders supporting the resolution plan, may be relevant?*
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> *37. … The Court, however, was not called upon to deal with the specific issue that is being considered in the present cases, namely, the scope of judicial review by the adjudicatory authority in relation to the opinion expressed by CoC on the proposal for approval of the resolution plan."*

10. From the facts which have been brought on the record, it is clear that admitted claim of a sole Financial Creditor who was 100% CoC of

₹60,13,50,956/– against which the proposed amount was ₹23,12,50,000/-. Adjudicating Authority in the Impugned Order in a Table in Paragraph 3 has noted following at Page 41 of the Paper Book:

S. No.	***Particulars***	***Claim received***	***Claim Admitted***	***Proposed amount in Resolution Plan***	***Payment term***
1.	***CIRP Cost***			*30,50,206/-*	
2.	***Financial Creditors***	*60,13,50,956/-*	*60,13,50,956/-*	*23,12,50,000/-*	*100% within 4 years*
4.	***Operational Creditors***	*6,52,82,950/-*	*3,61,28,713.00*	*NIL*	*NA*
7.	***Fresh Infusion of capital***			*5,00,00,000/-*	*100% within 4 years*
	Total	***66,66,33,906/-***	***63,74,79,669/-***	***28,43,00,206/-***	
Note: The Resolution Applicant also proposes to generate Rs. 845.47 lakhs within 4 years from Business revenue from the date of LOI and handover of Corporate Debtor for working capital and other running expenditure for factory. Therefore, based on above, the resolution applicant plans to bring total fund contribution of Rs. 28,45,47,000/- within 4 years.					

11. As per the provision of Section 30(2)(b) Operational Creditor has to be paid not less than the amount which would have been payable in event the Corporate Debtor is liquidated under Section 53. When we notionally compute the amount which could have been payable to the Operational Creditor in the Liquidation, the amount comes as NIL since sole Financial Creditor itself is not able to receive its full amount. The sole Financial Creditor who is the sole Member of the CoC has approved the Resolution Plan which Plan has proposed payment of total payout to ₹23,12,50,000/- to the Financial Creditor and CIRP Cost ₹30,50,206/–. The payout as proposed in the Resolution Plan cannot be said to be violate in any manner provisions of Section 30(2)(b). It is well settled that Adjudicating Authority can interfere with commercial wisdom of CoC only when Resolution Plan violates any of the provisions of Section 30(2)(b).

12. Learned Counsel for the Appellant has placed much reliance on the Judgment of this Tribunal in ***`Hammond Power'*** where this Tribunal after referring the Judgment of the Hon'ble Supreme Court in ***`Committee of Creditors of Essar Steel India Ltd., Through Authorized Signatory' (Supra)*** and ***`Swiss Ribbons Pvt. Ltd. & Anr.' Vs. `Union of India & Ors.',*** has laid down that interest of all stakeholders including the Operational Creditor has to be taken care of. In Paragraphs 13 & 14 of the Judgment following has been held:

> *"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.*
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> *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."*

13. In ***`Hammond Power' (Supra),*** Order of the Adjudicating Authority was set aside and the matter was remitted for sending the Plan back to the CoC. Adjudicating Authority in the said Order has noted that there were two summaries filed in one Operational Creditor was proposed ₹2.668 Crore/-

while in the revised Plan amount became zero. In paragraph 9 of the Judgment, this Tribunal noticed the two proposals relating to the Operational Creditor, whereas in one proposal amount of ₹2.668 Crore/- was proposed. Paragraph 9 of the Order is as follows:

> *"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"."*

14. In the above circumstances in the ***`Hammond Power' (Supra),*** this Tribunal came to the view that the CoC has not applied its mind and has not taken care of all stakeholders and in the said circumstances, the Order was set aside. Judgment of this Tribunal in ***`Hammond Power' (Supra),*** was on

the facts of the said case. In ***`Hammond Power' (Supra),*** also this Tribunal has noted and relied on ***`Committee of Creditors of Essar Steel India Ltd., Through Authorized Signatory' (Supra),*** thus, the law as laid down in ***`Committee of Creditors of Essar Steel India Ltd., Through Authorized Signatory' (Supra),*** which is law declared by Hon'ble Supreme Court binding on all concerns.

15. It is true that Operational Creditor's claim was submitted for an amount of ₹1,54,64,926/– but as per the provisions of Section 30(2)(b), it cannot be said that in the facts of the present case there is any non-compliance of Section 30(2)(b) in proposing NIL amount to the Operational Creditor. It is true that non-payment of any payment of Operational Creditor is harsh but the law as stand today is to that effect. We may notice that this Tribunal in the matter of ***`Damodar Valley Corporation' Vs. `Dimension Steel and Alloys Pvt. Ltd. & Ors.'*** in ***Comp. App. (AT) (Ins.) No. 62/2022,*** has observed that time has come when it should be examined by the Government to find out as to whether there are any grounds for considering change in the Legislative Scheme towards the payment to the Operational Creditor which also consists of the Government dues. In Paragraph 31 of the Judgment following has been observed:

> *"31. .....We are consistently receiving the Plans, where Operational Creditors either not paid any amount towards their claim or paid negligible amount, sometime even less than 1%. In the present case, the Operational Creditors have been given only miniscule of their admitted claim to the extent of only 0.19%. As the law stand today, no exception can be taken to such Plans, which provide payment to Operational Creditor in accordance with Section 30(2)(b) of the Code. However, the time has come when it should be examined by the Government and the Board to find out as to whether there are any grounds for considering*

change in the legislative scheme towards the payment to the Operational Creditors, which also consist of Government dues and other statutory dues. We make it clear that our observation is only to facilitate the Government and other competent Authority to consider this issue and take decision, so as to the objective of equitable and fair distribution can be fulfilled with clear parameters to guide the all concerned to arrive at the fair and equitable distribution."

16. It is true that Operational Creditors as the law stands now are denied any payment when the amount payable to them in the event of Liquidation is NIL, but till the Legislature comes to the aid of the claim of Operational Creditor by amending the Legislative Scheme hands of the Courts are tied to take any other view in the matter.

17. In view of the aforesaid, we do not find any error in the Order of the Adjudicating Authority, approving the Resolution Plan which was approved by the CoC.

There is no merit in the Appeal. The Appeal is dismissed.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

[Arun Baroka]
Member (Technical)

NEW DELHI

04th September, 2024

himanshu