

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

Comp. App. (AT) (Ins) No. 25 of 2022

IN THE MATTER OF:

Central Transmission Utility of India Ltd.

...Appellant

Versus

**Ashish Chhawchharia Resolution Professional,
Essar Power MP Ltd. & Ors.**

...Respondents

Present:

For Appellant :

Mr. Shubham Arya, Mr. Ravi Nair, Ms. Poorva Saigal, Ms. Anumeha Smiti & Mr. Yogeshwar, Advocates.

For Respondents :

Mr. Ramji Srinivasan, Sr. Advocate along with Mr. Diwakar Maheshwari, Ms. Pratiksha Mishra. Mr. Vishnu Shriram & Ms. Namrata Saraogi, for R-1.

Mr. Sandeep Singhi, Mr. Vishal Gehrana, Ms. Hancy Maini & Ms. Aakriti Vohra, for R-3.

Mr. Siddhant Kant & Mr. Nikhil Mathur, for CoC.

J U D G M E N T

Per: Justice Rakesh Kumar Jain:

This appeal is directed against the order dated 01.11.2021 passed by the Adjudicating Authority (National Company Law Tribunal, New Delhi) by which I.A. No. 2829 of 2021 filed by the Resolution Professional of Essar Power M.P. Ltd. (Corporate Debtor) for approval of the resolution plan

submitted by Respondent No. 3/Successful Resolution Applicant (SRA) (Adani Power Ltd.) has been allowed and application bearing I.A. No. 4099 of 2021 filed by the Appellant objecting to the resolution plan and I.A. No. 3015 of 2021 filed by the Appellant against the adjudication of its claim of Rs. 2643,54,00,000/- as Rs. 1, treating the same as contingent claim, has been dismissed.

2. In brief, the financial creditor (ICICI Bank Ltd.) filed an application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (in short 'Code') bearing No. (IB)/863/PB/2020 for the initiation of Corporate Insolvency Resolution Process (in short 'CIRP') against the Corporate Debtor which was admitted on 29.09.2020 and Respondent No. 1 was appointed as the Interim Resolution Professional (IRP) who continued as the Resolution Professional (RP).

3. The RP, consequent upon his appointment as IRP, made a public announcement in Form A on 10.10.2020 in the newspaper, namely, Business Standard – Delhi – Hindi Edition, Raj Express –Jabalpur – Hindi Edition and Financial Express – All India English Edition and also uploaded it on the website of the Insolvency and Bankruptcy Board of India (IBBI).

4. The Respondent No. 1 /RP constituted the Committee of Creditors (CoC) comprising of the following financial creditors with their respective voting share: -

S. No.	Name of Creditor	Voting Share % age

1.	ICICI Bank	29.19
2.	REC Limited	24.53
3.	Power Finance Corporation	24.26
4.	Punjab National Bank	15.98
5.	Edelweiss Asset Reconstruction Company Limited	6.04

5. Form G was published on 12.11.2020 in the newspapers. The last date for submission of Expression of Interest (EOI) was 27.11.2020 but it was extended to 04.12.2020 and then again to 14.12.2020. The last date for submission of resolution plan was ultimately fixed for 16.01.2020.

6. Four EOIs were made to the R1/RP i.e. by Adani Power Limited, Vedanta Limited, Jindal Power Limited and NTPC Limited out of which only two Prospective Resolution Applicants (PRAs) i.e. Vedanta Limited and Adani Power Limited submitted their resolution plans.

7. Voting for approval of the resolution plan was conducted in the 11th meeting of the CoC held on 21.05.2021 and the resolution plan submitted by Respondent No. 3 (Adani Power Limited) was approved by the CoC with 100 % votes. The Respondent No. 3 submitted performance guarantee of Rs. 150 Cr. on 22.06.2021. In the resolution plan, the detail of payments given to the various stakeholders of the Corporate Debtor was given in Form H. The extract is reproduced as under:-

7. The amounts provided for the stockholders under the Resolution plan is as under.

42-A

(Amount in

INR)

No1	Category of Stockholders*	Sub-Category of stockholders	Amount Claimed	Amount Admitted	Amount Provided Under the Plan #	Amount Provided to the Amount Claimed (%)
(1)	(2)	(3)	(4)	(5)	(6)	(7)
	Secured Financials Creditors	(a) Creditors not having a right to vote under sub-section (2) of section 21				
		(b) Other than (a) Above.				
		(i) who did not vote in favor of the resolution plan				
		(ii) who voted in favor of the resolution plan	124,391,359,685	120,129,831,567	25,000,000,000	20.098 %
		Total [a + b]	124,391,359,685	120,129,831,567	25,000,000,000	20.098%

2	Unsecured Financial Creditors*	(a) Creditors not having a right to vote under sub-section (2) of section 2.1		4,849,451,504	419,437,816	NIL	NIL
		(b) Other than (a) above:					
		(i) Who did not vote in favor of the resolution plan.		126,500,000	126,500,000	NIL	NIL
		(ii) Who voted in favor of the resolution plan					
		Total = (a+b)		4,975,951,504	545,937,816	NIL	NIL
3	Operational creditors	(a) Related party of corporate Debtor		547,055,623	546,408,891	NIL	NIL
		(b) Other Than (a) above:		42,494,439,721	5,446,721,303	NIL	NIL
		(i) Government		-	-	-	-
		(ii) Workmen		176,425,856	137,393,857	NIL	NIL
		(iii) Employees		29,504,909,458	429731,129	NIL	NIL
		(iv) Others					
		Total (a)+(b)		72,722,830,658	6,560,255,180	NIL	NIL
4	Other debits and dues	-		-	-	-	-
	Grand Total			202,090,141,846	127,236,024,563	25,000,000,000	12.37%

Amount Provided over time under the Resolution Plan and includes estimated value of non-cash components. It is not MPV.

8. The liquidation value of the CD was disclosed as Rs. 1733.4 Cr. and the fair market value of the CD as Rs. 2657.2 Cr. After approval of the

resolution plan, the Respondent No. 1 filed the application bearing 2829 of 2021 before the AA for the following prayers:-

“a. Allow the present application

b. pass an order approving the resolution plan dated 11.05.2021 (read with addendum dated 12.05.2021) submitted by Adani Power Limited (as annexed at Annexure Y) under Section 31(1) of the Code

c. Pass an order granting the reliefs and concessions sought in Section 9 of the Successful resolution plan dated 11.05.2021 (read with addendum dated 12.05.2021) submitted by Adani Power Limited (as annexure Y) and

d. Pass any such other order or orders it may deem fit and necessary in the interest of equity and justice.”

9. During the pendency of this application, various applications were filed by the Operational Creditors including the one by the present Appellant i.e. I.A. No. 4099 of 2021, questioning the validity of the resolution plan and also filed I.A. No. 3015 of 2021 seeking admission of Rs. 2632,54,00,000/- as an operational debt.

10. The Adjudicating Authority vide its impugned order, allowed I.A. No. 2829 of 2021, filed by the R1, approving the resolution plan and simultaneously, by the same impugned order, dismissed the applications i.e. I.A. No. 4099 of 2021 and 3015 of 2021 filed by the Appellant recording the following reasons which read as under:-

“24. That after going through the objections made by the Operational Creditors, and examining the reply given by the RP and CoC, this bench observes that as per Section 30(2)(b) of IBC, 2016, the higher of the following

amount is required to be paid to the Operational Creditors ie the amount to be paid to such creditors in the event of a liquidation of the corporate debtor under section 53; or 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.

“25. Since the Liquidation value of the Operational Creditors is 'Nil' and the amount which shall be distributed to the Corporate Debtor in accordance with Section53(1) would have been the Nil as well. Therefore, we are of the considered view that the Resolution Plan is not in violation of Section 30(2)(b) of IBC,2016.

26 Since the plan is approved by the 100% votes by the CoC. Therefore, this bench cannot interfere in the Commercial Wisdom of the CoC, in absence of any contravention of any provision of law. Therefore we dismiss IA 3286, IA 3293, IA 3318, IA 3396, IA 3614, IA 3862 IA 3869 Of 2021, IA 4099 filed by the Operational Creditors.

27. That IA 3608, IA 3619, IA 3620, IA 3621 were the Applications filed by the CoC to intervene in the Applications filed by the Operational Creditors. Since the objections of the operational Creditors are already decided, therefore these IAs are dismissed as infructuous.”

11. The application bearing I.A. No. 3015 of 2021 was also dismissed with the following reasons: -

IA 3015/2021

28. That 1A 3015/2021 has been filed by Central Transmission Utility of India Limited, claiming to be an Operational Creditor against the RP. That through this 1A Central Transmission Utility of India Limited has sought admission of Rs 26,325,400,000 as an Operational Debt.

29. That the necessary of adjudicating the claim of the Operational Creditor in IA 3015/2021 is not required since the all the Operational Creditors, irrespective of their claim amount, are awarded with NIL Amount in the resolution plan. Therefore, I.A. No. 3015 of 2021 is dismissed as infructuous.”

12. Aggrieved against the dismissal of both the applications, the present appeal has been filed.

13. Counsel for the Appellant has submitted that the Appellant is a statutory body constituted in terms of the Electricity Act, 2003 and is regulated by Central Electricity Regulatory Commission (CERC). The Appellant entered into a bulk power transmission agreement/long term access agreement (LTA) dated 07.01.2009 with the CD for 1200 MW. The CD relinquished LTA for 750 MW and accordingly is liable to pay the relinquishment charges to the Appellant as determined by CERC in petition no. 92/MP/2015.

14. The CD filed a petition no. 187/MP/2017 seeking certain reliefs against the relinquishment charges which was dismissed on 07.10.2019 and it was stated that relinquishment charges has to be paid as decided under petition no. 92/MP/2015. It is alleged that the Corporate Debtor is thus liable to pay an amount of Rs. 2643,54,00,000/- to the Appellant.

15. The Corporate Debtor filed an appeal No. 436/2019 before the Appellate Tribunal for Electricity (APTEL) against the aforesaid order which is pending adjudication. It is alleged that APTEL, vide order dated 08.10.2020 specifically permitted the Appellant to pursue claims on the generators where CIRP proceedings are pending, therefore, the Appellant filed its claim in Form B to Respondent No. 1 who adjusted the same as Rs. 1 and rest as contingent claim on the ground of pendency of appeal before the APTEL.

16. Counsel for the Appellant has submitted that Respondent No. 1 is suppose to make the best estimate of the claim filed before him as per Regulation 14 of the IBBI (CIRP) Regulations, 2016 (in short 'Regulations') if

the same is not precise but cannot estimate the claim at Rs. 1. It is submitted that the amount is precise and therefore, the claim of the Appellant cannot be adjudicated at Rs. 1 and hence, Respondent No. 1 has erred in the exercise of his jurisdiction.

17. It is further submitted that even the principle of non-justiciability of the commercial wisdom of the CoC is not applicable because the plan has been approved by the CoC is in violation of Section 30(2)(e) of the Code. The CoC can only approve such resolution plan which are in compliance of Section 30(2)(e) and cannot approve the resolution plan which is against the provisions of Section 30(2)(e) of the Code.

18. Counsel for the Appellant has further argued that if the claim of the Appellant is taken into consideration, then the total claim of the CD was to the extent of 20,000 Cr. and the CoC has approved the plan with a haircut of 85%. It is submitted that the CoC (R2) must ensure that the interest of all stakeholders are protected, but it did not take into account the interest of the operational creditors because NIL payment is provided to them in the resolution plan.

19. In reply, Counsel for Respondent No. 1 has argued that claim of the Appellant has rightly been categorised as contingent because of the pendency of the appeal against the determination of the said amount. It is also submitted that in the list of creditors published on 05.01.2021 by the erstwhile RP, a detailed note was placed therein qua Appellant's claim that it is contingent due to the pending of the litigation which has not been denied by the Appellant even in the prayer made in the application in which it has

been alleged that a direction may be issued to the RP that the operational debt of the Appellant would become payable on crystallisation of the debt.

20. It is further submitted that Respondent No. 1 could not have adjudicated upon the claim as it is not empowered to do so and legality of the claim is depending on the appeal which is pending before APTEL.

21. Counsel for Respondent No. 2 (COC) of the Corporate Debtor has submitted that the total admitted secured financial debt of the CD is Rs. 12,012.98 Cr. The average liquidation value of the CD is approx. Rs. 1733 Cr., therefore, the liquidation value due to the operational creditors is NIL considering that as per the waterfall mechanism set out in Section 53 of the Code the entire amount of Rs. 1733 Cr. would be exhausted in payment of the insolvency resolution process costs and the dues owed to the secured financial creditors which are substantially in excess of Rs. 1733 Cr. It is also submitted that the total payout under the approved resolution plan is Rs. 2500 Cr. which would also get exhausted in payment of the CIRP costs and the dues owed to the secured financial creditors. It is therefore submitted that the resolution plan cannot be considered to be in violation of Section 30(2)(e) of the Code keeping in view the fact that the liquidation value due to the operational creditors is NIL and even if the amount received under the approved resolution is to be distributed in accordance with the priorities set out in Section 53(1) of the Code and thus, the operational creditors would be paid NIL.

22. It is further submitted that there is no inequitable or unfair treatment meted out to the operational creditors of the CD, the CoC made every

possible effort towards protecting the interest of all stakeholders and has approved the best available resolution plan. It is submitted that out of the two resolution plans placed before the CoC for their approval while the resolution plan submitted by SRA provided for an overall payout of Rs. 2500 Cr. towards the stakeholders with an additional commitment of upto Rs. 1100 Cr. towards inter alia investment in the CD towards working capital, operational improvements and capital expenditure, the other resolution plan provided for a payout of only Rs. 1300 Cr. which was also payable over a significantly longer tenure. It is submitted that Respondent No. 2 negotiated with the resolution applicants to consider providing certain payments to operational creditors in its 7th meeting dated 25.02.2021 and thereafter, in the 11th meeting of the CoC held on 21.05.2021 but no payout to the operational creditor was found to be financially viable or commercially prudent according to the resolution applicant(s), therefore, the CoC approved the best resolution plan for the CD and passed the muster of fair and equitable as prescribed under Section 30(2)(e) of the Code. The allegation of the appellant against the CoC regarding failure to maximise the value of the assets of the CD and purportedly not acting in the best interest of all stakeholders is unsubstantiated.

23. It is further submitted that commercial wisdom of the CoC is paramount and cannot be interfered with. It is also submitted that claim of the Appellant has rightly been classified as contingent because it is depending upon the outcome of the pending appeal.

24. Counsel for Respondent No. 3 has submitted that the total claim in respect of the CD admitted by the Respondent No. 1 is Rs.

12723,60,24,563/- out of which the total admitted claim of the financial creditors (secured and unsecured) of the Corporate Debtor is Rs. 12067,57,69,383/-. It is submitted that the liquidation value of the CD as disclosed by the R1 was Rs. 1733 Cr. and the financial offer to the secured financial creditors under the approved resolution plan is Rs. 2500 Cr. with infusion of funds to the tune of Rs. 1102 Cr. It is further submitted that there is no discrimination towards the unsecured financial creditors as well as operational creditors and contingent creditors for NIL amount because the entire amount is to be consumed towards the CIRP costs and the secured financial creditors and the operational creditors would fall in the bottom of the water fall mechanism provided under Section 53. It is also submitted that in the case of K Sashidhar Vs. Indian Overseas Bank & Ors., 2019 (12) SCC 50 the Hon'ble Supreme Court has held that the judicial review of the commercial wisdom of a committee of creditors is impermissible. It is also submitted that in the case of Pratap Technocrats (p) Ltd. Vs. Monitoring Committee of Reliance Infratel Ltd. & Anr., Civil Appeal No. 676 of 2021 it has been held that once the requirement of Section 30(2)(b) of the Code is fulfilled, the proposal under a resolution plan is statutorily treated as fair and equitable which cannot be made subject matter of judicial review since the provisions of the Code do not confer any equity based jurisdiction of the AA or this Appellate Tribunal.

25. It is also submitted that the claim of the Appellant has rightly been classified as contingent because it is dependent upon a decision of an appeal which is pending adjudication before APTEL.

26. We have heard Counsel for the parties and perused the record with their able assistance.

27. The facts are not much in dispute and the only issue is about the treatment meted out to the operational creditors in the resolution plan which has been approved by the Adjudicating Authority. As per the chart (Supra), as against the admitted claim of the secured financial creditors of Rs. 120,129,831,567/- the amount provided in the resolution plan is Rs. 2500 Cr. which is only to the extent of 20.098 %, therefore, the claim of the unsecured creditors or operational creditors has rightly been provided as Nil because the amount which has been offered in the resolution plan is to be first appropriated towards the CIRP costs and dues owed to the secured financial creditors and then nothing would come to the kitty of the operational creditors, therefore, even the unsecured creditors have also been given as NIL.

28. As regards admitting the claim of the Appellant as contingent against Rs. 1 is concerned, this is not in dispute that the claim is based upon an order of the statutory authority against which an appeal is pending and it is not crystallised as such so far, thus in view of the decision of the Hon'ble Supreme Court in the case of Essar Steel India Ltd. Committee of Creditors Vs. Satish Kumar Gupta & Ors. (2020) 8 SCC 531 in which it has been held that "we therefore hold that this part of the impugned order judgment deserves to be set aside on the ground that the resolution professional was correct in only admitting the claim at a notional value of Rs. 1 due to the pendency of disputes with regard to these claims."

29. Thus, in view of the aforesaid discussion, we do not find any merit in the present appeal and the same is hereby dismissed though without any order as to costs.

**[Justice Rakesh Kumar Jain]
Member (Judicial)**

**[Mr. Naresh Salecha]
Member (Technical)**

**[Mr. Indavar Pandey]
Member (Technical)**

New Delhi

07th May, 2024.

Sheetal