

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL**  
**PRINCIPAL BENCH**

**Company Appeal (AT) (Insolvency) No. 613 & 614 of 2023**

**[Arising out of Order dated 13.02.2023 and 09.03.2023 passed by the Adjudicating Authority/National Company Law Tribunal, Principal Bench, New Delhi Bench in C.P. (IB) No. 1527/ (PB)/ 2018]**

**IN THE MATTER OF:**

**Jatinder Pal Builders Private Limited**

Regd. Office At:

RZ-289/345, Plot No. 85-A,

Kh No.- 345, Gali No.-4, Shiv Puri, Sagar

Pur,

New Delhi- 110046.

E-mail : [mschadha@ritcologistics.com](mailto:mschadha@ritcologistics.com)

**...Appellant**

**Versus**

**Mr. Sandeep Goel,**

Resolution Professional for Brys Hotels

Private Limited

Address Registered with IBBI:

410, Pratap Bhawan, 5 Bahadur Shah Zafar

Marg,

New Delhi -110002.

Email: [rp.bryshotels@gmail.com](mailto:rp.bryshotels@gmail.com)

**...Respondent**

**Present:**

**For Appellant : Mr. P. Nagesh Sr. Advocate along with Mr. Akshay Sharma & Ms. Tanya Kumar, Advocates.**

**Mr. Sougat Sinha & Ms. R. Gayathri Manasa, Advocates for Bank of Baroda.**

**For Respondent : Mr. Arun Kathpalia, Sr, Advocate along with Mr. Ankur Mittal (RP), Ms. Yashika Sharma, Ms. Sabhya Jain & Ms. Deeksha, Advocates. Mr. Sandeep Goel, Erstwhile RP.**

## J U D G M E N T

(31.05.2023)

### NARESH SALECHA, MEMBER (TECHNICAL)

1. The present appeals have been filed under Section 61 of the Insolvency & Bankruptcy Code, 2016 (in short '**Code**') against the 'impugned orders' dated 13.02.2023 & 09.03.2023 in C.P.(IB) No. 1527/ (PB)/ 2018 passed by the 'Adjudicating Authority' (National Company Law Tribunal, New Delhi Bench- V), whereby the 'Adjudicating Authority', in first 'impugned order' dated 13.02.2023 passed in IA 878/2023 'Plan Objection Application' raising objection to the 'Resolution Plan' approved by the 'Committee of Creditor' (in short '**CoC**') was dismissed and the Second 'impugned order' dated 09.03.2023 passed in IA 5027 of 2022 (Plan Approval Application) was approved by the 'Adjudicating Authority'.
2. Aggrieved by the same, the 'Appellant' has preferred the present appeals.
3. Heard the Counsel for Parties, perused the records and including cited judgments.
4. Learned Counsel for the Appellant stated that the Plan was approved by the CoC in contravention to the provisions of the law, as the 'Swiss Challenge Method' was not conducted in accordance with stipulated guidelines of RBI to the extent that second highest bidder (H2) i.e., M/s Serveall Land Developers Pvt. Ltd. in 'Swiss Challenge Method' was selected as Successful Resolution Applicant (in short '**SRA**'). Learned Counsel for the Appellant alleged that the 'Respondent/ Resolution Professional' in connivance with the sole secured 'Financial Creditor' i.e. Bank of Baroda

manipulated Swiss Challenge Method in selecting H2 Bidder as SRA, by which 90% marks on 'qualitative parameters', were allotted in rigged Evaluation Matrix and gave only 10% marks allocation to qualitative parameters. Learned Counsel for the Appellant alleged that these rigged parameters were used to fraudulently declare H2 bidder as H1 bidder.

5. Learned Counsel for the Appellant submitted that the Corporate Insolvency Resolution Process (in short '**CIRP**') in respect of the 'Corporate Debtor' commenced on 18.03.2019 and the 'Respondent' was appointed as 'Interim Resolution Professional (in short '**IRP**') and later confirmed as 'Resolution Professional', who made public announcement on 20.03.2019 and thereafter the 'Appellant' filed its claim for Rs. 1.90 Crores on 29.03.2019. Learned Counsel for the Appellant further submitted that the 'Resolution Professional' did not take any action on Appellant's claim i.e., neither accepted nor rejected the claims of the 'Appellant', compelling the 'Appellant' to prefer I.A 1439 of 2022 before the 'Adjudicating Authority' who vide order dated 30.11.2022 directed the 'Resolution Professional' to admit the claims of the 'Appellant' as 'Unsecured Financial Creditor' and subsequently after his claim was admitted, the 'Resolution Plan' approved by the CoC was shared with the 'Appellant'. Learned Counsel for the Appellant brought out that the 'Resolution Plan' of three 'Resolution Applicant's' which were examined by the CoC comprising of three Financial Creditors with Bank of Baroda being sole secured Financial Creditor having voting rights of 85% in the CoC and other two Unsecured Financial Creditors with remaining voting rights. Learned Counsel for the Appellant

submitted that the CoC approved 'Swiss Challenge Method' to get the best value out of the 'Resolution Plan' and finally the proposal of M/s Serveall Land Developers Pvt. Ltd. (alleged second highest bidder) was approved.

**6.** Learned Counsel for the Appellant brought out that the 'Appellant' had to file I.A. No. 878 of 2023 (Plan Objection Application) seeking rejection of 'Resolution Plan' of the SRA i.e., M/s Serveall Land Developers Pvt. Ltd. as well as proposing to consider enhanced values out of 'Resolution Plan' for all stakeholders including two Unsecured Financial Creditors, however the said I.A was rejected by the 'Adjudicating Authority' vide 'impugned order' dated 13.02.2020.

**7.** Learned Counsel for the Appellant stated that the Plan submitted by the SRA was vague and did not provide any specific source of funding making it uncertain and unviable plan.

**8.** Learned Counsel for the Appellant submitted that the Resolution Plan which was approved and recommended by the CoC to the 'Adjudicating Authority' was later modified by the Resolution Professional without seeking the fresh approval of the CoC and obtained approval from the 'Adjudicating Authority' directly in violation of the law. Learned Counsel for the Appellant stated that initially M/s Damont Developers Pvt. Ltd. was admitted as Unsecured Financial Creditor along with Sikka Hotels and Resorts Pvt. Ltd. who had voting percentage in CoC of 10.46% and 4.54% respectively along with sole secured Financial Creditor i.e. Bank of Baroda having 85% of voting share in the CoC. However, later M/s Damont Developers Pvt. Ltd. was removed from the CoC and the 'Appellant' was included in the CoC with

reduced voting percentage. Learned Counsel for the Appellant stated that in earlier composition of CoC, the combined voting percentage of two Unsecured Creditor was 15% and voting percentage of Sole Financial Creditor was 85% which was reduced in the revised composition of CoC i.e., combined voting percentage of 7.29% for unsecured Financial Creditors and 92.71% to sole 'Secured Financial Creditor'.

**9.** Learned Counsel for the Appellant pointed out that in terms of Judgment of Hon'ble Supreme Court of India in **(2023) SCC OnLine SCC 574 in Civil Appeal No. 1682 - 1683 of 2022** in the matter of **MK Rajagopalan vs. Dr. Periasamy Palani Gounder & Anr.**, it was held that non compliance of procedural requirement has significant bearing and cannot be ignored as mere technicalities while considering the revised 'Resolution Plan'. It was further held that the commercial wisdom of the CoC was with reference to commercial interest and revival of the 'Corporate Debtor' as well as maximisation of value of assets and commercial wisdom of CoC could be considered only when all relevant information were available before the CoC for due deliberations. Learned Counsel for the Appellant stated that in the present case such parameters were not followed, thereby vitiating the entire process of approval of 'Resolution Plan' which need to be set aside.

**10.** Learned Counsel for the Appellant summarised his averments with request to set aside the said two 'impugned orders' along with rejection of 'Resolution Plan' as approved by the 'Adjudicating Authority' and permit the

‘Appellant’ to submit or cause to submit new ‘Resolution Plan’ in respect of ‘Corporate Debtor’.

**11.** Per-contra, the Learned Counsel for the Respondent / Erstwhile Resolution Professional refuted all the averments of the ‘Appellant’. Learned Counsel for the Respondent gave the overall background of the case and stated that pursuant to public announcement of CIRP on 20.03.2019, the ‘Appellant’ filed Form ‘C’ on 29.03.2019 for an amount of Rs. 1.90 Crores as financial debt and the ‘Respondent’ wrote several emails to the ‘Appellant’ to provide required information to substantiate his claims, however the ‘Appellant’ did not provide any reply or information which could help the ‘Respondent’ to verify the claims of the ‘Appellant’. Learned Counsel for the Respondent stated that in the 39<sup>th</sup> Meeting of the Committee of Creditors, it was decided to publish fresh Form ‘G’ and thereafter four ‘Resolution Plans’ were received and it was decided by the CoC to follow Swiss Challenge Method to get better value from the three eligible ‘Resolution Applicants’ (4<sup>th</sup> Resolution Applicant was not considered in absence of his EMD). Learned Counsel for the Respondent stated that it was decided to allocate 90% weightage based on quantitative score i.e., consideration for Creditors (cash upfront + NAV of the deferred payments) and remaining 10% on qualitative scores. Learned Counsel for the Respondent stated that based on these pre-determined parameters in the Evaluation Matrix, M/s Serveall Land Developers Pvt. Ltd. was declared as highest bidder (H-1) which was duly approved by the CoC in the 47<sup>th</sup> CoC Meeting held on 03.10.2022 with 85%

voting and other remaining 15% voting the then Unsecured Financial Creditors members preferred to remain absent on all voting agenda.

**12.** Learned Counsel for the Respondent stated that on 11.10.2022 Plan Approval Application i.e., I.A. No. 5027/2022 was filed before the 'Adjudicating Authority' and, in the meantime, the 'Appellant' also filed I.A. No. 1439/2020 for seeking admission of the Appellant's claim which was finally decided vide order dated 30.11.2022 by the 'Adjudicating Authority' directing the 'Respondent' to admit the claims of the 'Appellant' as an Unsecured Financial Creditor. Learned Counsel for the Respondent further stated that in the same order, the 'Adjudicating Authority' also disposed another I.A. No. 5643/ 2020 filed by Damont Developers Pvt. Ltd. and as a consequence Damont Developers Pvt. Ltd. was removed from the list of Creditors and his claim was excluded. Learned Counsel for the Respondent submitted that in terms of these orders of the 'Adjudicating Authority', the CoC was reconstituted excluding Damont Developers Pvt. Ltd. and including the 'Appellant' as 'Unsecured Financial Creditor'.

**13.** Learned Counsel for the Respondent emphasised that the ratio of distribution of resolution amount between Secured and Unsecured Financial Creditors as provided in the 'Resolution Plan' dated 22.08.2022 has been maintained after 'Swiss Challenge Method' and also after the reconstitution of CoC. Learned Counsel for the Respondent also stated that distribution amongst the Unsecured Financial Creditors under the Plan dated 22.08.2022 and after the Swiss Challenge Method dated 09.09.2022 was pro-rata. Learned Counsel for the Respondent stated that after the

reconstitution of CoC, the distribution amongst the Unsecured Financial Creditor remained pro-rata and there was no revision in terms of Approved Resolution Plan.

**14.** Learned Counsel for the Respondent opposed the prayers of the 'Appellant' to submit or cause to submit fresh 'Resolution Plan' at this belated stage which is not maintainable as the 'Appellant' never submitted any Expression of Interest (in short '**EOI**') or did not participate in the 'Resolution Process'.

**15.** Learned Counsel for the Respondent stated that the Resolution Plan of the SRA i.e., M/s Serveall Land Developers Pvt. Ltd. has already been approved by the 'Adjudicating Authority' on 09.03.2023 and control of hotels of the 'Corporate Debtor' has already been handed over to the 'SRA'.

**16.** Learned Counsel for the Respondent stated that stated that judgment of the Apex Court in **MK Rajagopalan** (Supra) is not relevant here, since there is no revision in the 'Resolution Plan' and only changed is the distribution of the resolution amount in the inter-se between the two Unsecured Creditors as per the revised list of the 'Creditors'. Learned Counsel for the Respondent stated that in fact, the 'Appellant' is the beneficiary of the exit made by the Damont Developers Pvt. Ltd.

**17.** Learned Counsel for the Respondent pointed out that it is a settled law that the commercial wisdom of the CoC cannot be challenged by anyone and no judicial scrutiny is therefore warranted. Learned Counsel for the Respondent also submitted that in terms of Regulation 12(3) of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate

Persons) Regulations, 2016 the validity of decision taken by the CoC prior to such inclusion cannot be affected.

**18.** Learned Counsel for the Respondent, summarising his arguments, urged to dismiss these 'Appeals'.

**19.** Learned Counsel for the Successful Resolution Applicant, supported by and large, the averments of the Learned Counsel for the Respondent.

**20.** Learned Counsel for the Successful Resolution Applicant stated that after the Swiss challenge process, all resolution applicants were also permitted to tender final offers and the SRA's Plan provided an amount of Rs. 61,21,03,175/- for the sole secured creditor and an amount of Rs. 48,96,825/- for the two unsecured creditors (namely Damont Developers P. Ltd & Sikka Hotels & Resorts P. Ltd). Learned Counsel for the Successful Resolution Applicant stated that in terms of Section 30(4) of the Code, the distribution of plan proceeds is for the CoC to decide and accordingly, the distribution of the proceeds of the Final Plan was decided by the CoC in the 46<sup>th</sup> COC Meeting conducted on 26.09.2022. Concluding his arguments, the Learned Counsel for the Successful Resolution Applicant submitted that Resolution Plan is already under implementation.

**21.** It has been the case of the 'Appellant' that the Adjudicating Authority erred in dismissing both his IA's i.e., I.A. No. 878 of 2023 objecting to the Resolution Plan approved by the CoC and I.A. No. 5027 of 2022 challenging the approval of the Resolution Plan. The 'Appellant' has made several averments labelling allegations against the 'Respondent' for violation of various procedures and laws including Marks Allocation in the Evaluation

Matrix, incorrectly invocation of Swiss Challenge Method, wrongly declaring M/s Serveall Land Developers Pvt. Ltd. as ‘Successful Resolution Applicant’ despite being second highest bidder, allocating large distribution to ‘Secured Financial Creditor’ in contrast to meagre distribution to ‘Unsecured Financial Creditors’, changing distribution between the two Unsecured Financial Creditors without following due process and in violation to the Apex Court judgment in **MK Rajagopalan** (Supra) etc.,.

**22.** This ‘Appellate Tribunal’ finds that the majority of the averments made by the ‘Appellant’ regarding distribution of the claims amongst the Unsecured Financial Creditors, allocating the marks in the Evaluation Matrix before the ‘Swiss Challenge Method’, approval of the ‘Resolution Plan’ etc., normally falls in the domain of the ‘Committee of Creditors’. It is a settled position in the law that the commercial wisdom of the CoC is paramount and the same has been upheld in the catena of the judgment by the Hon’ble Supreme Court of India as well as this ‘Appellate Tribunal’ including the judgment given by the Hon’ble Supreme Court of India in the matter of **K. Sashidhar vs. Indian Overseas Bank, [(2019) 12 SCC 150]**. The relevant Para-52 of the judgment which read as under, makes the legal position very clear which does not support the averments of the ‘Appellant’

*“52. \*\*\*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 through 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-justiciable.***”

**23.** We have perused the relevant records including the relevant minutes of the CoC Meetings which considered the ‘Resolution Plan’ and the ‘impugned orders’ under challenge. Prima-facie detailed reasoning have been recorded in the minutes of the CoC regarding distribution of the amount amongst the ‘Creditors’ and the same has been adjudicated suitably by the ‘Adjudicating Authority’ in accordance with law.

**24.** The main point as emerged from the above discussion requiring the decision of this ‘Appellate Tribunal’ is to determine, whether the approval of ‘Resolution Plan’ and distribution of funds amongst the ‘Creditors’ was legal and correct in accordance with law or otherwise. The ‘Appellant’ has taken shelter of the judgment of **MK Rajagopalan** (Supra), where it has been held that the irregularity of not placing of **the Revised Plan** before the CoC and directing placing before the ‘Adjudicating Authority’ cannot be ignored as mere technicalities and every aspect relating to the ‘Resolution Plan’ particularly its financial layout, has to be considered by the CoC before could be considered by the ‘Adjudicating Authority’.

**25.** This ‘Appellate Tribunal’ notes that the total amount as provided by M/s Serveall Land Developers Pvt. Ltd. (SRA) was Rs. 50.40 Crores in his

original 'Resolution Plan' dated 22.08.2022 and after the Swiss Challenge Method dated 09.09.2022, the 'Resolution Plan' amount was substantially enhanced to Rs. 61.70 Crores (approx.) which was recommended by the CoC and finally approved by the 'Adjudicating Authority' vide 'impugned order' dated 09.03.2023.

**26.** We have also observed that after Swiss Challenge Method, it was proposed to distribute Rs. 61,21,03,175/- to Sole Secured Financial Creditor and Rs. 48,96,826/- to two Unsecured Financial Creditors. Initially, there were two Unsecured Financial Creditors, namely, Damont Developers Pvt. Ltd. whose claim of Rs. 9,25,00,000/- was admitted and it was proposed to distribute Rs. 34,15,316/- to him and the other Unsecured Financial Creditors, namely, M/s Sikka Hotels & Resorts Pvt. Ltd., whose claim of Rs. 4,01,25,000/- was admitted and Rs. 14,81,509/- was proposed to be distributed to him. The distribution between the Secured Financial Creditors and Unsecured Financial Creditors is in the same ratio as provided in the original Plan dated 22.08.2022 to Secured Financial Creditor (Bank of Baroda) and to Unsecured Financial Creditors.

**27.** This Appellate Tribunal notes that the subsequent to order of the Adjudicating Authority in IA No. 5643/2020, the claim of Unsecured Financial Creditors M/s Damont Developers Pvt. Ltd. of Rs. 9,25,00,000/- was excluded and claims of the Appellant of Rs. 1,90,00,000/- was allowed to be admitted in I.A. No. 1439/20. As such there was only change in the pro-rata amount between the two 'Unsecured Financial Creditors' which did not make any impact or changes in the overall plan size or distribution

amongst the 'Secured Financial Creditor' vis-à-vis other 'Unsecured Financial Creditors'. In fact, this 'Appellate Tribunal' notes that due to exclusion of M/s Damont Developers Pvt. Ltd., both Unsecured Financial Creditors gained in absolute terms for getting more distribution which is evident from the fact that the M/s Sikka Hotels & Resorts Pvt. Ltd. who were initially getting Rs. 14,81,509/- were finally allocated Rs. 33,23,216/-. We also observe that the sole Financial Creditor continue to get the exact same amount i.e. Rs. 61,21,03,175/- in both the scenarios and total earlier proposed and subsequently distributed to Unsecured Financial Creditors also remained the same as Rs. 48,96,826/-.

**28.** As regard, the judgment cited by the Appellant' i.e. ***MK Rajagopalan*** (Supra), this Appellate Tribunal has carefully gone through the judgment and find that this is not applicable in the present appeals, being based on different facts. The main issue before the Hon'ble Supreme Court of India in ***MK Rajagopalan*** (Supra), was regarding non submission of the revised plan to the CoC for consideration and directly taking to the 'Adjudicating Authority' without benefit of commercial wisdom of the CoC. In contrast, herein there is no change in the Resolution Plan or change in overall amount or change in amount of inter-se distribution between two classes of Creditors i.e. Secured Financial Creditors vis-à-vis Unsecured Financial Creditors. We also observe that it is only due to judicial orders of the 'Adjudicating Authority' which resulted into exclusion of M/s Damont Developers Pvt. Ltd. and inclusion of the Appellant in the list of Unsecured Financial Creditors and this obviously required some arithmetical changes

in distribution between these two Unsecured Financial Creditors keeping the overall kitty as available to Unsecured Financial Creditors intact. We do not find any irregularity or illegality in the same.

**29.** We takes note of the Regulation 12(3) of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 prescribes that decisions taken by the CoC are not invalidated by a subsequent change in the composition of the COC. Therefore, even though the Appellant was not in the COC when the Final Plan was approved, the approval of the Final Plan by the COC is not vitiated by the subsequent inclusion of the Appellant. Regulation 12(3) of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 is reproduced as hereunder :-

***“12. Submission of proof of claims.***

\*\*\*

*(3) Where the creditor in sub-regulation (2) is [a financial creditor under regulation 8], it shall be included in the committee from the date of admission of such claim: Provided that such inclusion shall not affect the validity of any decision taken by the committee prior to such inclusion.”*

**30.** It has been brought to our notice that the ‘Resolution Plan’ is already under implementation and the hotels of the Corporate Debtor have already been handed over to the SRA and SRA has already paid Rs. 17,25,00,000/- to various Creditors, along with payment of the CIRP expenses of Rs. 4,68,00,000/-. We further take into consideration from the averments

of the Learned Counsel for the Successful Resolution Applicant that Unsecured Creditors such as the Appellant herein have been paid an amount of Rs. 49,96,000/- (the Appellant has however, refused to accept payment of his share) as communicated by them to the RP vide email dated 17.04.2023.

**31.** After careful consideration of all the facts, averments made, by all parties cited judgments, we do not find any error in both the challenged 'impugned orders. The 'Appeals' being devoid of any merit are dismissed. No costs. Interlocutory Applications, if any, are closed.

**[Justice Ashok Bhushan]  
Chairperson**

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

Simran/nn