NATIONAL COMPANY LAW APPELLATE TRIBUNAL

PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 26 of 2023

[Arising out of order dated 20.12.2022 passed by the Adjudicating Authority, National Company Law Tribunal, Ahmedabad Bench (Court-II) in I.A. No. 358 of 2020 in CP (IB) 602 of 2018]

IN THE MATTER OF:

1. Hemant Shantilal Shah
401, Amrutam,
6 Gujarat Brahmkshtriya Society,
B/h Suvidha Shopping Centre, Paldi,
Ahmedabad 380007.

2. Heena Hemant Shah
401, Amrutam,
6 Gujarat Brahmkshtriya Society,
B/h Suvidha Shopping Centre, Paldi,
Ahmedabad 380007.

...Appellants

Versus

1. Care Office Equipment Ltd.
GF 8, Zodiac Square, Besides Vishal Mega Mart,
Opp. Gurudwara, SG Highway,
Ahmedabad 380054.

2. Vikash Gautamchand Jain
204, Wall Street-1, Opp. Orient Club,
Nr. Gujarat College, Ellisbridge,
Ahmedabad-380006.

3. Kamlesh Dhirajlal Shah
502, Kala Siddhi Apartment,
Jodhpur Gam Road, Ahmedabad 380015.

4. Firoz Pirbhal Sama
402, Mayrose Tower,
B/s Ellisbridge Post Office,
Ahmedabad 380006.

5. Sudeep Sampatmal Dasani
288, New Cloth Market,
Raipur, Ahmedabad 380002.

6. Bank of India,
Ahmedabad Large Corporate Branch,
2nd Floor, bank of India Building Bhadra,
Ahmedabad 380001.

7. State Bank of India
Stressed Assets Management Branch,
2nd Floor "Paramsiddhi Complex" Opp.
V S Hospital Ellisbridge, Ahmedabad 380006.

8. Canara Bank
Assets Recovery Management Branch
4th Floor, Neelkanth Avenue Bldg. No. 1
C.U. College Street Income Tax Cross,
Ahmedabad 380014.

9. American Express,
One Indiabulls Centre, Tower 2, B-Wing,
8th Floor Jupiter Mills Compound S.B. Marg,
Eliphinstone Road Mumbai 400013.

...Respondents

Present:

Appellant: **Ms. Purti Gupta, Ms. Henna George and Ms. Ashmeet Arora, Advocates.**

For Respondents: **Ms. Honey Satpal, Mr. Nipun Singhvi, Mr. Vishal J. Dave, Advocates for R-1.**
Mr. Krishnendu Datta, Sr. Advocate with Mr. Palash S. Singhvi and Mr. Rajat Sinha, Advocates. Mr. Ashish Rana, Advocate for R-6 to R-8.

J U D G M E N T

[Per: Barun Mitra, Member (Technical)]

The present appeal filed under Section 61 of Insolvency and Bankruptcy Code 2016 ('**IBC**' in short) by the Appellants arises out of the Order dated 20.12.2022 (hereinafter referred to as 'Impugned Order') passed by the Adjudicating Authority (National Company Law Tribunal, Ahmedabad Bench, Court-II) in I.A. No. 358 of 2020 in CP (IB) 602 of 2018. By the impugned order, the Adjudicating Authority allowed the I.A. No. 358 of 2020 filed by the Resolution Professional - Respondent No. 2 approving the resolution plan of Respondent No. 5/Sudeep Dasani-Successful Resolution Applicant in respect of the Corporate Debtor-M/s Care Office Equipment Ltd. Aggrieved by this impugned order, the present appeal has been preferred by the Appellants.

2. The brief facts of the case which are relevant to be noticed for deciding this case are as follows:-

- The Corporate Debtor- M/s Care Office Equipment Ltd was admitted into Corporate Insolvency Resolution Process ('**CIRP**' in short) on 29.05.2019 following a Section 9 application filed by an operational creditor.
- The Resolution Professional ('**RP**' in short) constituted the Committee of Creditors ('**CoC**' in short). Form G was published and EOI invited on 14.08.2019.
- The CoC was reconstituted on 21.11.2019 comprising of four members namely, SBI (26.37%), Bank of India (56.82%), Canara Bank (16.50%) and American Express (0.31%).

- The 4th CoC meeting held on 23.10.2019 approved extension of CIRP for further 90 days which was approved by the Adjudicating Authority on 03.12.2019 vide IA No. 745 of 2019.
- The 5th CoC meeting held on 09.12.2019 approved fresh publication of Form G. EOI was invited on 12.12.2019.
- The 6th CoC meeting held on 03.02.2020 considered the valuation reports received from two valuers wherein the average Fair Value was Rs.13.06 cr and the Liquidation Value was Rs.9.96 cr. In this meeting, the CoC also negotiated with four Prospective Resolution Applicants ('**PRAs**' in short) for submission of modified resolution plans.
- The 7th CoC held detailed discussion on the revised resolution plans received from the PRAs but could not conclude the decision on acceptance of the resolution plan. Since, no suitable revised plan was received, the 7th CoC authorised the RP to move an application before the Adjudicating Authority for exclusion of time. The Adjudicating Authority on 28.02.2020 allowed the IA No. 173 of 2020 filed by the RP for exclusion of time.
- The 8th CoC meeting was held on 26.02.2020 in which RP informed the CoC that modified resolution plan was received from two PRAs based on negotiated terms and conditions in the 7th CoC meeting. The modified resolution plans were circulated to all CoC members which was thereafter duly considered and deliberated.
- The 8th CoC meeting approved the resolution plan of Sudeep Dasani with 99.69% voting share and the RP issued letter of intent to the Successful Resolution Applicant ('SRA' in short) on 11.05.2020.

- The RP filed IA No. 358 of 2020 before the Adjudicating Authority in June 2020 for approval of the Resolution Plan submitted by the SRA.
- Opposing the Resolution Plan of the SRA, the Appellant being personal guarantor for the debts owed by the Corporate Debtor filed IA No. 434 of 2020 before the Adjudicating Authority challenging the approval of the Resolution Plan.
- The Adjudicating Authority on 30.03.2022 disposed of the IA 434 of 2020 directing the RP to provide valuation reports to the suspended management of the Corporate Debtor subject to non-disclosure agreement.
- The Adjudicating Authority allowed IA No. 358 of 2020 on 20.12.2022 and approved the Resolution Plan of the SRA.
- Assailing the Impugned Order, the Appellant approached the Hon'ble Gujarat High Court seeking stay of the operation and implementation of the Impugned Order and for remanding IA No.358 of 2020 for consideration afresh. The Hon'ble Gujarat High Court disposed of the CA No. 26669 of 2022 by allowing the Appellant to approach this Tribunal to seek their remedies.
- The Appellant has preferred the present appeal against the Impugned Order passed by the Adjudicating Authority dated 20.12.2022.

3. Ms. Purti Gupta and Ms. Henna George the Learned Counsels appearing for the Appellants submitted that the Appellants had raised serious objections to the resolution plan of the SRA but their objections were completely overlooked by the Adjudicating Authority while approving the resolution plan without recording proper reasoning in the impugned order. This resulted in violation of the principles

of natural justice. In support of their contentions, reliance has been placed on the judgment of the Hon'ble Apex Court in ***Kranti Associates Pvt Ltd Vs Masood Ahmed Khan (2010) 9 SCC 496*** in which it has been held that reasons must be recorded by a court of law in support of its conclusion to serve the wider principle of natural justice and for reasons of transparency.

4. Submission was also pressed by the Learned Counsel for the Appellants that the RP had acted in collusion with the SRA and committed irregularities in the CIRP proceedings. Pointing out that the SRA had initially submitted the EOI in his individual capacity, but later slipped in the names of two other resolution applicants, namely, the Tulsiani brothers and this was allowed by the RP after the last date of submission of EOI had expired. The SRA not only acted as an agent of the Tulsiani brothers and shared with them confidential information of the Corporate Debtor but also associated an SPV, namely, Coral Minechem Pvt Ltd to implement the resolution plan which entity was also not mentioned before the expiry of the last date of the EOI.

5. It was also pointed out that the SRA is a Chartered Accountant who has no experience in the field of Information Technology and lacked the capability to run the Corporate Debtor. Even the Tulsiani brothers are devoid of experience in this sector and the SPV was also in the business of quarrying and not in the IT sector. Further, the SRA having decided to terminate all existing employees, it becomes clear that the intention of the SRA was not to keep the Corporate Debtor running as a going concern. The game plan of the SRA is to sell the showroom spaces of the Corporate Debtor to third party buyers which is the main asset of the Corporate Debtor and not to revive the Corporate Debtor.

6. The Learned Counsel for the Appellants further assailed the impugned order on the ground that the resolution plan did not take into consideration the interest of the personal guarantors in spite of they being critical stakeholders in the CIRP process. It was contended that when the plan contemplated transfer of the loan in the books of the Financial Creditors to the books of the SPV and thus debts were to be transferred in full, it was inconceivable that the banks could still prosecute the guarantors. The plan was also assailed on the ground that it has also taken away the rights of the Appellants in effecting their recoveries from the Corporate Debtor. It was vehemently contended that the right of subrogation available to the personal guarantors cannot be taken away by the resolution plan.

7. Pointing out infirmities in the CIRP proceedings, it was contended that the Appellants were not allowed to effectively participate in the CoC meetings by the RP though in their capacity as personal guarantors they had a critical stake in the resolution process of the Corporate Debtor. It was also pointed out that the RP had deliberately not provided them with copies of the valuation reports though they were entitled to receive the same. It was pressed strongly that the resolution plan has been approved at a highly undervalued and throw-away price due to anomalous valuation reports and yet the RP chose to ignore the same and did not seek the opinion of the third valuer though the circumstances so warranted.

8. The resolution plan as approved by the Adjudicating Authority is contrary to the provision of law and contrary to the scheme of Section 30(2)(e) of the IBC and hence the resolution plan is liable to be recalled in the interest of justice.

9. Rebutting the arguments made by the Appellants, Shri Krishnendu Datta, Learned Senior Counsel appeared for the SRA, Ms. Honey Satpal, Learned Counsel

appeared for the RP and Shri Ashish Rana appeared for Respondents No. 6-8. Since their arguments and contentions overlapped, for reasons of convenience the same have been captured conjointly. It was contended that the impugned order at para 13 has recorded in details the submissions made by the Appellants and therefore the Adjudicating Authority was clearly cognisant of the issues raised by them while passing the impugned order. Thus, to say that the impugned order was not a reasoned order lacks merit.

10. It was strenuously contended by the Learned senior Counsel of the SRA that the RP had conducted the valuation exercise of the Corporate Debtor in terms of Regulations 27 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 which provides for appointment of two registered valuers to determine the fair value and liquidation value of the corporate debtor and only when the two estimates of value are found to be significantly different or on a specific proposal of the CoC that the RP may appoint a third registered valuer. This matter was considered in details by the CoC before deciding not to appoint any third valuer. The allegations of the Appellants of anomaly in the valuation reports lack foundational basis as nothing has been placed on record to substantiate the allegations. It was also stated that if the RP did not provide copy of valuation report to the suspended board of the corporate debtor initially, it was because valuation reports constituted confidential documents which are to be presented only to CoC members and the Adjudicating Authority and the Appellants were therefore not entitled to it. However, they were subsequently provided with the valuation reports, subject to confidentiality undertaking, on the directions of the Adjudicating

Authority in its order dated 30.03.2022 in IA No. 434 of 2020 and hence there was no irregularity on the part of the RP.

11. It was further emphatically asserted that the contention of the Appellants regarding extinguishment of personal guarantees was misconceived and misplaced. It was pointed out that if any resolution plan provides for right of recovery from old guarantors with respect to personal guarantee or any asset mortgaged with financial creditors, the same is to continue with the financial creditors. The right of the financial creditor to enforce guarantees including personal guarantees issued on behalf of the corporate debtor continues to be retained by the financial creditors and becomes enforceable by them. Clearly therefore, the guarantor is not discharged of its liability towards the creditor on discharge of principal debtor's liability under IBC.

12. Rebutting the imaginary assumption of the Appellants that the SRA did not intend to keep the Corporate Debtor as a going concern, it was submitted that Clause 7 of the resolution plan clearly stipulated the future business plan by the new management. It was also pointed out that SRA has successfully implemented the resolution plan and the objections of the Appellant on the capability of SRA to implement the plan does not hold good. It has also been pointed out that when Sudeep Dasani submitted the resolution plan on 20.01.2020 it was clearly mentioned that the plan was being submitted by Sudeep Dasani acting in joint concern. The CoC in the 6th meeting had asked Sudeep Dasani to submit the details of his associates which was complied with by him while submitting the revised resolution plan dated 19.02.2020. The RP during the CIRP also conducted

requisite verification and necessary compliance under Section 29A of the IBC of all the persons acting in the joint concern.

13. It was emphatically asserted that the Adjudicating Authority had examined the contents of the resolution plan of the SRA which had been approved by the CoC on 26.02.2020 with 99.69% vote share. It was asserted that the Appellants had failed to show how the resolution plan was in contravention of Section 30(2) of IBC. The plan being neither in contravention of the provisions of any law for the time being in force nor any material irregularity having been committed by the RP in the CIRP process and given that the Adjudicating Authority cannot interfere on merits with the commercial wisdom of the CoC as it has limited scope of judicial review available to it, and thus, there was no error committed on the part of the Adjudicating Authority in approving the resolution plan of the SRA. It was contended that the Adjudicating Authority had come to the correct conclusion that the resolution plan was within the contours of Section 30(2) of the IBC.

14. We have heard the Learned Counsel of all the parties including the various judgments of the Hon'ble Supreme Court and this Tribunal and perused the records carefully.

15. The first issue which merits our consideration is the propriety of the valuation exercise conducted by the RP. It was contended by the Appellants that the RP did not provide copy of valuation report to the suspended board of the corporate debtor though they were entitled to it. In support of their contention, they have relied on the judgement of the Hon'ble Supreme Court in ***Vijay Kumar Jain Vs Standard Chartered Bank and Ors (2019) 20 SCC 455*** wherein it has been held that a combined reading of the IBC as well as the Regulations leads to the

conclusion that members of the erstwhile Board of Directors, who are often guarantors, are vitally interested in resolution plans as they affect them and therefore must have access to such documents accompanying the resolution plan.

16. It is further the case of the Appellants that the resolution plan has been approved at a highly undervalued price of about Rs.10 cr as against the value of the Corporate Debtor approximated to be about Rs.78 cr and that such under-valuation goes against the objective of the IBC to further maximisation of the value of assets. It was also pointed out that in spite of there being significant variations in the valuation reports submitted by the two valuers, the RP did not exercise the option for obtaining a report from the third valuer. It is also their contention that one of the valuer's reports was dated 10.02.2020 while the CoC meeting which considered these reports met on 03.02.2020. Thus, the CoC did not have the full picture of the valuation reports at the time of considering these reports. The present is also a case of gross under-valuation since it did not consider the receivables and claims lodged against Dell which was itself valued at Rs.40.69 cr. The valuers have not given any reasons for treating the receivables from Dell at Rs. Nil and Rs.57.55 lakhs and not provided any reasons either as to why the recovery from Dell was not considered at all. Apprehension was expressed that recovery from Dell has been withheld with a view to make recovery in the future for the benefit of the SRA.

17. It is the counter contention of the Respondents that the RP had conducted the valuation exercise of the Corporate Debtor in terms of Regulations 27 and 35 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (hereinafter referred to as '**CIRP Regulations**') and hence the allegations of anomaly in the valuation reports as raised by the Appellant lack credulity. Further

it is the CoC which had considered in details the valuation reports before deciding not to appoint the third valuer and hence the RP could not have interfered in this business decision of the CoC. It was also submitted that the contention of the Appellant that the CoC met on 03.02.2020 and hence could not have considered one of the valuer's reports which was received on 10.02.2020 is wrong. It was pointed out that in their affidavit before the Adjudicating Authority, the RP has clearly stated that the RP conducted 7th CoC meeting on 13.02.2020 and placed all reports before CoC by which time the report of valuation of Security & Financial Assets from Ms. Dipali Raval stood received on 10.02.2020 and CoC members thus discussed all the valuation reports.

18. Before we dwell into this issue, we may have a look at the relevant IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 Regulations which are as follows:

> ***"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.*
>
> ***35. Fair value and liquidation value. –*** *(1) Fair value and liquidation value shall be determined in the following manner:*
>
> *(a) the two registered valuers appointed under regulation 27 shall submit to the resolution professional an estimate of the fair value and of the liquidation value computed in accordance with internationally accepted valuation standards, after physical verification of the inventory and fixed assets of the corporate debtor;*
>
> *(b) if the two estimates of a value in an asset class are significantly different, or on receipt of a proposal to appoint a third registered valuer from the committee of creditors, the resolution professional may appoint a third registered valuer for an asset class for submitting an estimate of the value computed in the manner provided in clause (a).*

(2) After the receipt of resolution plans in accordance with the Code and these regulations, the resolution professional shall provide the fair value, the liquidation value and valuation reports to every member of the committee in electronic form, on receiving an undertaking from the member to the effect that such member shall maintain confidentiality of the fair value, the liquidation value and valuation reports and shall not use the information contained in the valuation reports to cause an undue gain or undue loss to itself or any other person and comply with the requirements under sub-section (2) of section 29."

19. Given this backdrop of relevant Regulations, we may now look at the Minutes of the CoC meetings where the valuation reports were considered. The 6th CoC meeting and the 7th CoC meeting have recorded the discussion on the valuation reports as follows:

6th CoC Meeting on 03.02.2020

*"**Item 5) Discussion on valuation Report of Stock:** Resolution Professional placed all valuation reports before COC and discussed. It was decided by the COC to re-look the reports where there is a big differences in both set of valuers. Third set of valuers to be appointed to value the assets of the CD, if required."*

7th CoC Meeting on 13.02.2020

"***4) Discussion during meeting:***

- *Resolution Professional placed all valuation reports before COC and discussed."*

(Emphasis supplied)

20. These discussions and deliberations were further clarified and corroborated by submission of an affidavit before the Adjudicating Authority on 01.09.2022 by the CoC on the directions of the Adjudicating Authority on 26.08.2022 which is as reproduced below:

Affidavit on behalf of the CoC Members in compliance of Order dated 26.08.2022 in I.A. No. 358 of 2020

"2. CoC to clarify further submit that on 3rd February 2020, 6th CoC meeting was conducted by RP and informed CoC that only one report of Mr. Chirag Shah for valuation of stock was received whereas stock verification by another valuer i.e. Ms. Dipali Raval (Shree Datt Valuer & Associates) was in process. In the meeting it was further discussed and decided that in case the stock valuation report by Ms Dipali Raval is received and upon perusal if it is revealed that there is significant difference, between the stock valuation report of Ms. Dipali Rawal and in the report of Mr. Chirag Shah, RP may appoint third valuer after discussing the same with CoC Members in accordance with Regulations 35(1)(b) of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations 2016. Relevant extract of minutes of 6th CoC meeting is reproduced herein for reference:

> *'It was decided by the CoC to re-look the reports where there is a big difference in both set of valuers. Third valuers to be appointed to value the asset of the CD if required.'*

Copy of the minutes of 6th CoC meeting is attached and marked as Annexure-2

3. Thereafter on 13.02.2020 RP conducted 7th CoC meeting and placed all reports before CoC as report of valuation of Security & Financial Assets from Ms. Dipali Raval was received on 10.02.2020 and CoC members discussed the valuation reports. After considering all the reports provided by the RP CoC was of the view that as there is no significant difference in valuation of the both the valuers therefore, appointment of 3rd valuer is not required. Copy of the minutes of 7th CoC meeting is attached and marked as Annexure-3."

(Emphasis supplied)

21. It is clear from the above-cited CIRP Regulations that Regulation 27 provides for appointment of two registered valuers to determine the fair value and liquidation value of the corporate debtor in accordance with Regulation 35. Further Regulation 35(1)(b) provides that only when the two estimates of a value in an assets class are significantly different, or on the specific proposal of the CoC, that the RP may appoint a third registered valuer. In the present facts of the case, we notice that the CoC after deliberations decided in the 6th CoC meeting that a third valuer would

require to be appointed only if there was gulf of a difference in the stock valuation figures estimated by the two appointed valuers, while the 7th CoC meeting after noticing the valuation reports of the two valuers decided against the appointment of the third valuer. This position was later confirmed by the CoC in their affidavit dated 01.09.2022 filed before the Adjudicating Authority.

22. It is an admitted position that the valuation report was not initially given to the Appellants by the RP on the ground that as per CIRP Regulation 35(2) such valuation reports constituted confidential documents which is required to be presented only to CoC members and the Adjudicating Authority. However, it is also an undisputed fact that the Appellant was provided with the valuation report on the directions of the Adjudicating Authority in its order dated 30.03.2022 in IA No. 434 of 2020 to provide the same subject to confidentiality undertaking as placed at page 1432-1442 of Appeal Paper Book ('**APB**' in short). This compliance has been noticed by the Adjudicating Authority in its order dated 26.08.2022 as placed at pages 1384-1385 of APB. Having already received the valuation reports, the Appellants cannot now raise the plea that they were unaware of the contents of the valuation reports.

23. We also find cogency in the submission made by the SRA that the valuation of receivables from Dell was not factored in since these debts could not be realised by the erstwhile management nor by the RP and thus being of a contingent nature was not rightly not taken into account. Moreover, it is noticed that the resolution plan has noted the criminal and civil cases filed against Dell as seen at page 210 of the APB.

24. Given this position, we are of the view that the RP did not violate the CIRP Regulations in the conduct of the valuation exercise. The RP had followed Regulation 27 to disclose the estimated fair and liquidation value of the Corporate Debtor. Further, we find that the CoC had duly considered and deliberated upon the valuation reports before deciding not to have any report from a third valuer. That being the considered business decision of the CoC, the supremacy of the commercial wisdom cannot be questioned by the Appellants. In fine, we do not find any infirmity in the conduct of the valuation exercise.

25. The second issue which requires to be addressed is the tenability of the contention of the Appellants that the resolution plan by allowing the lenders of the Corporate Debtor to pursue the personal guarantees given by the Appellant was in violation of law as after the transfer of debts, the liability of the Corporate Debtor would stand extinguished. It was also vehemently contended that the right of subrogation available to the personal guarantors cannot be taken away by the resolution plan and that the Appellants cannot be denied the opportunity to effectuate their recoveries from the Corporate Debtor. It was contended that the resolution plan was contrary to the settled proposition of law as laid down by this Tribunal in the case of ***KV Jayprakash vs SBI in CA (AT)(Ins) No. 362 of 2022*** wherein it is held that the guarantor will continue to have recourse towards the Corporate Debtor as a creditor for the claims invoked under the guarantee.

26. It is however the contention of the SRA that that the resolution plan clearly provided that the Resolution Applicant and PAC shall have no right of recovery from old promoters, directors or old guarantors with respect to personal guarantee or any asset mortgaged with financial creditors and that the same shall continue with

the financial creditors. It was emphasised that this provision in the resolution plan cannot be faulted as it is in consonance with the ratio laid down in the judgement of the Hon'ble Supreme Court in ***Lalit Kumar Jain Vs UOI and Ors. (2021) 9 SCC 321.***

27. When we look at the judgement of this Tribunal in ***KV Jayprakash vs SBI in CA (AT)(Ins) No. 362 of 2022***, we notice that the facts of the case are clearly distinguishable in that it dealt with applicability of moratorium under IBC acting as a bar to proceed against the personal guarantor during liquidation process. More significantly, we find that this judgement has extensively relied on the judgement of the Hon'ble Apex Court in ***Lalit Kumar Jain Vs UOI and Ors (2021) 9 SCC 321*** which is as extracted hereunder:

> *"76. Thus, the view taken by the Hon'ble Apex Court is that the approval of a resolution plan does not ipso facto discharge a personal guarantor of a corporate debtor of her or his liabilities under the contract of guarantee and it will not discharge or release the Principal Debtor from the debt owed by it to its creditor by an involuntary process i.e. by operation of law, or due to liquidation or insolvency proceeding, does not absolve the surety/guarantor of his or her liability which arises out of an independent contract."*

28. Before we apply the legal precepts enunciated in the ***Lalit Kumar Jain Vs UOI and Ors*** to the facts of the present case, we may quickly notice the relevant provisions of the resolution plan of the SRA. Clause 3 which is nomenclated as 'Overview of Plan' deals with the 'Treatment of Financial Creditors' at sub clause 4 which is to the effect:

> *"The Resolution Applicants through Special Purpose vehicle (SPV) or along with Person acting in concert, proposes to buy all*

loans, interest and all other charges due from the Corporate Debtor Viz Care Office Equipment Ltd. After payment for this transaction no amount shall be due from the Corporate Debtor or PAC by the Financial Creditors.

The Resolution Applicant and PAC shall have no right of recovery from old promoters, old directors or old guarantors with respect to personal guarantee or any asset mortgaged with Financial Creditors, the same shall continue with the Financial Creditors."

29. If we look at the above stipulations contained in the resolution plan, we find that the resolution plan categorically stipulates that the SRA proposes to buy the debt of the Corporate Debtor which in no manner can discharge the personal guarantors from its liability towards the Financial Creditors. The resolution plan also stipulates that the right to recover from old promoters, directors and guarantors with respect to personal guarantee shall continue with the Financial Creditors. Thus, the Appellant was never discharged from its liability qua the personal guarantees under the resolution plan. Moreover, under Section 128 of the Contract Act, the liability of the borrower and guarantor are coextensive and the lender can choose to recover the outstanding shortfall amount from either of them. The contract of guarantee is an independent contract from the Loan Agreement and hence the contract of guarantee does not end if the borrower has failed to discharge the entire liability. Now when we apply the ratio of the judgement of the Hon'ble Supreme Court in ***Lalit Kumar Jain Vs UOI and Ors*** to the present resolution plan, the personal guarantor is not discharged of his liabilities under the contract of guarantee. The release or discharge of a principal borrower from the debt owed by it to its creditor by operation of law or due to insolvency proceedings

or liquidation does not absolve the guarantor of his liability which arises out of an independent contract. There is no specific bar under the IBC that a creditor cannot claim its remaining debt from the guarantor which has not been recovered from the Corporate Debtor. Further, the resolution plan at Clause 12 which is nomenclated as 'Terms of the Resolution Plan' deals in Part-III thereof with "Extinguishment of Claims/Rights" which stipulates that the guarantors shall not exercise any subrogation rights in respect of the guarantee. Thus, to answer the second issue, we are of the considered opinion that when the CoC in its wisdom has approved the resolution plan which provided for the continued rights of the Financial Creditor against the personal guarantor and did away with the subrogation rights of the personal guarantors, the contention of the Appellant that the liability of the personal guarantors should stand extinguished, not being in sync with the commercial wisdom of the CoC, is clearly devoid of merit.

30. This brings us to the third major allegation raised by the Appellants that the SRA did not intend to keep the Corporate Debtor as a going concern. When we look at Clause 7 of the resolution plan, it outlines the future business plan by the new management after identifying the lacunae in the previous business plan of the erstwhile management which led to insolvency. The business plan as maybe seen at page 192 of APB shows that the SRA proposed to continue the electric store of the Corporate Debtor while changing the product portfolio by concentrating on high margin goods. It was also pointed out by the SRA that it has successfully implemented the resolution plan to the satisfaction of the CoC. Hence, the objections of the Appellant on the capability of SRA to implement the plan and questions raised on the sourcing of fund by SRA does not hold good. Coming to the

allegation that the SRA had submitted the EOI as an individual but had later been joined by others which renders their resolution plan infirm, it has been pointed out that by the SRA that when Sudeep Dasani had submitted the resolution plan to the RP on 20.01.2020, it was clearly mentioned on the document in the column of "Resolution Applicant" that the "Resolution Applicant refers to Mr. Sudeep Dasani, his associates and other persons acting in concern." The same has been placed on record at page 744 of APB. Further, the CoC in the 6th meeting after considering the resolution plan had asked Sudeep Dasani to submit the details of his associates which was complied with by him while submitting the revised resolution plan dated 19.02.2020. The 7th CoC meeting held on 13.03.2020 also noted that the RP had informed that PAC names given by Sudeep Dasani will have to be checked for eligibility as per Section 29A and hence requested for further details on the same. The RP during the CIRP also conducted the necessary compliance under Section 29A of the IBC of all the persons acting in the joint concern as SRA and that these persons also gave an undertaking as required in law is evident from records placed at pages 237-273 of APB. The Adjudicating Authority has also observed at para 22 of the impugned order that "*certificate regarding the eligibility of resolution applicant under Section 29A alongwith undertaking of the Resolution Applicant to this effect has been filed.*" It is therefore clear that the SRA did not conceal the fact that he was submitting his plan along with his associates and since there is no bar in bringing other associates as co-applicants, there was nothing irregular in the submission of resolution plan by the SRA along with associates. All that the RP was required to do in such circumstances was to check the eligibility of the associates and this prescriptive requirement of Section 29A of IBC was complied with by the RP. To field our response to the third issue raised by the Appellant, we

therefore hold that there is no irregularity in the conclusion of the Adjudicating Authority that the RP had carried out the verification exercise in terms of Section 29A of the IBC.

31. This brings us to the last issue for our consideration as to whether the resolution plan was within the contours of Section 30(2) of the IBC in that it did not contravene the provisions of any law for the time being in force and that no material irregularity was committed by the RP in the CIRP process.

32. The question, which needs to be answered is as to whether the Resolution Plan submitted, which was approved by the Adjudicating Authority, is in compliance of provisions of Section 30(2) of IBC. It is brought out by the SRA that when the RP moved IA 358 of 2020 before the Adjudicating Authority for approval of the resolution plan, during one of the hearings held on 20.07.2022, the Adjudicating Authority had raised a specific query as to whether the plan was still viable as it was approved in 2020. The SRA has further submitted that in furtherance to the aforesaid order of the Adjudicating Authority dated 20.07.2022, a meeting of the CoC was conducted on 02.08.2022. This meeting was attended by all the four CoC members and in the said meeting, excepting American Express (having a miniscule voting share of 0.31%), all the other three CoC members having 99.69% aggregate total voting rights, were in the favour of the Resolution Plan which was approved in 2020 and wanted to continue with the Resolution Plan in spite of efflux of nearly two years.

33. We find that the Adjudicating Authority in the impugned order has also taken cognisance of this development and noted as follows:

"20. During the hearing, a query was sought by the Bench vide order dated 20.07.2022, whether this plan is viable as on date, which was approved in 2020? In compliance of said order, CoC filed an affidavit on 18.08.2022, stating that the lenders meeting was conducted by the Resolution Professional on 02.08.2022, in the said meeting, following points were decided by the CoC members:

i. All the CoC members except American Express is in the favor of the resolution plan as on date which was approved in 2020 based on the feasibility of the resolution plan considering all the factors as per IBC, 2016. Therefore, CoC with 99.69% voting share wants to continue with the resolution plan.

ii. CoC authorized lead bank-Bank of India to submit affidavit in compliance of order of the Court dated 20.07.2022.

22. It is further noted that certificate regarding the eligibility of resolution applicant under Section 29A alongwith undertaking of the Resolution Applicant to this effect has been filed. We have also perused the contents of Resolution Plan, and are of the view that all requirements provided under Section 30(2) of IBC, 2016 and Regulation 36 to 39 of CIRP Regulations, 2016 have been compiled with. We also find that the Resolution Plan addresses the cause for default and also contains measures to run the Corporate Debtor in future. We also find that Resolution plan is both feasible and viable as held by CoC and it also contains provision for its effective implementation. Accordingly, we, being satisfied, approve the Resolution Plan."

34. The extent of judicial review of resolution plan approved by the CoC in its commercial wisdom is very limited. The Hon'ble Supreme Court in ***Committee of Creditors of Essar Steel India Ltd. vs. Satish Kumar Gupta and Ors. (2020) 8 SCC 531*** and in ***K. Sashidhar v. Indian Overseas Bank (2019) 12 SCC 150*** and in a catena of other judgments has laid down that commercial wisdom of the CoC has to be given paramount importance and limited jurisdiction has been provided to interfere in the approval of the plan by the Adjudicating Authority or the Appellate Tribunal, which is to be exercised only when the Plan is not in compliance with statutory provisions of Section 30(2) of IBC. The law is thus well

settled that commercial wisdom of the CoC approving the Plan cannot be interfered and it can be interfered only when there is statutory non-compliance, i.e., non-compliance of Section 30(2). The Adjudicating Authority has duly analysed the contents of the resolution plan of the SRA which has been approved by the CoC on 26.02.2020 with 99.69% vote share. Furthermore, in the present case, no grounds have been made that resolution plan approved by the CoC and the Adjudicating Authority violates any of the provisions of Section 30(2). Hence the resolution plan passes the muster.

35. Given that the CoC has considered the resolution plan and passed the same with requisite majority and given the well settled legal position that the Adjudicating Authority has limited scope of judicial review available to it and cannot interfere on merits with the commercial wisdom of the CoC, there was no error committed on the part of the Adjudicating Authority in approving the resolution plan.

36. We, thus, do not find any ground in this appeal to interfere with the impugned order of the Adjudicating Authority approving the Resolution Plan. There is no merit in the Appeal. The Appeal is dismissed. Parties to bear their own costs.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

Place: New Delhi
Date: 18.04.2024
Ashok Kr.