NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Comp. App. (AT) (Ins.) No. 426 of 2020 & I.A. No. 1702, 2198, 2199 of 2023

(Arising out of the Order dated 07.02.2020 passed by the National Company Law Tribunal, Hyderabad Bench, Hyderabad, in I.A. No. 950 of 2019 in I.A. No. 32 of 2019 in C.P. (IB) No. 248/7/HDB/2017.)

IN THE MATTER OF:

NCC Ltd.
Rep. by its Authorised Representative
Having its registered office at:
NCC House, Madhapur,
Hyderabad, Telangana – 500081
Mail – srinivasamurthy.mv@nccltd.in **…Appellant**

Versus

1. **M/s Golden Jubilee Hotels Pvt. Ltd.**
   Rep. by its Resolution Professional
   Mr. Subodh Kumar Agarwal
   IBBI/IPA001/IP-P00087/20017-18/10183
   Having its registered office at:
   Survey No. 64, Beside Shiparamam,
   Madhapur, Hyderabad, Telangana – 500081. **…Respondent No. 1**
   Email: cirp.goldenjubilee@gmail.com

2. **Committee of Creditors**
   M/s Golden Jubilee Hotels Pvt. Ltd.
   Survey No. 64, Beside Shiparamam,
   Madhapur, Hyderabad, Telangana – 500081.
   Email: Not Available **…Respondent No. 2**

3. **Telangana State Tourism Corporation Limited**
   Government of Telangana
   D-Block, 2nd floor, Telangana Secretariat,
   Hyderabad, Telangana – 500081
   Email : secy_trsm@ap.gov.in **…Respondent No. 3**

4. **Shilparamam Arts, Crafts & Cultural Society**
   Hi Tech City Main Road, Hitec City,
   Madhapur, Hyderabad, Telangana- 500081.

Email: shilparamamhyd@gmail.com **…Respondent No. 4**

5. **BREP Asia II Indian Holding Co. II (NQ) Pte. Ltd.**
77, Robinson Road
#13-00 Robinson 77,
Singapore – 068896
Email: vijay.kaundal@srgrlaw.com **…Respondent No. 5**

Present

For Appellants: **Ms. Priya Kumar & Mr. Shivam Goel, Advocates**

For Respondents: **Dr. Abhishek Manu Singhvi, Sr. Adv. with Mr. Gyanendra Kumar, Mr. Aviral Singhal, Mr. D. Kapila, Adv. for SRA.**

Mr. Arun Kathpalia, Sr. Advocate with Mr. Pankaj Vivek, Advocate for R-2.

PCS, Manoj Kumar Koyalkar, Adv. for R-3.

Mr. Swapnil Gupta, Mr. Abhinav Mishra, Mr. Vaibhav Mendirata, Advocates for R-4.

With

Comp. App. (AT) (Ins.) No. 430 of 2020

(Arising out of the Order dated 07.02.2020 passed by the National Company Law Tribunal, Hyderabad Bench, Hyderabad, in I.A. No. 960 of 2019 in I.A. No. 32 of 2019 in C.P. (IB) No. 248/7/HDB/2017.)

IN THE MATTER OF:

Consolidated Engineering Company
Through its Partner,
Office at K-Block, Chaudhary Building,
Connaught Circus,
New Delhi – 110001. **…Appellant**

Versus

1. **Subodh Kumar Agrawal**
   Former Resolution Professional of
   Golden Jubilee Hotels Private Limited,
   1, Ganesh Chandra Avenue,
   3rd Floor, Room No. 301,
   Kolkata – 700013. **…Respondent No. 1**

2. **Golden Jubilee Hotels Private Limited**
   Through Successful Resolution Applicant
   Survey No. 64, Beside Shilpakalavedika,,
   Shilparamam, Madhapur,
   Hyderabad, Telangana – 500081. **…Respondent No. 2**

3. **BREP Asia II Indian Holding Co. II (NQ) Pte. Ltd.**
   77, Robinson Road
   #13-00 Robinson 77,
   Singapore – 068896 **…Respondent No. 3**
   Email: vijay.kaundal@srgrlaw.com

4. **Committee of Creditors**
   Golden Jubilee Hotels Private Limited
   Survey No. 64, Beside Shilpakalavedika,
   Shilparamam, Madhapur, Hyderabad – 500081.
   …Respondent No. 4

Present

For Appellants: **Mr. Uddyam Mukherjee & Mr. Swapnil Pattanayak, Adv.**

For Respondents: **Dr. Abhishek Manu Singhvi, Sr. Adv. with Mr. Gyanendra Kumar, Mr. Aviral Singhal, Mr. D. Kapila, Adv. for SRA**

Mr. Arun Kathpalia, Sr. Advocate with Mr. Pankaj Vivek, Advocate for R-4

With

Comp. App. (AT) (Ins.) No. 432 of 2020

(Arising out of the Order dated 07.02.2020 passed by the National Company Law Tribunal, Hyderabad Bench, Hyderabad, in I.A. No. 961 of 2019 in I.A. No. 32 of 2019 in C.P. (IB) No. 248/7/HDB/2017.)

IN THE MATTER OF:

Infinity Interiors Private Limited
Through its Authorized Representative,
Head Office at 502, Abhiraj Building, Munosuvrat
8-68, Swastik Society, C.G. Road,
Ahmedabad – 380009. **…Appellant**

Versus

1. **Subodh Kumar Agrawal**
   Former Resolution Professional of
   Golden Jubilee Hotels Private Limited,
   1, Ganesh Chandra Avenue,
   3rd Floor, Room No. 301,
   Kolkata – 700013. **…Respondent No. 1**

2. **Golden Jubilee Hotels Private Limited**
   Through Successful Resolution Applicant
   Survey No. 64, Beside Shilpakalavedika,,
   Shilparamam, Madhapur,
   Hyderabad, Telangana – 500081. **…Respondent No. 2**

3. **BREP Asia II Indian Holding Co. II (NQ) Pte. Ltd.**
   77, Robinson Road
   #13-00 Robinson 77,
   Singapore – 068896 **…Respondent No. 3**

4. **Committee of Creditors**
   Golden Jubilee Hotels Private Limited
   Survey No. 64, Beside Shilpakalavedika,
   Shilparamam, Madhapur, Hyderabad – 500081. **…Respondent No. 4**

Present

For Appellants: **Mr. Uddyam Mukherjee, Mr. Swapnil Pattanayak, Adv.**

For Respondents: **Mr. Arun Kathpalia, Sr. Advocate with Mr. Pankaj Vivek, Advocate for R-4**
Dr. Abhishek Manu Singhvi, Sr. Adv. with Mr. Gyanendra Kumar, Mr. Aviral Singhal, Mr. D. Kapila, Adv. for SRA

With

Comp. App. (AT) (Ins.) No. 710 of 2020

(Arising out of the Order dated 07.02.2020 passed by the National Company Law Tribunal, Hyderabad Bench, Hyderabad, in C.A No. 32 of 2019 in C.P. (IB) No. 248/7/HDB/2017.)
IN THE MATTER OF:

Ahuja furnishers Pvt. Ltd.
Through its Director,
Office at Mandir Marg,
Behind Gandhi Sadan Housing Complex,
New Delhi – 110001. **…Appellant**

Versus

1. **Subodh Kumar Agrawal**
   Former Resolution Professional of
   Golden Jubilee Hotels Private Limited,
   1, Ganesh Chandra Avenue,
   3rd Floor, Room No. 301,
   Kolkata – 700013. **…Respondent No. 1**

2. **Golden Jubilee Hotels Private Limited,**
   Through Successful Resolution Applicant
   Survey No. 64, Beside Shilpakalavedika,,
   Shilparamam, Madhapur,
   Hyderabad, Telangana – 500081. **…Respondent No. 2**

3. **BREP Asia II Indian Holding Co II (NQ) PTE. Ltd.**
   77, Robinson Road

#13-00 Robinson 77,
Singapore – 068896
Email: vijay.kaundal@srgrlaw.com **…Respondent No. 3**

4. **Insolvency and Bankruptcy Board of India,**
7th Floor, Mayur Bhawan,
Shankar Market, Connaught Circus,
New Delhi – 110001. **…Respondent No. 4**

5. **Committee of Creditors**
Golden Jubilee Hotels Private Limited
Survey No. 64, Beside Shilpakalavedika,
Shilparamam, Madhapur, Hyderabad – 500081. **…Respondent No. 5**

Present

For Appellants:	**Mr. Uddyam Mukherjee, Mr. Swapnil Pattanayak, Adv.**
For Respondents:	**Mr. Arun Kathpalia, Sr. Advocate with Mr. Pankaj Vivek, Advocate for R-5** **Dr. Abhishek Manu Singhvi, Sr. Adv. with Mr. Gyanendra Kumar, Mr. Aviral Singhal, Mr. D. Kapila, Adv. for SRA**

J U D G E M E N T

(11.12.2024)

NARESH SALECHA, MEMBER (TECHNICAL)

1. There are six appeals before us arising out of common Impugned Order dated 07.02.2020 under 61(3) of the Insolvency & Bankruptcy Code, 2016 (in short **'Code'**) passed by National Company Law Tribunal, Hyderabad Bench, Hyderabad (in short '**Adjudicating Authority**') in IA No's. 433, 447 and 448/2018 and IA Nos. 32, 61, 950, 960 and 961/2019 in CP (IB) No. 248/7/HDB/2017.

2. These six appeals have been filed against a common Impugned Order and have been tagged together, we shall deal all these six appeals in the following discussion.

3. At the initial stage, we will take note of the details of appeals mentioned herein :-

> *Company Appeal (AT) (Ins.) No. 426 of 2020, Company Appeal (AT) (Ins.) No. 430 of 2020, Company Appeal (AT) (Ins.) No. 432 of 2020, Company Appeal (AT) (Ins.) No. 710 of 2020, Company Appeal (AT) (Ins.) No. 438 of 2020 and Company Appeal (AT) (Ins.) No. 336 of 2020.*

4. At this stage, we note that there are four Operational Creditors i.e., NCC in Company Appeal (AT) (Ins.) No. 426 of 2020; Consolidated Engineering company in Company Appeal (AT) (Ins.) No. 430 of 2020; Infinity Interior Private Limited in Company Appeal (AT) (Ins.) No. 432 of 2020; and Ahuja Furniture in Company Appeal (AT) (Ins.) No. 710 of 2020. All these four appeals have been filed by Operational Creditors who have supplied different services to the Corporate Debtor.

5. We also note that the issues of all four appeals are by and large same, in fact three appeals, namely, Company Appeal (AT) (Ins.) No. 430 of 2020, 432 of 2020 & 710 of 2020 have been argued by the same Counsel Mr. Uddyam Mukherjee, whereas Company Appeal (AT) (Ins.) No. 426 of 2020 has been

argued by Ms. Priya Kumar. As such we will take into consideration the issues, pleadings of the Appellants and submissions of the Respondents along with our analysis herein after.

6. The two other appeals, namely Company Appeal (AT) (Ins.) No. 438 of 2020 has been filed by Laxmi Narayan Sharma, Suspended Director / Promoter of the Corporate Debtor who has challenged the approval of the Resolution Plan on entirely different grounds. Similarly, Company Appeal (AT) (Ins.) No. 336 of 2020 has been filed by EIH Limited who filed the appeal on the limited grounds of relegating him as related party and Promoter of the Corporate Debtor covered under Section 29A of the Code.

7. Hence, in fitness of things, first four appeals shall be dealt herein after and a common order will be pronounced. Other two appeals are being dealt in two different orders.

8. Pleadings are generally identical, in all these four appeals. The Corporate Debtor has been arrayed the Respondent in all four appeals at different Serial Nos i.e., Respondent No. 1 in Company Appeal (AT) (Ins.) No. 426 of 2020 and Respondent No. 2 in Company Appeal (AT) (Ins.) No. 430 of 2020, 432 of 2020 & 710 of 2020.

9. Committee of Creditors ('CoC') is the Respondent No. 2 in Company Appeal (AT) (Ins.) No. 426 of 2020, Respondent No. 4 in Company Appeal

(AT) (Ins.) No. 430 of 2020 & 432 of 2020 and Respondent No. 5 in Company Appeal (AT) (Ins.) No. 710 of 2020.

10. BREP Asia II Indian Holding Co II (NQ) PTE. Ltd. i.e., SRA is the Respondent No. 5 in in Company Appeal (AT) (Ins.) No. 426 of 2020, Respondent No 3 in in Company Appeal (AT) (Ins.) No. 430 of 2020 and 710 of 2020.

11. Subodh Kumar Agrawal is the IRP and Respondent No. 1 in in Company Appeal (AT) (Ins.) No. 430 of 2020, 432 of 2020 & 710 of 2020.

12. Counsel for the other Respondents who appeared before us generally took the same line of pleadings as taken by the Respondents noted above.

Company Appeal (AT) (Ins.) No. 426 of 2020

13. NCC Ltd. is the Appellant herein and the Operational Creditor of M/s Golden Jubilee Hotels Pvt. Ltd. ('**Corporate Debtor**') the Respondent No. 1 herein, who submitted the claims of Rs. 51,75,95,253/- as on 14.03.2018 in form -B subsequent to public notice dated 01.03.2018 after initiation of CIRP of the Corporate Debtor on an application under Section 7 of the Code.

The Committee of Creditors ('**CoC**') is the Respondent No. 2 herein.

Telangana State Tourism Corporation Limited ('**TSTCL**') (earlier known as Youth Advancement Tourism and Culture Department) ('**YATCL**') is the Respondent No. 3 herein.

Shilparamam Arts, Crafts & Cultural Society ('**Society**') is the Respondent No. 4 herein.

BREP Asia II Indian Holding Co. II (NQ) Pte. Ltd. is the Respondent No. 5 herein who is the Successful Resolution Professional ('**SRA**') of the Corporate Debtor.

14. It is the case of the Appellant that relying upon this Appellate Tribunal's order dated 23.10.2019, the Appellant also preferred an I.A. No. 950 of 2019 in I.A. No. 32 of 2019 in CP (IB) No. 248/7/HDB/2017 opposing the application of Resolution Professional, inter-alia, seeking approval of the Resolution Plan of SRA/Respondent No. 5. The Appellant submitted that the Adjudicating Authority had decided the said application of the Appellant along with other application objecting to the approval of the Resolution Plan, however, vide the Impugned Order dated 07.02.2020, the Adjudicating Authority approved the Resolution Plan as recommended by majority of CoC.

Company Appeal (AT) (Ins.) No. 430 of 2020

15. This appeal has been filed by the Consolidated Engineering Company through its partner against the Impugned Order dated 07.02.2020 passed in IA. No. 960 of 2019 and IA. No. 32 of 2019 filed in CP (IB) No. 248/7/HDB/2017.

Subodh Kumar Agrawal, the former Resolution Professional of M/s Golden Jubilee Hotels Private Limited/ Corporate Debtor is the Respondent No. 1 herein.

Golden Jubilee Hotels Private Limited/ Corporate Debtor is the Respondent No. 2 herein.

BREP Asia II Indian Holding Co. II (NQ) Pte. Ltd. is the Respondent No. 3 herein who is the Successful Resolution Professional ('**SRA**') of the Corporate Debtor.

Committee of Creditor ('CoC') of the Corporate Debtor is the Respondent No. 4 herein.

16. The Appellant stated that the Appellant is a small enterprise registered under MSMED Act and had supplied goods and services for designing, fabrication and installation of building facade and allied works for Trident (Tower- I) and Oberoi Hotel (Tower-II) of the Corporate Debtor.

17. The Appellant submitted a claim of Rs. 20,02,07,912/- in Form B by email and on 14 March 2018. The Respondent No. 1 admitted a claim of Rs. 10,52,37,168/- submitted by the Appellant. Post reconciliation a further amount of Rs. 21,54,575/- was admitted on 8th September 2018 as against the claim of the Appellant and an amount of Rs. 5,18,56,248/- was admitted as contingent liability. The Appellant stated that as a huge amount of Rs. 3,84,32,558/- of the claim of the Appellant was not admitted by the Respondent No.1, the Appellant filed I.A. No. 264 of 2018 before the Adjudicating Authority, inter alia, praying for a direction for Respondent No. 1 to admit the entire claim of the Appellant.

Even though the Resolution Plan has been approved, the said application has not been decided.

Company Appeal (AT) (Ins.) No. 432 of 2020,

18. This appeal has been filed by the Infinity Interiors Private Limited against the Impugned Order dated 07.02.2020 passed in IA. No. 961 of 2019 and IA. No. 32 of 2019 filed in CP (IB) No. 248/7/HDB/2017.

Subodh Kumar Agrawal is the Respondent No. 1 herein, who was Resolution Professional of M/s Golden Jubilee Hotels Private Limited/ Corporate Debtor/ the Respondent No. 2 herein.

BREP Asia II Indian Holding Co. II (NQ) Pte. Ltd. is the Respondent No. 3 herein who is the Successful Resolution Professional ('**SRA**') of the Corporate Debtor.

Committee of Creditor ('CoC') of the Corporate Debtor is the Respondent No. 4 herein.

19. The Appellant stated that he is a registered "Small Enterprise" under the MSMED Act and is an Operational Creditor of the Corporate Debtor, who was engaged by the Corporate Debtor for certain interior works and supply of materials.

20. The Appellant submitted that post CIRP of Corporate Debtor, he filed a claim of Rs. 4,87,39,050/- with the Respondent No. 1 and subsequently on 20

July 2018, the appellant also submitted an additional claim of Rs. 1,85,00,000/- and after clarifications regarding the claims by the Appellant and discussions between the parties, the admissible claim of the Appellant was revised to be Rs. 4,40,24,552/-.

Company Appeal (AT) (Ins.) No. 710 of 2020,

21. This appeal has been filed by the Ahuja Furnishers Pvt. Ltd. against the Impugned Order dated 07.02.2020 passed in I.A. No. 32 of 2019 in CP (IB) No. 248/7/HDB/2017.

Subodh Kumar Agrawal is the Respondent No. 1 herein and former Resolution Professional of M/s Golden Jubilee Hotels Private Limited/ Corporate Debtor, who is the Respondent No. 2 herein.

BREP Asia II Indian Holding Co. II (NQ) Pte. Ltd. is the Respondent No. 3 herein who is the Successful Resolution Professional ('**SRA**') of the Corporate Debtor.

Insolvency and bankruptcy Board of India (in short '**IBBI**') is the Respondent No. 4 herein.

Committee of Creditor ('CoC') of the Corporate Debtor who is the Respondent No. 5.

22. The Appellant stated that he is a supplier of furniture to the Corporate Debtor and a registered 'small enterprise' under the MSMED Act.

23. The Appellant stated that after CIRP of Corporate Debtor, he submitted a claim of Rs. 29,83,025.69/- in Form B to the Respondent No. 1 on 08.03.2018. The Respondent No.1 admitted a claim of Rs. 29,08,729/- The same was communicated to the Appellant by the Respondent No. 1 vide email dated 24th August 2018 and the Appellant communicated his approval to the Respondent No. 1 on the same date.

Common Pleading of the Appellants

24. We have already noted the facts of all four cases of Operational Creditor as discussed above. We note that the Company Appeal (AT) (Ins.) No. 426 of 2020 was represented by Ms. Priya Kumar whereas other three Operational Creditor in Company Appeal (AT) (Ins.) No. 430, 432 & 710 of 2020 were commonly represented by Mr. Uddyam Mukherjee.

Both Counsels have argued extensively and supported each other. As such, the common arguments of all four Appellants are noted in following discussions.

25. The Appellants stated that they came to know that nil payment has been provided in respect of his claims in the Resolution Plan and aggrieved by same, the Appellant (NCC) filed an I.A. No. 9 of 2019 before the Adjudicating Authority seeking direction that the Resolution Plan as submitted should not be approved. The Appellants submitted that by a common order dated 27.09.2019 passed by the Adjudicating Authority in I.A. No. 9 of 2019 of the Applicant as

well as similar applications filed by the Operational Creditors were disposed of by the Adjudicating Authority holding that the objection raised by the Operational Creditor including the Appellants herein will be considered at the stage of consideration of the Resolution Plan which was pending before the Adjudicating Authority and also held that the Appellant being an Operational Creditor had no locus to challenge the same.

26. The Appellants stated that the Appeal bearing Company Appeal (AT) (Insolvency) No. 1112 of 2019 was filed against the said order of the Adjudicating Authority dated 27.09.2019 by one of the operational Creditor i.e., Consolidated Engineering Company and this this Appellate Tribunal vide order dated 23.10.2019 directed the Adjudicating Authority to consider whether the Operational Creditor has been given the same treatment as the Financial Creditor under the Resolution plan and also gave further direction that if found to be discriminatory, it will be upon the Adjudicating Authority to pass the appropriate order as per the decision of the Hon'ble Supreme Court of India in the matter of ***Swiss Ribbons Pvt. Ltd. & Anr. vs. Union of India & Ors.*** in *Writ Petition (Civil) No. 99 of 2018.*

27. The Appellants submitted that they filed the applications before the Adjudicating Authority objecting to the Resolution Plan dated 17.12.2018 on the ground that the plan as approved by the CoC and discriminates between similarly situated operational creditors in so far as YATCL and Society were

being paid exorbitant amounts while the claim of the Appellants were allotted 'Nil amounts'. YATCL and the Society are collectively referred to as 'Special Operational Creditor' or ‘GoT’ in the Resolution Plan. The Appellants pleaded that such special category is beyond the scheme of the Code which does not mention of such categorization. The Appellants submitted that their objections were rejected by the Adjudicating Authority through the Impugned Order. It is the case of the Appellants that the Adjudicating Authority reliance on ***Committee of Creditors of Essar Steel India Limited vs. Satish Kumar Gupta & Ors.*** *[(2020) 8 SCC 531]* for a sub-class is misplaced since that was in the context of financial creditors being secured and unsecured or dissenting and concurring financial creditors and not in the case of Operational Creditors like in the present case and there can be no class or sub-class within the Operational Creditor.

28. The Appellants submitted that while approving the Resolution Plan, the CoC was expected to exercise its commercial wisdom in overall perceptive taking care of all stakeholders and it was expected that the Adjudicating Authority would examine whether in fact the commercial wisdom was exercised correctly or not. The Appellants stated that the Adjudicating Authority completely ignored this aspect.

29. The Appellants summarised main grounds for challenge to the Resolution Plan i.e., discrimination within the same class of creditors, i.e., Operational

Creditors and while exercising the alleged commercial wisdom, the CoC has not taken into account requirement of all stakeholders especially while distributing the corpus available with the Corporate Debtor. The Appellants stated that the Resolution Plan was also not firm as further amounts, other than those provided in the resolution plan for the Special Operational Creditor, are being negotiated even now.

30. The Appellants submitted that the role assigned to CoC, due to exclusion of Operational Creditors from the CoC, cast more duties on CoC to balance the interest of all stakeholders. The Appellants stated that the preferential treatment to Special Operational Creditor, does not tantamount to exercise of commercial wisdom.

31. The Appellants submitted that on 21.12.2018, the Resolution Plan submitted by the SRA was approved by the CoC with 68.26% votes, despite being a Conditional Resolution Plan, wherein all payments under the Resolution Plan were subject to completion of the condition precedent. The Appellant stated that the CoC overlooked the fact that in the 14th CoC meeting the resolution applicants were requested to remove condition precedents from the resolution plans and submit revised plans which was overlooked.

32. The Appellants assailed the conduct of the CoC and the Resolution Professional, who permitted the SRA to acquire the Corporate Debtor for a meagre amount of Rs. 385 Crores whereas the value of the land and the building

alone was in excess of Rs. 600 Crores and the Hotel being an operating business, the enterprise value of the Corporate Debtor should at least be in excess of Rs. 800 Crores at the stage of filing appeal in the year 2020.

33. The Appellants stated that taking note of conditions of MSMEs in the economy, the Parliament in its wisdom enacted and inserted Section 240A of the Code to give special protection to MSMEs in CIRP, but the same was ignored while approving the Resolution Plan. The Appellants mentioned that the amounts due and payable to MSMEs are statutorily payable and any Resolution Plan which does not provide for the same is contrary to law.

34. The Appellants submitted that I.A. No. 960 of 2019 in CP (IB) No. 248/7/HDB/2017 was filed before the Adjudicating Authority on 31.10.2019, inter alia, praying for declaration that the Resolution Plan was contrary to law and appropriate modifications be made in the Resolution Plan to ensure payment of entire claim of the Appellants, among other things. The Appellants stated that the Adjudicating Authority, vide the Impugned Order, approved the Resolution Plan without appreciating that the Resolution Plan was contrary to law as it discriminates amongst similarly situated operational creditors and unlawfully created & provided a sub-category of 'special operational creditor' provided for payment of 100% dues of only Special Operational Creditor ignoring the claims of all the other operational creditors, in violation of provisions of the Code.

35. The Appellants brought that an award has been pronounced on 25.02.2020 by the Arbitral Tribunal in the pending arbitration proceedings between the Corporate and YATCL and as per the Corporate Debtor and in terms of the Award, no payment was required to be made by the Corporate Debtor to YATCL. On the contrary, the Corporate Debtor was entitled to recover Rs. 28.88 Crores from YATCL in terms of the Award. It is the case of the Appellants that the surplus money on account of dismissal of claims of YATCL in the arbitration proceedings must be distributed among operational creditors.

36. The Appellants stated that Adjudicating Authority failed to follow the principles laid down by the Hon'ble Supreme Court of India in ***Swiss Ribbons (Supra)*** wherein it was held that the Regulation further strengthens the rights of operational creditors by statutorily incorporating the principle of fair and equitable dealing of operational creditors' rights, together with priority in payment over Financial Creditors. The Appellants submitted that Adjudicating Authority failed to appreciate that the Resolution Plan was in violation of Regulation 38 of the Regulations which provides that no differential treatment should be done between the Operational Creditors and the Financial Creditors, who are similarly situated and failed to look after the interests of all stakeholders including operational creditors.

37. The Appellants stated that the SRA has no right on the surplus generated by the Corporate Debtor during CIRP and such amounts have to be distributed amongst the stakeholders such as Financial Creditors, Operational Creditors, etc. but the Adjudicating Authority erroneously approved the Resolution Plan.

38. The Appellants submitted that the Adjudicating Authority has misconstrued the law laid down by this Appellate Tribunal in ***Jindal Steel & Power Ltd. Vs. DCM International Ltd.*** in *Company Appeal (AT) (Insolvency) No. 288 of 2017*, as the facts in present case are completely distinguishable from ***Jindal Steel (Supra)***, where the lessee initiated CIRP against the Corporate Debtor (lessor) for default in refund of security deposit which is not the case here.

39. The Appellant submitted that there cannot be any further classification in the same category of Operational Creditors. The Appellant cited the judgement of Hon'ble Supreme Court of India in the case of ***Pratap Technocrats (P) Ltd. v. Reliance Infratel Ltd. (Monitoring Committee),*** [(2021) 10 SCC 623]. The Appellant pleaded that the approved Resolution Plan violates this Ratio and hence the Resolution Plan and Impugned Order needs to be rejected. The relevant paragraph of the cited judgement reads as under: -

> *"32. .....the ambit of the adjudicating authority is to determine whether the amount that is payable to the operational creditors under the resolution plan is consistent*

with the above norms which have been stipulated in clause (b) of sub-section (2) of Section 30.

..... "shall be fair and equitable" to such creditors. Fair and equitable treatment, in other words, is what is fair and equitable between the operational creditors as a class, and not between different classes of creditors."

(Emphasis Supplied)

40. The Appellants conceded that while upholding the preferential treatment extended to farmers, in the case of ***Excel Engineering & Ors. v. Vivek Muralidhar Dabhade*** *[2022 SCC OnLine NCLAT 4461]*, this Appellate Tribunal in the passing has stated under paragraph 15 that,

".... This Tribunal is of the considered opinion that there is no embargo for the classification of 'Operational Creditors' into separate/ different classes for deciding the way in which the money is to be distributed to them by the CoCs"

The Appellant submitted that this observation cannot be stated to give rise to a precedent and an expression of the law.

41. Concluding their pleadings, the Appellants requested this Appellate Tribunal to set aside the Impugned Order or alternatively direct the CoC to redistribute amount payment to all Operational Creditors on pro-rata basis instead of payment being made only to Special Operational Creditor.

Pleadings of the Respondents

42. We note that the Resolution Professional of the Corporate Debtor and Corporate Debtor, in all four appeals, have been represented by Mr. Suryanarayan. The CoC has been represented by Mr. Arun Kathpalia. The SRA has been represented by Dr. Abhishek Manu Singhvi. YATCL has been represented by Mr. Manoj Kumar Koyalkar and Society was represented by Mr. Swapnil Gupta.

43. Three main contesting Respondents i.e., Corporate Debtor/ Resolution Professional, CoC and SRA have pleaded in all four appeals, by and large, with common approach and common pleadings. Hence, we will take note of same in the following discussions.

44. Per contra, the Respondents denied all averments of the Appellate Tribunal and also denied following grounds of challenge to the impugned order by the appellants: -

(a) There is no category as "Special Operational Creditor" in the code which also does not contemplate discrimination within the same class of creditors.

(b) While the "Special Operational Creditor" had been given 100% of the claims which included admitted and disputed claims pending adjudication, all other operational creditors like the appellant, even though having adjudicated/admitted claims in their favor have been granted "NIL".

(c)The payment approved in the resolution plan in favor of YATCL is not based on

liquidation value but on other considerations and though preferential payment is considered to YATCL, the consideration for the payment of Rs.41.99 Crs. was not relatable to lease rentals and is speculative and based on probabilities.

(d) Adjudicating Authority failed to consider disproportionate distribution of amounts and non-compliance of provisions of section 30 of the Code.

(e) The Resolution plan is a conditional resolution plan and is dependent upon completion of condition precedent. The Resolution plan provides return of the performances guarantee in full to the respondent no. 3 in the event the CP is not satisfied without any obligation or liability being incurred by Respondent No.3.

(f) The Resolution plan has not made any provision for infusion of funds for the purpose incurring the CIRP costs by the SRA.

(g) The Resolution plan purports to incentivize the financial creditors for providing NIL payment to operational creditors.

Pleadings of the Resolution Professional/ Corporate Debtor

45. The Respondent submitted that the dues of YATCL and Society, being the lessors of the land, stand on a different footing when compared to other Operational Creditors. The Respondents emphasised that the hotel of the Corporate Debtor is built on the land provided on lease by YATCL and the Society, therefore, the Adjudicating Authority correctly recognized this aspect

in the Impugned Order i.e., the claims of all the operational creditors can not be considered similar and consequently they cannot be paid in equal proportion.

46. The Respondent submitted that there is a clear subclass of Operational Creditors which was envisaged by the SRA and hence the category of Special Operational Creditor has been created which is legally permissible.

47. The Respondent submitted that the preamble of the Code clearly establishes that resolution of the Corporate Debtor is the prime objective of the Code as amplified by the Hon'ble Supreme Court in the matter of ***Swiss Ribbons (Supra)*** and intention of present Resolution Plan is same.

48. The Respondent stated that in ***K. Shashidhar Vs Indian Overseas Bank & Ors*** in *Civil appeal No. 10673 of 2018 with 10719 & 10971 of 2018 and SLP No. 29181 of 2018*, held that the commercial wisdom of the CoC has been given paramount status without any scope for any judicial intervention for ensuring the resolution of the Corporate Debtor within the timelines prescribed in the Code. The Respondent stated that neither the Adjudicating Authority nor this Appellate Tribunal have been given any jurisdiction to reverse the decision taken in excise of commercial wisdom of the CoC.

49. The Respondent submitted that project related agreements i.e., the lease agreement and the Development Management Agreements entered by the Corporate Debtor with Society and the YATCL are the essential agreements of

the BOT model who as the owner of the land has leased the premises to the Corporate Debtor.

50. The Respondent submitted that, though agreeing to the contention of the Appellants that some of them are registered as MSMED units for which certain benefits and reliefs have been provided under the MSMED Act, the Appellant's cases do not fall under protective net of provisions of MSMED Act, as the MSMED act being an act enacted in the year 2006, is subservient to the provisions of the Code which has a non-obstante clause under section 238 of the Code.

51. The Respondent submitted that the Hon'ble Supreme Court of India in ***Committee of Creditors of Essar Steel India Limited Vs. Satish Kumar Gupta & Ors.*** (Civil Appeal No. 8766-67 of 2019) held that it is the commercial wisdom of the requisite majority of the CoC which is to negotiate and accept a resolution plan, which may involve differential payment to different classes of creditors. The Respondent further stated that the Section 30 (2)(b) of the Code deals with the payments of debts of the operational creditors and in explanation (1) given in the said section, it has been clarified that a distribution in accordance with provisions of clause (b) of Sub Section (2) of Section 30 shall be fair and equitable to such creditors. The Respondent elaborated that as long as the payment and distribution to the creditors under the plan is in compliance of the Section 30(2)(b) (i) & (ii), the same has to be considered as fair and

equitable and therefore the allegation of distribution being made to Operations Creditors being NIL therefore, contravenes the provisions of the Code is not correct. The Respondent stated that the Resolution Plan submitted by the SRA is in compliance with the provisions of Section 30(2)(b), as the liquidation value payable to the Operational Creditors is NIL.

52. The Respondent submitted that in terms of ratio of ***"Pratap Technocrats Vs Monitoring committee of Reliance infratel...& Ors"*** (Civil appeal no.676 of 2021 (2020-10 SCC 623), the Adjudicating Authority or Appellate Tribunal does not have any residual jurisdiction with respect to modification of the claims once the resolution plan is approved and commercial wisdom of the CoC in approving the resolution plan can not be interfered.

53. The Respondent submitted that in the matter of Arbitration between Golden Jubilee Hotels (p) Ltd and the State of Telangana (YATCL), the award has been pronounced on 25.02.2020 and monetary claims made by M/s GJHPL is awarded to the extent of Rs.25.95 Crores which has been challenged by the YATCL under section 34 of the Arbitration and conciliation act before the City Civil and Commercial Court- Hyderabad vide COP 39 of 2020.

54. The Respondent elaborated that the approved resolution plan provides for Rs. 41.99 Crores as the amount of "Society Claim," towards lease and DMA dues. The Respondent explained that the claims filed by the operational creditors aggregating to Rs.112.52 Crores out of which Rs.50.07 Crores have

been admitted which excludes Rs. 41.99 Crores as the Society Claim. The Respondent submitted that the claims of YATCL and Society as Special Operational Creditor, have been earmarked as amount of upto society claims forming part of Upfront Financial Commitment of the approved Resolution Plan. The Respondent submitted that a conjoint reading of the clauses 8.2.1 of the approved resolution plan and the "upfront financial commitment" denote that the SRA would engage in discussion with the special operational creditor to arrive at a negotiated settlement with respect to the "Upfront Financial Commitment" as mentioned in the approved resolution plan. The Respondent stated that the “Upfront Financial Commitment” has been defined in clause no. 1.22. It has been clarified by the SRA that in case the Actual special operational creditor amount is higher than that of the society claim then the difference between the Actual Special Operational Creditor Amount and the Society Claim would be added to Rs. 384 Crores. i.e., "Upfront Financial Commitment".

55. The Respondent stated that in addition, as a part of Corporate Debtor’s contractual obligations, the lease rentals and DMA amounts as specified by lease agreements, entered by the GJHPL are being paid to YATCL during CIRP to maintain the Corporate Debtor as a "Going Concern." Against this back ground, the negotiations are being undertaken by the SRA for arriving at a positive settlement with Special Operational Creditor (i.e., YATCL and Society) keeping in view the special status of the project and the overall economic

viability of the project and potential financial benefits that would accrue to the Corporate Debtor which would eventually result in value maximization of assets of the Corporate Debtor.

56. The Respondent submitted that the alleged contention that the Resolution plan purports to incentivize the financial creditors is frivolous and the liquidation value is far less than the total amount of admitted claims of the financial creditors and hence as per the provisions the code the amounts which are purported to be distributed would be as per the water fall mechanism under section 53 of the Code and resultantly the value available to the operational creditors is NIL.

57. The Respondent empathetically submitted that the CoC can approve the Resolution Plan which provide different amounts to different creditors as per their collective commercial wisdom. The Respondent referred to the judgments of this Appellate Tribunal in submissions of this pleadings and relied to ***Excel Engineering & Ors vs Mr. Vivek Murlidhar Dabhade*** and ***Resolution Professional of New Phaltan Sugar Works Ltd.*** in Comp. Apps. (AT) (Ins.) No. 85-86 of 2020, where this Appellate Tribunal held that *"....Different class of creditors can be treated differently and the contention that all the operational creditors shall be treated on equal footing is not tenable"*. The Respondent stated that Resolution Plan is not discriminatory and is not in violation of Section 30(2) of the Code and further Section 53 of the Code categorically

provides different priorities of payments for Employees, Statutory Dues and other Operational Creditors. The Respondent elaborated that suitable classification would depend upon the facts and circumstances of each case and the nature of the industry and the Modus Operandi of the functioning of the Corporate Debtor.

58. The Respondent also cited this Appellate Tribunal's order in the case of ***Sai Balaji Facility vs CA Ramchandra Dallaram Choudhary, RP for Adico Forge Pvt. Ltd. & Ors.-*** *Company Appeal (AT) (Ins) No. 1642 of 2024*, where it was held 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 and this Appellate Tribunal in this case did not find any error in the Order of the Adjudicating Authority, approving the Resolution Plan.

59. The Respondent cited to the case of this Appellate Tribunal in the matter of ***Paramvir Singh Tiwana & Ors V Puma Realtors thru R Pawan Kumar Garg, and Ors*** (NCLAT Principal Bench New Delhi- Company Appeal (INS) No. 554 of 2021) [(2022) SCC online NCLAT 1605], where it was held that :-

> *"In approval of Business plan, the COC takes a business decision based on ground realities by majority which binds all the stakeholders including the dissenting creditors…"In the instant case cited, the GMADA being the owner of the land and a secured creditor have not filed their claim in the CIRP. However, keeping in view, the nature of business*

(real estate) and ground realities the COC has taken a commercial decision"

(Emphasis Supplied)

60. The Respondent negated that pleadings of the Appellant regarding conditional Resolution Plan keeping in view "Condition Precedent" as well as Arbitrations amount discussed earlier. In this connection, the Respondent cited judgment of this Appellate Tribunal in the case of ***Santosh Wasantrao Walokar Versus Vijay Kumar V. Iyer and Another*** passed in *Company Appeal (AT) (Insolvency) No. 871-872 of 2019 [(2020) SCC OnLine NCLAT 128]* , where the following was held :-

"30. The issues raised in the present Appeal is accordingly answered below:-…

(ii)…The Adjudicating Authority and Appellate Authority has to go by various propositions of law stated above accordingly to which they have to go by the commercial wisdom of the committee of creditors while approving the Resolution Plan. The given Resolution Plan is conditional but since according to the express directions given by Supreme Court in the various stated above. The Adjudicating Authority per se will have to go the Commercial wisdom of Committee of Creditors."

(Emphasis Supplied)

61. Concluding, his arguments, the Respondent requested to dismiss all four appeals with costs.

Pleadings of SRA

62. The SRA gave the background of the case and highlighted the important provisions of the Resolution Plan He summarized and brought out the key clauses of the Resolution Plan which reads as under –

Cl. 1.1(a) and (b): As per the approved resolution plan admitted claims of financial creditors are Rs. 949.83 Crores, admitted claims of operational creditors amount to Rs. 50.07 Crores, which excludes the claims of YATCL and Society of Rs. 41.99 Crores. The SRA has earmarked Rs. 41.99 Crores ("Society Claim") to be paid to the GoT/ Special Operational Creditor.

Cl. 1.1 r/w Cl. 1.2.3(c) r/w Cl. 8.2.2:Liquidation value of the Corporate Debtor is 'Nil'. Hence, no payment has been proposed to Operational Creditors and the Other Creditors

Cl. 8.2.1 @ Pg. 21 r/w the Definition of Actual Special Operational Creditor Amount in Schedule 1: The amount to be actually paid to the GoT/ Special Operational Creditor is termed as "Actual Special Operational Creditor Amount", which is the final negotiated amount payable to GoT pursuant to negotiations between the SRA and GoT

[Note: The SRA is negotiating with the GoT because (i) after making a claim of Rs. 41.99 Crores, the GoT sent a letter dated 14.09.2018 to the Corporate Debtor claiming Rs. 76.13 Crores, and (ii) there is an Arbitral Award dated 25.02.2020 ("YATC Arbitral Award") for an amount of Rs. 25.95 Crores in

favour of the Corporate Debtor and the GoT, has challenged the same and the monies have not been paid to the Corporate Debtor until now. By way of negotiations, the SRA is inter alia aiming to arrive at a final Actual Special Operational Creditor Amount to be paid to GoT in settlement of all past, present and future claims of GoT vis-à-vis the Corporate Debtor.]

Table in Cl. 1.2.2: Upfront Financial Commitment to be paid by the SRA to inter alia GoT/ Special Operational Creditor (Actual Special Operational Creditor Amount) and Financial Creditors (Upfront FC Amount) is Rs. 384 Crores.

Note: Financial Creditors, who are only entitled to receive sums forming a part of Rs. 384 Crores as per the Approved Resolution Plan, are taking haircuts of more than 60% against their admitted claims of INR 949.83 Crores.

6.1 **Cl. 8.2.5**: If the Actual Special Operational Creditor Amount, after negotiations with the GoT, is fixed at an amount which is greater than the Society Claim/ INR 41.99 Crores, the amount in excess of INR 41.99 Crores will be added to the Upfront Financial Commitment, i.e., the excess amount will be paid in addition to Rs. 384 Crores.

6.2 **Cl. 8.2.5 r/w Definition of Upfront Payment Amount in Schedule 1**: If the Actual Special Operational Creditor Amount, after negotiations with the GoT, is fixed at an amount which is lesser than the Society Claim of Rs. 41.99 Crores, the SRA will pay the Upfront Payment Amount (which will

automatically increase proportionate to the money saved from the earmarked sum of Rs. 41.99 Crore for the GoT). Over and above, the SRA will also pay an additional Rs. 17 Crores to the Financial Creditors.

6.3 **Cl. 1.2.5 along with the Definition of Net Cash in Schedule 1**: After transferring a sum of INR 16 Crores to a new bank account of the Corporate Debtor to be opened by the SRA and to be used for the Corporate Debtor's operational expenses, all excess cash remaining in the existing bank accounts of the Corporate Debtor, will be transferred to the Financial Creditors

Note: In light of the above, there is no possibility of any gains occurring to the SRA or Corporate Debtor by way of the negotiations with GoT, or the YATCL Arbitral Award, or even otherwise.

63. The SRA highlighted that differential treatment inter se the same class of creditors is legal and permissible, like Special Operational Creditor in the present case. The SRA stated that. Explanation 1 to Section 30(2)(b) of the Code only mandates that distribution of dues to operational creditors shall be "fair and equitable". The legislature has consciously used the words "fair" and "equitable" as opposed to "equal" or "proportionate" as is being claimed by the Appellants.

64. The SRA submitted that during CIRP, the distribution of dues to operational creditors can differ and may not be equal or proportionate, as long as, there is an intelligible differentia behind such unequal treatment which

renders such treatment to be just, fair and reasonable, depending on the facts and circumstances of each case. It is the case of the SRA that in the present case, the SRA, CoC, Resolution Professional as well as the Adjudicating Authority, agreed that the priority and special treatment to be given to the GoT/ Special Operational Creditor is fair and equitable in the typical facts and circumstances, whereby the GoT has a special status qua the Corporate Debtor and performs an indispensable and important role being lessor of the land on which hotel is situation.

65. The SRA submitted that the Hon'ble Supreme Court of India and this Appellate Tribunal have upheld several resolution plans which provide for differential treatment of creditors belonging to the same class. The SRA cited the case of ***Essar Steel (Supra)***, where an example of electricity dues (operational debt) was cited to state that a particular set of dues may be paid in full so that carrying on business of the Corporate Debtor does not become impossible. The Respondent stated that the Hon'ble Supreme Court of India consciously stated that such special dispensation, if given to electricity dues, may result in a consequent reduction of amounts payable to other financial and operational creditors, which is the commercial wisdom exercised by the CoC and resolution applicant to decide how CIRP is to take place.

66. The SRA brought to our notice to judgment of this Appellate Tribunal in case of ***Excel Engineering (Supra)***, where it was held that a particular class

within the class of operational creditors, i.e., farmers, was separated and paid their dues in full, while other operational creditor was paid only 1%. This Appellate Tribunal held that classification and priorities of payments would depend on facts and circumstances and nature of the industry.

67. The SRA stated that yet in other case, this Appellate Tribunal gave similar ration i.e., in the case of ***Sabari Realty Private Limited v. Sivana Realty Private Limited & Ors.,*** Company Appeal (AT) (Insolvency) No. 1162 of 2023, where it upheld the approval of a resolution plan which created two separate classes within the same class of creditors/ homebuyers, i.e., (i) affected homebuyers, and (ii) unaffected homebuyers, on the ground that the classification was justified in the facts and circumstances and there was no violation of any provision of law, upholding the commercial wisdom of CoC.

68. The SRA cited the case of in ***Beacon Trusteeship Ltd v. Jayesh Sanghrajka & Ors.***, Company Appeal (AT) (Insolvency) No. 1494 – 1495 of 2022, where this Appellate Tribunal upheld a resolution plan wherein the class of financial creditors was divided into two sub-classes, i.e., homebuyers/ allottees and other financial creditors. While the homebuyers/ allottees were given 100% of their dues, the other financial creditors suffered 93% haircuts.

69. The SRA cited that in the present case, the priority and special dispensation given to GoT/ Special Operational Creditor is “fair and equitable” because as per the Memorandum of Association of the Corporate Debtor, the

sole object and business of the Corporate Debtor is to develop and manage the 5-star hotel – Trident, Hyderabad, which is constructed on a land owned by the GoT and leased to the Corporate Debtor vide the Lease Agreement dated 09.05.2007, continuation of the which is absolutely essential for the continuity of the business of the Corporate Debtor. Further, the GoT and the Corporate Debtor have entered into a Development and Management Agreement dated 09.05.2007 which clarifies that the Project is PPP model and on BOT basis. The Corporate Debtor is a SPV created by a consortium of several private members, all jointly and severally responsible for development and operation of the Project.

70. The SRA stated that the GoT is not simply a lessor/ landlord to the Corporate Debtor, but a 'partner', which enjoys many more rights qua the Project, as opposed to being simply entitled to lease rentals: The GoT is entitled to 'Lease Rentals' as consideration for grant of lease. The GoT is entitled to an 'Additional Development Premium' from the Corporate Debtor, which is akin to a revenue share, and is a minimum amount as specified in Schedule C of the D&M Agreement or 3% of the gross revenue earned from the Project The Corporate Debtor has provided bank guarantees to the GoT for due and punctual performance of its obligations under the Lease Agreement and D&M Agreement, and is required to furnish fresh bank guarantees upon occurrence of events of default. GoT is entitled to clear any outstanding amounts of lenders in

case of default by the Corporate Debtor, terminate the lease, repossess the site along with the Project. The GoT is not required to change the land use under any circumstances. The GoT is at liberty to terminate the D&M Agreement at its absolute discretion even during subsistence of the lease period, and upon such termination, the GoT will buy-out the Project based on a business valuation by an independent valuer. At the time of expiry of the Lease Period (which expires in 2040 as of now) by efflux of time and in the normal course, the site along with all immoveable assets shall be handed over by the Corporate Debtor to the GoT in proper condition and without any damages.

71. The SRA submitted that the nature of relationship between the Corporate Debtor and the GoT is not one where the interaction and dependency is a one-time event but the engagement is continuous and inevitably requires the highest degree of trust, mutual confidence, good faith, cooperation, consensus and collaboration between both parties. The GoT plays an all-pervasive role in the development, management and operations of the Project during and after the lease period.

72. The SRA elaborated that "Fair and equitable" treatment means equal treatment of parties who are similarly placed. The Appellant Operational Creditors herein are operational creditors, who are certainly not similarly placed with the GoT/ Special Operational Creditor. The Appellant Operational Creditors are merely providers of goods and services to the Corporate Debtor

and do not hold any security interest and the Corporate Debtor is at liberty to avail the goods and services from the present Appellant Operational Creditors or any other such providers. Thus, the Appellant Operational Creditors are not indispensable, unlike the GoT/ Special Operational Creditor, who are lessor of land on which hotel is situated and Corporate Debtor can't survive without support of Special Operational Creditor.

73. The SRA reiterated that the categorisation of the GoT as Special Operational Creditor is based on an intelligible differentia, and is just, fair, equitable and coherent with the principles of natural justice. The Appellant Operational Creditors are being paid their liquidation value, i.e., 'Nil' and the Appellant Operational Creditors do not have any locus standi to claim payments as a right in the present facts and circumstances.

74. The SRA denied the case-laws relied upon by the Appellants which are distinguishable and inapplicable to the facts of the case for the following reasons:

(i) ***Pratap Technocrats (P) Ltd. v. Reliance Infratel Ltd. (Monitoring Committee)***, (2021) 10 SCC 623,

The SRA stated that in this case the Hon'ble Supreme Court merely reiterated that payments under a resolution plan must be "fair and equitable" amongst the operational creditors and nowhere the Hon'ble Supreme Court held

that differential treatment of creditors belonging to the same class/ operational creditors is ipso facto not "fair and equitable".

(ii) ***Akashganga Processors Pvt Ltd. v. Shri Ravinda Kumar Goyal & Ors.,*** Company Appeal (AT) (Ins) No. 1148/2017, National Company Law Appellate Tribunal

The SRA clarified that special treatment was sought to be given to tax authorities and the only reason why this Appellate Tribunal did not permit special treatment of the aforesaid tax authorities was because the special treatment had no nexus with the revival of the corporate debtor or to ensure its survival as a 'going concern'. Hence, there was no intelligible differentia which could justify the special treatment. The SRA stated that in the present case, special treatment of the GoT in the Resolution Plan has a direct nexus to the revival of the Corporate Debtor and to ensure its survival as a 'going concern'.

75. The SRA stated that the Resolution Plan treats the monies received under the Arbitral Award in a fair manner and there is no possibility of any windfall gain being caused to the SRA or the Corporate Debtor. The SRA submitted that the YATCL Arbitral Award of Rs. 25.95 Crores has no impact on the liquidation value of the Corporate Debtor, which remains Nil. Hence, any amounts to be received by the Corporate Debtor pursuant to the YATCL Arbitral Award shall have no impact on distribution of dues to the Appellant

Operational Creditors/ operational creditors as per the provisions of Section 30(2)(b) or Section 53 of the Code.

76. The SRA further elaborated that any monies gained by the Corporate Debtor, or saved by the SRA, as a result of the YATCL Arbitral Award and/ or negotiations with the GoT/ Special Operational Creditor, will be added to the kitty of the Financial Creditors. This provision was instrumental to obtain the approval of the CoC for the Approved Resolution Plan in its commercial wisdom. In any case, the Appellant Operational Creditors cannot claim a right to the amount as the same is reserved for the benefit of the Financial Creditors.

77. The SRA stated that the condition precedent in the Approved Resolution Plan do not violate the Code. The sole condition precedent to the implementation to the Approved Resolution Plan is obtaining GoT's consent for change of control and restructuring of the Corporate Debtor. The Condition Precedent has been inserted because the Corporate Debtor has specific obligations to maintain a minimum shareholding of the original promoters of the Corporate Debtor under the Development and Management Agreement dated 09.05.2007 which provides that the Lead Developer shall maintain a minimum equity holding of at least 26% and stake never being less than any other member and unless explicitly agreed by the GoT, the combined shareholding of all original members shall not be less than 68%. The SRA clarified that Development & Management Agreement is co-terminus with the Lease

Agreement, which means that, if prior consent of the GoT is not received for change in shareholding of the Corporate Debtor, the Development & Management Agreement and Lease Agreement can be terminated by the GoT, which would be a death knell for the Corporate Debtor.

The SRA submitted that in light of the pre-existing contractual arrangements between the GoT and the Corporate Debtor, the Condition Precedent is absolutely essential for the business of the Corporate Debtor and implementation of the Approved Resolution Plan, which is legally permissible.

78. The SRA cited this Appellate Tribunal in ***Jet Aircraft Maintenance Engineers Welfare Association v. Ashish Chhawchharia Resolution Professional of Jet Airways (India) Ltd. & Ors***., Company Appeal (AT)(Insolvency) No. 752 of 2021, where this Appellate Tribunal upheld the validity of condition precedent necessary for the implementation of the resolution plan. The aforesaid judgment of this Appellate Tribunal has been upheld by the Hon'ble Supreme Court of India vide Order dated 30.01.2023 passed in Civil Appeal No. 407/ 2023.

79. The SRA stated that this Appellate Tribunal in ***AJR Infra and Tolling Ltd. v. Sutanu Sinha,*** Company Appeal (AT) (Insolvency) No. 920 of 2022 stipulated the ratio regarding the validity of condition precedent which is necessary for implementation of the resolution plan itself, this Appellate Tribunal also distinguished the Hon'ble Supreme Court's judgment in ***Ebix***

Singapore Private Limited v. Committee of Creditors of Educomp Solutions Limited & Anr., *[(2021) 14 S.C.R. 321]* on the grounds that Ebix (Supra) was not concerned with a situation where the conditions precedent were critical for the implementation of the resolution plan itself.

80. The SRA submitted that the provisions of the MSMED Act do not override the provisions of the IBC as under the Code, there exist no preferential rights in the favour of operational creditors who are registered MSMEs under the MSMED Act, 2006.

81. The SRA submitted that this Appellate Tribunal has not been vested any jurisdiction to modify the Approved Resolution Plan and direct redistribution of "payable amount to other Operational Creditor from amount payable to the GoT/ Special Operational Creditor as this is impermissible in law. The Hon'ble Supreme Court of India has held in ***SREI Multiple Asset Investment Trust Vision India Fund v. Deccan Chronicle Marketeers & Ors.,*** Civil Appeal No. 1706 of 2023 (Order dated 17.03.2023), that once a resolution plan is approved by the CoC, the Adjudicating Authority or this Appellate Tribunal have no authority to modify or alter the Resolution Plan.

82. Concluding his arguments, the SRA requested this Appellate Tribunal to dismiss all these appeals with exemplary costs.

Pleading of CoC

83. The CoC submitted that the Impugned Order dated 07.02.2020 is lawful and in accordance with the principles laid down by the Hon'ble Supreme Court & as per code, therefore cannot be looked into.

84. The CoC submitted that decision of the Resolution Plan are non-justiciable as the commercial wisdom of the CoC is supreme. The CoC stated that the Resolution Plan received the requisite approval vote, complied with all legal requirements and therefore there is no scope for any judicial interference with commercial wisdom of CoC in view of Apex Court judgments in several cases as cited by the counsel for SRA.

85. The CoC elaborated that full payment to Special Operational Creditors, is not prejudicial to any stakeholder including or the other Operational Creditors. The Special Operational Creditors provided land for the Hotel of corporate debtor on lease, therefore in order to keep the Corporate Debtor as going concern it was important to secure the land. The CoC stated that in absence of such leased land, there would be nothing left with Corporate Debtor, so differential treatment to State/YATCL & Society cannot be faulted with.

86. The CoC strongly defended the Discrimination within same class of Operational Creditors**.** The CoC stated that the issue of discrimination within the same class of Operational Creditors is settled law, as the Hon'ble Supreme

Court has held in *Essar Steel v. Satish Kumar Gupta* (supra) that differential treatment is permissible, if Operational Creditors are paid at least their liquidation value. In this case, since the liquidation value payable to Operational Creditors is NIL, the appellants have not suffered any loss or prejudice from the payment made to the Government of Telangana/YATCL & Society.

87. The CoC negated the pleadings of the Appellants that the Resolution plan is not firm due to potential variations in payment amounts to GoT/YATCL & Society. The CoC stated that the flexibility of variations ensures the Resolution Plan's viability despite ongoing arbitration-related negotiations. As the Resolution Plan's includes provisions for full payment of society dues, there is no risk to its implementation, and GoT/YATCL & Society will have no grounds to withhold cooperation once fully compensated.

88. The CoC clarified the issue regarding availability of additional funds on account of award in arbitration proceedings and stated that the claim of additional funds from the arbitration award is unfounded, as the award is under challenge under Section 34 of the Arbitration & Conciliation Act. Furthermore, the corporate debtor's claims are smaller than those of GoT/YATCL, making it unlikely for any significant funds to accrue to the corporate debtor from this source.

89. The CoC denied the allegations of the Appellant that the SRA has terminated the Resolution Plan. The Respondent clarified that the termination of

the Resolution Plan by the SRA occurred over a year after its approval. However, the Bank of Baroda has filed IA No. 509/2021 before the Adjudicating Authority for the implementation of the approved plan, which is still pending. The withdrawal has not been approved by the Adjudicating Authority, and the SRA has requested more time for implementation due to ongoing negotiations with YATC/GoT. The Adjudicating Authority has granted adjournments and extensions for implementation starting from December 22.

90. The CoC defended that long delay in implementation and stated that the delay in implementing the Resolution Plan was due to litigation and the same cannot be used as a basis to allow an appeal against the plan. The CoC stated that the approval of the plan should be assessed based on the facts available at the time of the impugned order.

91. The CoC requested this Appellate Tribunal to dismiss all these appeals.

Findings

92. The following issues emerges in above four appeals which are as under :-

93. **Issue (I)** Whether separate class of creditors can be created under the broad category of Operational Creditors especially “special operational creditor”.

Issue (II) Whether, differential treatment inter-se the same class of creditors is permissible.

Issue (III) Whether this Appellate Tribunal can exercise jurisdiction and direct redistribution without any change in Resolution Plan and not infringing upon commercial wisdom of CoC.

Issue (IV) Whether the condition precedent in the approved Resolution Plan violated Code and Regulations.

Issue (V) Whether the provisions of MSMED give protection to MSME status Operational Creditors in CIRP proceedings under the Code and Regulations.

Issue (VI) Whether Arbitral Award which came in favour of the Corporate Debtor post CIRP will have impact in the present case.

94. Issue (I) Whether separate class of creditors can be created under the broad category of Operational Creditors especially "special operational creditor".

Issue (II) Whether, differential treatment inter-se the same class of creditors is permissible.

Issue (III) Whether this Appellate Tribunal can exercise jurisdiction and direct redistribution without any change in Resolution Plan and not infringing upon commercial wisdom of CoC.

i. The crux of the matter in these appeals relates to differential treatment given to various categories of Operational Creditors.

ii. We have noted from the pleadings that different Operational Creditors in the present case have given different services or supplies to the Corporate

Debtors like supplying material, construction of facade, providing furniture, providing interior decorations or even the land which has been given on lease by YATCL and the Society on two different plots owned by these government entities.

iii. It is the case of the Appellants that the Resolution Plan has categorized a sub-class within the class of Operational Creditors giving special and preferential treatment to YATCL and Society (Special Operational Creditor). We note that the 100% of claims of both the entities have been provided for payment in the approved Resolution Plan and they have been classified as "special Operational Creditors"; in contrast to other Operational Creditors who have been clubbed together (other than Special Operational Creditors) and given NIL payment in the Resolution Plan.

iv. It is an undisputed fact that the claims of the all the Operational Creditors were collated by the Resolution Professional after submission by respective Operational Creditors in Form B. After legal battles before the Adjudicating Authority and this Appellate Tribunal, the Resolution Professional admitted the various claims of the Operational Creditors and put up to the CoC. We note that the SRA dealt the claims of all creditors i.e., Financial Creditor, Operational Creditor, Special Operational Creditor, employees, workmen, etc., in the Resolution Plan.

v. At this stage, we would like to take into account details provided in the Resolution Plan giving the details of status of claims, financial commitments, admitted claims and proposed payment, etc. The relevant portion of the Resolution Plan as submitted by SRA dated 17.12.2018 reads as under :-

EXECUTIVE SUMMARY

1. TREATMENT OF CLAIMS

1.1 Status of claims

Based on the information made available to the Resolution Applicant in the Shared Data by the Resolution Professional:

(a) the debt filed by each of the Financial Creditors with the Resolution Professional has been admitted and it amounts to an aggregate of INR 949.83 crores (**"Admitted Financial Debt"**);

(b) the claims filed by the Operational Creditors of the Company with the Resolution Professional aggregate to INR 112.52 crores, out of which claims of INR 50.07 crores have been admitted. The amount of claims filed as specified in this clause excludes the claims of INR 41, 99,92,797 (**"Society Claim"**) submitted by the Society Further, the Special Operational Creditor vide its letter dated September 14, 2018 has claimed an amount of INR 76,13,93,422;

(c) the claims filed by Other Creditors of the Company with the Resolution Professional aggregate to INR 10.19 crores out of which claims of INR 5.94 crores have been admitted; and

(d) a claim of an aggregate amount of approximately INR 6.46 crores has been filed by three employees of the Company with the Resolution Professional out of which claim, an amount of approximately INR 3.44 crores has been admitted.

The requirement for disclosing the Liquidation Value of a company undergoing insolvency resolution process to the resolution applicant has been dispensed with. Accordingly, the Liquidation Value of the Company is currently not available to the Resolution Applicant. Consequently as per the Resolution Applicant's estimate: (i) the liquidation value would not be sufficient to cover the amounts owed to the Financial Creditors in full; and (ii) if the Company were to be liquidated, other than liquidation costs and CIRP Costs, it is only the Financial Creditors and workmen of the Company, who will be entitled to receive the liquidation proceeds (proportionate to the Admitted Financial Debt owing to the Financial Creditors and the workmen's dues which have been unpaid for a period of 24 (twenty four) months preceding the commencement of the CIRP of the Company respectively).

1.2 Financial Commitment

1.2.1 As part of the Resolution Plan, the Resolution Applicant proposes to infuse the Financial Commitment into the Company, directly or indirectly, through equity, or through equity and/or debt (**"Capital Instruments"**).

1.2.2 Please see below the amounts submitted as a bid for the Company and the break-down of various purposes for utilisation of such amounts (collectively **"Financial Commitment"**).

BREP Asia II Indian Holding Co II

	Particulars	Amounts (INR crores)
1.	Workmen Liquidation Dues, if any.	384
2.	Employee Liquidation Dues, if any.	**"Upfront Financial Commitment"**
3.	Liquidation Value of Operational Creditors and Other Creditors, if any.	
4.	Any other Liquidation Value required to be paid under the Code in priority to the amounts owed to the Financial Creditors, if any. (Amounts mentioned in serial numbers 1, 2, 3 and 4 above collectively referred to as **"Mandatory Payment Amounts"**).	
5.	Actual Special Operational Creditor Amount.	
6.	Upfront FC Amount.	
1.	Payment of excess CIRP Costs to the extent not met out of the Company's operating cash flows;	180
2.	Capex and Working Capital Requirements, on a need to do basis; and	**"Capex Financial Commitment"**
3.	Transaction related expenses	
Identified Bank Guarantees		20.02
Financial Commitment		584.02

1.2.3 No payment has been proposed to:

(a) the unsecured Financial Creditors, as the Resolution Applicant understands from the information provided in the Data Room, that the Financial Creditors who have submitted the Admitted Debt are all secured Financial Creditors.

(b) the employees of the Company, since the liquidation value owing to the employees is expected to be NIL. However, the employees will be paid Employee Liquidation Dues, if any.

PART B. FINANCIAL PROPOSAL

8. MANDATORY CONTENTS OF THE RESOLUTION PLAN

This part of the Resolution Plan outlines the various payments to be made to different classes of Creditors and stakeholders of the Company, which shall in summary be as follows[4]:

Sr. No.	Category of Claims[5]	Amount Claimed (INR)	Amount Admitted (INR)	Resolution Amount as part of the Resolution Plan (INR)
A	**CIRP Costs** [6]	As per actuals	As per actuals	As per actuals
B	**Payment towards claims**			
1.	Workmen and employee dues	6.46 Cr	3.44 Cr	0
2.	Special Operational Creditor	Society Claim	-	Actual Special Operational Creditor Amount[7]
3.	Financial Creditors	949.83 crores	949.83 crores	Upfront Payment Amount
4.	Creditors who have issued Identified Bank Guarantees	20.02 crores	20.02 crores	To be continued by the banks who have issued the Identified Bank Guarantees
5.	Operational Creditors other than Special Operational Creditor	INR 112.52 crores and the Society Claim	50.07 crores	0
6.	Other Creditors, if any	10.19 crores	5.94 crores	0

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4 The financial bid has been provided on the assumptions that: (i) all Clearances required for the construction and operation of the projects which are undertaken by the Company until the date of this bid submission are in place and are full and complete, other than as disclosed in the Shared Data; (ii) there is no information which has been withheld or which will negatively affect the status of the projects housed in the Company or otherwise in relation to this resolution process and submission of bid in this CIRP; (iii) the fixed assets of the Company as set out in the Provisional Balance Sheet have not been alienated, disposed or transferred in any manner (and nor has any security interest or Encumbrance been created over such assets after the commencement of CIRP in respect of the Company).

5 For the purposes of this Resolution Plan, the List of Creditors has been relied upon to determine/arrive at the Admitted Financial Debt.

6 These amounts are computed in accordance with the provisions of the Code and the Resolution Applicant is given to understand that such costs are being met on a monthly basis out of the cash flows of the Company and any CIRP Costs which are outstanding as at the NCLT Approval Date are proposed to be paid in accordance with Clause 8.1 of this Resolution Plan.

7 The Resolution Applicant has assumed that the Society Claim is a part of this amount and not in addition to it.

vi. From above, it is noted that the total admitted claims of the Financial Creditors is Rs. 949.83 Crores.

vii. Similarly, the claims filed by the Operational Creditors aggregated to Rs. 112.52 Crores, out of which the claim of Rs. 50.07 Cores have been admitted. It is significant to note that such admitted claim of Operational Creditors excluded claims of Rs. 42 Crores (Approx.) of Special Operational Creditors and further the Special Operational Creditor vide letter dated 14.09.2018 has claimed amount of Rs. 76 Crores (Approx.).

viii. Similarly, other creditors have filed claims of Rs. 10.19 Crores and Rs. 5.94 Crores has been admitted. Three employees have filed claims of Rs. 6.46 Crores, out of which Rs. 3.44 Crores (Approx.) has been admitted.

ix. We also note from the Resolution Plan furnished by the SRA that total financial commitment providing amount for various categories was Rs. 584.02 Crores which included' the claims of special Operational Creditors.

x. It will be relevant to note that from the above quoted tables (information) note No. 1 reads as under :-

xi. "The Actual Special Operational Creditor Amount is higher than the Society claim, then the difference between the Actual Special Operational Creditor Amount and the Society Claim will be added to

Rs. 384 Crores and shall be deemed to be the restated Upfront Financial Commitment.

xii. The Appellants empathetically argued before us that such extra ordinary treatment of Operational Creditors classifying into special Operational Creditors is illegal and perverse as the same is not envisaged in the Code or the Regulations.

xiii. It would be worthwhile to take into account the relevant definitions as provided in the Code, having effect in the present appeal lik Section 3(6), 3(10), 5(7), 5(8), 5(20) and 5(21) of the Code, which are reproduced as under :-

> *"**3. In this Code, unless the context otherwise requires**, —*
> *(6) "**claim" means**— (a) a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured; (b) right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured"*
> *Section 3(10) –*
> *"(10) "**creditor**" means any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decree holder"*
> *Section 5(7) –*
> *"**5. In this Part, unless the context otherwise requires, —***
> *(7) "**financial creditor**" means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to"*

Section 5(8) –
*"(8) "**financial debt**" means a debt alongwith interest, if any, which is disbursed against the consideration for the time value of money and includes…*
*"(20) "**operational creditor**" means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred"*
Section 5(21) –
*"(21) "**operational debt**" means a claim in respect of the provision of goods or services including employment or a debt in respect of the repayment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority"*
(Emphasis Supplied)

xiv. We note that claim is the basic ingredient of the debt which is due and payable by the Corporate Debtor to such class of Creditors. While considering resolution of the Corporate Debtor, the claims are dealt in accordance with the approved Resolution Plan under Section 31 of the Code failing which they are dealt under Section 53 of the Code during liquidation of the Corporate Debtor.

xv. Broadly the creditors can be classified into two categories, namely, the Financial Creditor and the Operational Creditor. The Financial Creditor by nature provides financial facilities. The claims of such Financial Creditors are dealt in Resolution Plan and the Financial Creditor constitute the CoC. As against this, the Operational Creditor are the Creditors who have provided goods and services to the Corporate Debtor whose claims are also dealt in the Resolution Plan but Operational

Creditor are not made members of the CoC except in accordance with the Code.

xvi. Generally, speaking Financial Creditor allocate maximum amount possible to themselves since they are in CoC and being in CoC it is for them to consider the approval of Resolution Plan or otherwise and only on recommendation of CoC, the Resolution Professional files suitable IAs before the Adjudicating Authority for approval of the Resolution Plan.

xvii. In the present case, YATCL and Society claims will also fall in the definition of Operational Creditor like other Operational Creditors who supplied various services, noted earlier.

xviii. For amount to be categorised as operational debt, it should satisfy the definition of Section 3 (6) of the Code i.e., "claim" and such claims should satisfy the definition of debt as referred to under Section 3(11) of the Code and again it should satisfy the definition of Operational Debt as contained in Section 5(21) of the Code. We note that no word like "special Operational Creditor" has been defined under Section 3 or 5 of the Code or anywhere else or even in the regulations.

xix. The claims payable by the Corporate Debtor who is the Central Government or State Government or other local authority to whom operational debt is owed are categorised as Operational Creditor as per Section 5(20) of the Code. Thus, the Government, for such claims, in this

sense, would be an Operational Creditor. Such dues will also include the dues like electricity services and will be treated as operational debt.

xx. The role of the CoC has been defined under Section 21 of the Code which in fact, is supposed to be in charge during CIRP process and continues the role during the approval of the Resolution Plan by the Adjudicating Authority unless taken over the Corporate Debtor by the SRA. In fact, even during implementation of the Plan by the SRA, the hat of the CoC changes and take shape of the monitoring committee. The role of the CoC is very important in bringing up the Corporate Debtor on his feet by finding suitable resolution of the Corporate Debtor. The CoC is supposed to exercise its commercial wisdom judiciously keeping in the object of the Code and the provisions of the Code. The CoC assess viability and the feasibility of the Resolution Plan and take decision on the Resolution of all prevailing liabilities, both of Financial Creditor and Operational Creditor as well as other liabilities as per Resolution Plan under consideration of CoC. There is no doubt that the approval, rejection or modification of Resolution Plan submitted by Prospective Resolution Applicant is the commercial decision of the CoC taken as business decision.

xxi. The Resolution Plan can be approved by the CoC only if 66% or more of the votes of the voting shares of Financial Creditor approves the same

else the Resolution Plan stand rejected. We note that in the present case, Resolution Plan was approved by this requisite majority and was approved by 68.25%.

xxii. We note that in catena of judgment passed by the Hon'ble Supreme Court of India as well as this Appellate Tribunal, it has been held, loud and clear, without any ambiguity whatsoever, that commercial wisdom of the CoC is paramount and cannot be interfere by the Adjudicating Authority or by this Appellate Tribunal. Following are some of such cases :-

a. ***K. Shashidhar vs. Indian Overseas Bank & Ors.*** (2019) 12 SCC 150

b. ***Embassy Property Developments (P) Ltd. v. State of Karnataka***, (2020) 13 SCC 308

c. ***Greater Noida v. Prabhjit Singh Soni,*** (2024) 6 SCC 767

d. ***E.S. Krishnamurthy v. Bharath Hi-Tecch Builders (P) Ltd.,*** (2022) 3 SCC 161

e. ***Tata Consultancy Services Limited v. Vishal Ghisulal Jain,*** 2020 SCC OnLine SC 1254

f. ***Ebix Singapore (P) Ltd. v. Educomp Solutions Ltd. (CoC),*** (2022) 2 SCC 401 : 2021 SCC OnLine SC 707

g. ***Pratap Technocrats (P) Ltd. v. Monitoring Committee of Reliance Infratel Limited,*** 2021 SCC OnLine SC 661

h. ***Kalpraj Dharamshi v. Kotak Investment Advisors Ltd.,*** (2021) 10 SCC 401

i. ***Gujarat Urja Vikas Nigam Ltd. v. Amit Gupta,*** (2021) 7 SCC 209; 2021 SCC OnLine SC 194

j. ***Essar Steel India Ltd. Committee of Creditors v. Satish Kumar Gupta,*** (2020) 8 SCC 531

k. ***Maharashtra Seamless Ltd. v. Padmanabhan Venkatesh,*** (2020) 11 SCC 467

l. ***Phoenix ARC (P) Ltd. v. Spade Financial Services Ltd.,*** (2021) 3 SCC 475

xxiii. We will now take into consideration the latest judgment of the Hon'ble Supreme Court of India passed in ***State Bank Of India & Ors Vs. The Consortium Of Mr. Murari Lal Jalan And Mr. Florian Fritsch & Anr*** *in Civil Appeal Nos. 5023-5024 OF 2024 (Jet Airways case)* and the relevant portion on commercial wisdom of CoC reads as under :-

> ***"Para 169-*** *A Resolution Plan evolves through these players referred to above. However, it is the "commercial wisdom of the CoC" that assumes a position of superiority and becomes binding on all the stakeholders. The NCLT, which is the adjudicating authority and who has to approve the Resolution Plan under Section 31 of the IBC, 2016 also cannot trespass into the commercial wisdom exercised by the CoC. This decision to restrict the scope of interference on the commercial wisdom of the CoC was conscious and possibly taken bearing in mind the time delays that may arise out of a subsequent adjudication of the resolution*

plans approved by the CoC. Therefore, the commercial wisdom of the CoC has achieved paramount status, immune from any judicial intervention, to ensure the completion of the respective processes under the IBC, 2016 within the timelines prescribed therein.

Para 170- *The position that the "commercial wisdom" of the CoC is non-justiciable and only a limited judicial review is available in this regard is well-settled through several decisions of this Court. This Court in the case of* ***K Shashidhar v. Indian Overseas Bank and Ors****. reported in* ***(2019) 12 SCC 150****, held that: "*

"*52. As aforesaid, upon receipt of a "rejected" resolution plan the adjudicating authority (NCLT) is not expected to do anything more; but is obligated to initiate liquidation process under Section 33(1) of the I&B Code. The legislature has not endowed the adjudicating authority (NCLT) with the jurisdiction or authority to analyse or evaluate the commercial decision of CoC much less to enquire into the justness of the rejection of the resolution plan by the dissenting financial creditors. From the legislative history and the background in which the I&B Code has been enacted, it is noticed that a completely new approach has been adopted for speeding up the recovery of the debt due from the defaulting companies. In the new approach, there is a calm period followed by a swift resolution process to be completed within 270 days (outer limit) failing which, initiation of liquidation process has been made inevitable and mandatory. In the earlier regime, the corporate debtor could indefinitely continue to enjoy the protection given under Section 22 of the Sick Industrial Companies Act, 1985 or under other such enactments which has now been forsaken. Besides, the commercial wisdom of CoC has been given paramount status without any judicial intervention, for ensuring completion of the stated processes within the timelines prescribed by the I&B Code. There is an intrinsic assumption that financial creditors are fully informed about the viability of the corporate debtor and*

feasibility of the proposed resolution plan. They act on the basis of thorough examination of the proposed resolution plan and assessment made by their team of experts. The opinion on the subject-matter expressed by them after due deliberations in CoC meetings through voting, as per voting shares, is a collective business decision. The legislature, consciously, has not provided
any ground to challenge the "commercial wisdom" of the individual financial creditors or their collective decision before the adjudicating authority. That is made non-justiciable."

Para 171- *Thus, there is no doubt that the commercial wisdom of the CoC cannot be subjected to judicial review. However, in order to foster a much more effective and time-bound decision making by the members of the CoC, in the interests of maximization of value of the assets of the Corporate Debtor, certain selfregulating guidelines were issued by the IBBI on 06.08.2024 with immediate effect…*

Para 172- *The aforesaid guidelines may go a long way in streamlining the functions of the CoC. Adding to the aforesaid guidelines, we suggest that the CoC exercise their commercial wisdom and approve/reject the Resolution Plans placed before them exhibiting fairness and with good reasons. Such a reasoned decision making on their part will only serve to further enable the other key players like the Adjudicating Authorities to understand the rationale behind their decision and to uphold the correctness of the same. Furthermore, it is also suggested that the Central Government or the IBBI explore the possibilities of better enforcement of the standards and practices enumerated in the guidelines through an independent mechanism under the auspices of an oversight committee instead of making them self-regulatory. This will enable the guidelines to achieve some level of practical and operational relevance and also*

prevent any significant lapse in decision making on the part of the CoC."

(Emphasis Supplied)

xxiv. This recent judgment leaves no doubt about reinforced faith in commercial wisdom of CoC and little scope of any judicial intervention.

xxv. From all these judgments, we note that the role of the Adjudicating Authority is to ensure that the Resolution Plan complies with the requirements of the Code especially under Section 30(2) of the Code.

xxvi. We observe that the CoC is also required to act fairly and in the transparent manner and without any arbitrariness at any stage on their part. However, the CoC has no role in deciding the position of the creditor either as financial or Operational Creditor and such decision in true sense cannot be treated as commercial wisdom. Whether the claims of the Creditors will fall within the definition of Financial Creditor or the Operational Creditor would be strictly in terms and ingredients provided in the Code i.e., Financial Creditor as per Section 5(7)of the Code and Operational Creditor as defined under Section 5(20) of the Code.

xxvii. We note that it is a job of the IRP/RP to collate the claims after which the CoC is formed under Section 18 of the Code and if any person aggrieved can make a case before the Adjudicating Authority.

xxviii. This Appellate Tribunal has dealt with this issue in the case of ***Rajnish Jain (Supra)*** and relevant paras reads as under :-

> *42. Therefore we are of the considered opinion that the Committee of Creditors was not empowered to adjudicate the issue that has cropped up in the present case, i.e. M/s BVN Traders' is a 'Financial' or 'Operational' Creditor. Such adjudication is beyond the scope of consideration of the Committee of Creditors.*
>
> *(Emphasis Supplied)*

xxix. From above it is clear that the categorisation from one class of creditors cannot be done without competent authority approval. We consciously note that the above judgement was specifically w.r.t., change from Financial Creditor to the Operational Creditor and not *inter-se* sub-class between same class like in present case.

xxx. In the present case various claims including by the Financial Creditor and the Operational Creditor were submitted. In the Resolution Plan, the SRA, classified the claims of the Operational Creditor into further two categories i.e., Operational Creditor and Special Operational Creditor. The same was examined, approval and recommended by the CoC and finally approved by the Adjudicating Authority. We have already noted these details earlier and will not repeat now.

xxxi. Still the issue remains whether the CoC or for that matters the Adjudicating Authority could have approved sub-category within same

class of Operational Creditor. The Code specifically and consciously stipulated provisions only for the Financial Creditor and the Operational Creditor. The Code also recognises secured and unsecured creditors, but we do not find any mention of Special Operational Creditor in the Code.

xxxii. It seems that the parliament never intended to do further bifurcation within same category of Creditors i.e., Financial Creditor and Operational Creditor, otherwise, sub-clause in Section 7 or Section 9 of the Code would have been provided or at least covered under explanation to the same. Even the definition contained under Section 3 and 5 also do not havesuch sub-classification of creditors within same set of creditors.

xxxiii. In terms of judgment of ***Swiss Ribbons Private Limited (Supra),*** it has been held that only Financial Creditor's to be member of the CoC and Operational Creditor's are only entitled to have limited say in CoC. This has been done perhaps, due to reason that Financial Creditor's are involved in money lending and are best equipped to assess the feasibility and viability of the business of the Corporate Debtor and they can exercise the judicious decision while considering, the Resolution Plan i.e., to accept or otherwise. On the other hand, the Operational Creditor's who provide goods and services have limited role only for recovering their outstanding amount which are not paid by the Corporate Debtor .

xxxiv. It is very important to understand that the Resolution Plan cannot be approved by the Adjudicating Authority under Section 30 (2) (b) r/w Section 31 of the Code unless a minimum payment is made to the Operational Creditor which cannot be less than as per Section 53 i.e., related to liquidation value. We need to understand that this, however, cannot be construed that the claims of the Financial Creditor's and the Operational Creditor are to be satisfied in pro-rata or in the same manner as provided in the Resolution Plan under Section 31 of the Code. This Appellate Tribunal in earlier case of ***Central Bank of India Vs Resolution Professional Of the Sirpur Paper Mills Ltd. & Ors.*** in Company Appeal (AT) (Insolvency) No. 526 of 2018 has clarified that as long as two or more Financial Creditor's or two or more financial and operational Creditors are not similarly situated then there is no discrimination between them under a Resolution Plan.

xxxv. Section 30(2) (b) of the Code deals with the submission of the Resolution Plan and how the same could be examined by Resolution Professional, which reads as under :-

> *"**30. Submission of resolution plan. –***
>
> **…**
>
> *(2) The resolution professional shall examine each resolution plan received by him to confirm that each resolution plan –*

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

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

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

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

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

(Emphasis Supplied)

xxxvi. This makes it clear that the amount provided in the Resolution Plan to Operational Creditor cannot be less than liquidation value of Corporate Debtor w.r.t. amount payable to Operational Creditor. Explanation I makes it clear that a distribution in accordance with the provision of this clause shall be fair and equitable to such creditors.

xxxvii. While the Code does not categorize any operational creditors as "special," it does recognize different classes of operational creditors based on their claims. For instance, operational debts can include dues related to the supply of goods and services, employment-related obligations, and statutory dues payable to government authorities. However, all operational creditors are treated under the same legal framework without special distinctions within their category.

xxxviii. We will refer to our own earlier decision taken in the case of ***Gail India Ltd. (Supra)*** where this Appellate Tribunal observed that although a plea has been raised that the Appellant (in that case) who was discriminated as an Operational creditor and that the Equality Concept was not adhered to by the Adjudicating Authority while approving the Resolution Plan (especially in the teeth of the Resolution Plan 100% payment to the Operational Creditors with claim upto Rs. 3 Lakhs were admitted), this Appellate Tribunal, consciously held that the Operational Creditors were paid as per Section 30(2) (b) of the Code r/w with Regulation 38 of the CIRP Regulations and therefore the Operational Creditors were entitled to receive only such money that are payable to them as per Section 53 of Code. The relevant portion of this judgement reads as under :-

> *"**Para 67-** Although, according to the 1st Respondent, 'Operational Creditors were entitled to 'Nil' payment as per Section 32 of the Code, the fact of the matter is that the*

'Resolution Applicants' in their commercial wisdom had provided for the full payment of Rs.4.83 crores in respect of 'Approved Resolution Plan' for 'Operational Creditors' with admitted claims of a sum of rupees upto Rs.3 Lakhs only.

Para 68- *The plea of 2nd and 3rd Respondent is that the 'Resolution Applicant' based on 'Good Faith' a sum of Rs.4.83 crores was allotted in respect of payment of dues relating to debt of 'Operational Creditors' post admitted claims were upto Rs.3 Lakhs and this allocation had culminated in the debts of Operational Creditors numbering 357 were fulfilled in entirety. Added further, the said allotment of the aforesaid sum in respect of the operational debt of the Corporate Debtor was made Bona fide by the 'Committee of Creditors' exercising their 'Commercial Wisdom'*

Para 69- *According to the Learned Counsel for the 4th Respondent, the 'Distribution of amounts' in respect of a Resolution Plan comes within the ambit of the Committee of Creditors while exercising their 'commercial wisdom' and in short, the proceeding under the I&B Code, 2016(being summary in character) is not to be resorted to as an 'Debt Enforcement Procedure'. Also that, the Appellant's claim(s) pertain to the same being arising out of the Corporate Debtor's purported obligations to pay for goods, and obviously, the disputes are of contractual in nature.*

Para 71- *As far as the present case is concerned, although on behalf of the 'Appellant' a plea is raised that the 'Appellant' was discriminated as an 'Operational creditor' and that the 'Equality Concept' was not adhered to by the 'Adjudicating Authority' while approving the 'Resolution Plan' (especially in the teeth of the 'Resolution Plan' 100% payment to the 'Operational Creditors' with claim upto Rs. 3 Lakhs were admitted), this Tribunal, is of the considered opinion that the 'Operational Creditors' were paid as per*

Section 30(2) (b) of the I&B Code, 2016, and coupled with Regulation 38 of the 'CIRP Regulations' the 'Operational Creditors' are entitled to receive only such money that are payable to them as per Section 53 of Code.

***Para 72- In reality, there is no embargo for the classification of Operational creditor(s) into separate/different classes for deciding the way in which the money is to be distributed to them by the 'Committee of Creditors' because of the fact, undoubtedly, they do have the subjective final discretion of 'Collective Commercial Wisdom' in relation to (1) The amount to be paid (2) The quantum of money to be paid, to a certain category or the incidental** category of creditors, of course**, nicely balancing the interests of the 'Stakeholders' and the 'Operational Creditors', as the case may be**. Suffice it for this Tribunal to pertinently make a significant mention that it cannot be lost sight of that the 'Appellant's' claim is not relatable to the supply of goods or services so as to keep the 'Corporate Debtor' as a 'Going Concern'. It is to be remembered that the ''Appellant' had commenced 'Arbitration proceedings' in regard to its claim emanating from the 'Gas Sale Agreement'. In fact, the 'Appellant's' claim pertains to supposed obligation to pay for goods, even where, these were not made use of as "take or pay obligation'. Looking at from any angle, the impugned order dated 08.03.2019 passed by the Adjudicating Authority (National Company Law Tribunal), Ahmedabad Bench in dismissing the I.A. 41/2019 in IA 259/2018 (filed by the Applicant for Appellant) in CP (IB)48/2017 does not suffer from any material irregularity or patent illegality in the eye of Law. Resultantly the instant 'Appeal' sans merits."*

(Emphasis Supplied)

xxxix. Thus, this Appellate Tribunal held that in reality, there is no embargo for the classification of Operational creditor(s) into separate classes for

deciding the way in which the money is to be distributed to them by the CoC because CoC has the subjective and final discretion of Collective Commercial Wisdom in relation to the amount to be paid as well as the quantum of money to be paid. This Appellate Tribunal mentioned that it cannot be lost sight of that the Appellant's claim is not relatable to the supply of goods or services so as to keep the Corporate Debtor as a Going Concern.

xl. We find one contrarian view taken by this Appellate Tribunal, as cited by the Appellants in support of their claim. In this direction, we refer to our earlier decision in the case of ***Akashganga Processors (Supra),*** where this Appellate Tribunal has directed the Successful Resolution Applicant to allocate funds to Operational Creditors in the Resolution Plan, who were left unpaid while other Operational Creditors were proposed to be paid. The relevant part of the said judgment reads as under :-

> *"However, when the Successful Resolution Applicant was making payment to other two Operation Creditors, there cannot be any discrimination between payment of one class of Creditors."*
>
> *4. Learned counsel for the Dissenting Financial Creditor i.e. Respondent No.3 has opposed the submission of the learned counsel for the Appellant as well as learned counsel for the Resolution Professional and submits that there cannot be any discrimination between payment to Operational Creditors interse, which is a well settled law.*

It is submitted that the Respondent No.3 was not given any notice of 7th CoC meeting, which is also reason given by the Adjudicating Authority for rejecting the plan.

*6…… **where it was held that there can be differential payment in payment of debts of Financial Creditors and Operational Creditors, however, there can be no difference in interse payment within a class of creditors**…*

7. Present is a case where admittedly the claims of two Operational Creditors - State Tax, Government of Gujrat and Central Excise, Government of India were filed as has been admitted by the learned counsel for the Resolution Professional. It was open for the Resolution Applicant not to allocate any amount to any of the Operational Creditor since under Section 53 no entitlement was there in accordance with the total amount available for distribution. However, when the Successful Resolution Applicant was making payment to other two Operation Creditors, there cannot be any discrimination between payment of one class of Creditors.

10. In the facts of the present case, we are of the view that ends of justice be served in disposing of this appeal in directing that the amount of Rs.32,78,102/- be distributed to all the four Operational Creditors so as to save the plan from being invalidated. We, thus, are of the view that the Adjudicating Authority having found that there is discrimination in payment of Operational Creditors could have directed for compliance of provision of the Code by distribution of Rs.32,78,102/- without affecting the other

terms and conditions of the plan. By this modification the plan shall be able to sail and implemented, which is approved by CoC with 99.84% vote share. The plan need to be implemented with modification as directed above.

12. In view of the aforesaid, we modify the order of the Adjudicating Authority by approving Resolution Plan, the application filed by the Resolution Professional being I.A. No. 680 of 2022 is allowed subject to modification that amount of Rs.32,78,102/- shall be distributed on prorata basis between all Operational Creditors. No costs.

(Emphasis Supplied)

xli. To understand the ratio of the above case, we note that the Corporate Debtor was admitted into CIRP and the State Tax (Government of Gujrat) and Central Excise (Government of India), being Operational Creditors of the Corporate Debtor, submitted their claims before the Resolution Professional. There were statutory dues of Gujarat Industrial Development Corporation and Surat Municipal Corporation in the capacity of Operational Creditors as well. The Resolution Plan was submitted by the SRA, which was approved by the CoC with 99.84% voting share. The Resolution Plan proposed to pay Rs.32,78,102/- to Gujarat Industrial Development Corporation and Surat Municipal Corporation. However, no sums were allocated for State Tax (Government of Gujrat) and Central Excise (Government of India). The Resolution Professional filed an application under Section 30(6) of the

Code before Adjudicating Authority, seeking approval of the Resolution Plan. The Adjudicating Authority refused to approve the plan on the premise that it violates Section 30(2)(e) and 30(2)(f) of the Code. However, this Appellate Tribunal placed reliance on the Supreme Court judgment in ***Committee of Creditors (Supra)***, where it was held that there can be differential payment in payment of debts of Financial Creditors and Operational Creditors, however, there can be no difference in *inter se* payment within a class of creditors. It was opined that the Resolution Applicant was at liberty to not allocate any amount to any of the Operational Creditor in view of Section 53 of the Code. *"However, when the Successful Resolution Applicant was making payment to other two Operation Creditors, there cannot be any discrimination between payment of one class of Creditors."* This Appellate Tribunal directed distribution of Rs.32,78,102/- to all the four Operational Creditors on pro rata basis, in order to save the plan from being invalidated.

xlii. We have already observed that as per Clause 30 (2) (b) of the Code, the Resolution Plan must provide for payment of debt of Operational Creditors in such a manner as may be specified by IBBI and the same shall not be less than the amount to be paid to the Operational Creditors in the event of liquidation of the Corporate Debtor under Section 53 of the Code. It tantamount that in case the liquidation value of the Corporate

Debtor in terms of Section 53 of the Code payable to the Operation Creditor is nil then nothing is required to be paid to such Operational Creditors.

xliii. We note that in the present case, the liquidation value payable to the Operational Creditor was nil, hence no payment became payable in the Resolution Plan as per the Code.

xliv. We have noted the contradictory stand taken by all parties on issue of Commercial Wisdom of CoC as well regarding distribution of corpus among all Operational Creditor including Special Operational Creditor. In this regard, we will again refer to the case of ***Essar Steel India (Supra),*** where the Supreme Court of India noted the importance of the majority decision of the Committee of Creditors as stated in S. 31(1) of the Code to further observe that:

> *"Thus, what is left to the majority decision of the Committee of Creditors is the "feasibility and viability of a resolution plan, which obviously takes into account all aspects of the plan, including the manner of distribution of funds among the various classes of creditors. As an example, take the case of a resolution plan which does not provide for payment of electricity dues. It is certainly open to the Committee of Creditors to suggest a modification to the prospective resolution applicant to the effect that such dues ought to be paid in full, so that the carrying on of the business of the corporate debtor does not become*

impossible for want of a most basic and essential element for the carrying on of such business, namely, electricity. This may, in turn, be accepted by the resolution applicant with a consequent modification as to distribution of funds, payment being provided type of operational creditor, namely, the electricity distribution company, out of upfront payment offered by the proposed resolution applicant which may also result in a consequent reduction of amounts payable to other financial and operational creditors. What is important is that it is the commercial wisdom of this majority of creditors which is to determine, through negotiation with the prospective resolution applicant, as to how and in what manner the corporate resolution process is to take place."

(Emphasis Supplied)

xlv. The ratio from above judgement is very clear that all aspect of the Resolution Plan, taken by majority of CoC Members, is commercial wisdom which includes distribution of funds to all creditors and the manner (including quantum of such distribution) of such distribution without any judicial intervention.

xlvi. We will examine the issue of discriminatory payments among the Operational Creditor including Special Operational Creditor from another perspective. It is undisputed fact that liquidation value payable to the Operational Creditor including Special Operational Creditor is nil. According, there could have been two Scenarios :-

xlvii. As per Scenario I – the SRA would have proposed nil payment to all Operational Creditor including YATCL and Society (Special Operational Creditor) and the entire money proposed in the Resolution Plan would have been paid to Financial Creditors and others in accordance with the Code and Regulations.

xlviii. The Second Scenario – envisaged that SRA proposed payment to lessors of the land i.e., YATCL and Society (Special Operational Creditor) with a view to ensure viability and feasibility of the Resolution Plan and sustainability of the Corporate Debtor from long term perspective. In this second scenario, SRA proposed the same amount as total Resolution Plan amount which the SRA would have paid even in Scenario I. However, the SRA proposed payment to Special Operational Creditor by reducing payment proposed to the Financial Creditors. This approach i.e., Scenario II was envisaged in the Resolution Plan and put up to the CoC. The CoC considered the same and recommended for approval and which was finally approved by the Adjudicating Authority vide Impugned Order.

xlix. It is significant to note that by this action, the CoC consciously decided to take more hair cut and take reduction in the amount payable to Financial Creditors with a view for revival of the Corporate Debtor which is one of the primary objection of the Code.

l. We reiterate that legally speaking based on the liquidation value, none of the Operational Creditors would be entitled for any payment and only after reduction from amount payable to Financial Creditors, it could have been possible to make payment to Special Operational Creditor.

li. We do not find any illegality in this approach. Clear rational and business logic exists for taking this approach. In any case, this is not violation of Section 30(2) of the Code.

lii. We consciously note that CoC's commercial wisdom is based on their business decision acumen in approving or rejecting a resolution plan is after evaluation of the resolution plan based on its feasibility. It is appropriate that the CoC is fully informed about the viability of the Corporate Debtor, therefore, such commercial wisdom of the CoC with requisite voting majority is non-justiciable and the discretion on Adjudicating Authority is restricted to scrutiny of resolution plan as approved by CoC and this enquiry postulated under S. 31 of the Code is limited to matters covered under S. 30(2) of the Code when the resolution plan does not confirm the stated conditions.

liii. We ourselves held in catena of our earlier judgment that approval of the resolution plan is exclusively in the domain of the commercial wisdom of the CoC. The scope of judicial review is contained under Section 31 for approval of the Resolution Plan by the Adjudicating Authority and in

S.32 read with S.61 as regards the scope of in S.31 as regards appeal against the order of approval. We reiterated that the powers of the Adjudicating Authority dealing with the resolution plan do not extend to examining the correctness or otherwise of the commercial wisdom exercised by the CoC. The limited judicial review available to Adjudicating Authority lies within the four corners of S. 30(2) of the Code, to examine that the resolution plan does not contravene any of the provisions of law for the time being in force and it is conform its to regulations. We further reiterated that there is very limited scope of judicial review provided for an appeal against an order approving a resolution plan, namely, if the plan is in contravention of the provisions of any law for the time being in force; or the debts owed to the operational creditors have not been provided for as per provisions of the Code or the resolution plan does not comply with any other criteria specified by the IBBI.

liv. There is no scope for the Adjudicating Authority or this Appellate Authority to proceed on any equitable assumptions and presumptions to assess the resolution plan on the basis of quantitative analysis. Similarly, Code and Regulations do not visualise any road map which is left to the collective commercial wisdom of the CoC. We understand that the power of judicial review in Section 31 of the Code is not akin to the power of a

supervision jurisdiction to deal with the merits of the decision of any lower judicial authority. The jurisdiction to decide as to what ought to be the terms of the resolution plan is vested on the CoC alone, who has to take such a decision in its commercial wisdom, while keeping in view the applicable provisions and the specified parameters.

lv. Therefore, grievances of Operational Creditors may be genuine from their perspective as they are not as big as Financial Creditors/ Bank/ ARC and have limited financial strength. We appreciate their concern that Nil payment to them in approved Resolution Plan will be great detrimental to their own survival and in turn may lead them towards insolvency or even liquidation.

lvi. This led us for some introspection as to how generally Operational Creditors are dealt with vis-à-vis Financial Creditor. As per Report of IBBI as on 31.12.2023, following picture emerges :-

	amount in Rs. crore
Data	**As on 31/12/2023**
Admitted claims of FCs	9,00,730.8
Realisable Amount by FCs	3,13,461.5
Admitted claims of OCs	97,729.5
Realisable Amount by OCs	10,363.3
Liquidation Value	1,92,731.5
Realisable by FCs as % of claims	34.80%
Realisable by OCs as % of claims	**10.57%**
Realisable by FCs as % of LV	162.64%
Realisable by OCs as % of LV	**5.36%**

lvii. Thus, we note that as on 31.12.2023 the total admitted claims of Financial Creditors, were Rs. 9,00,730.8 Crores whereas total admitted claims of Operational Creditors were Rs. 97,729.5 Crores. The Financial Creditors, could realise Rs. 3,13,461.5 Crores i.e., 34.80% of their admitted claims on the other hand, Operational Creditors could realise only Rs. 10,363.3 Crores i.e., 10.57% of their admitted claims and 5.36% of liquidation value.

lviii. This tantamount that Financial Creditors are taking haircut of Rs. 65.20% and Operational Creditor are given huge haircut of 89.43% or almost 90%.

lix. However, revisiting of commercial wisdom of the CoC or judging over just and equitable distribution by CoC will eventually take us in the domain of Equity. We wonder, if such equity jurisdiction is vested with the Adjudicating Authority or even with this Appellate Tribunal.

lx. We note that the Adjudication Authority is within its jurisdiction in approving a resolution plan which is in conformity with Code but there is no equity-based jurisdiction with the Adjudicating Authority, under the provisions of the Code. The function of the Adjudicating Authority under Section 31 of the Code is to determine whether the resolution plan "as approved by the committee of creditors" under Section 30(4) of the Code "meets the requirements" under Section 30(2) of the Code. If the

Adjudicating Authority is satisfied that the resolution plan, as approved, meets requirements under Section 30(2) of the Code, the Adjudicating Authority is required to approve the resolution plan, binding on the corporate debtor and all stakeholders. We note that the jurisdiction of this Appellate Authority under Section 61 (3) of the Code, while considering an appeal against an order approving a resolution plan under Section 31, is similarly structured on specific grounds. Thus, neither the Adjudicating Authority nor this Appellate Tribunal can enter into the commercial wisdom underlying the approval granted by the CoC to the Resolution Plan on the basis of doctrine of Equity.

lxi. We do not find any provision in the Code or in the Regulations which gives equity based jurisdiction for Adjudicating Authority or this Appellate Tribunal, directly or indirectly, fully or even remotely. After all, we are dealing in summary trial which hardly has such equity based concept and rather we find the CIRP to be rules and regulations driven process. Thus, despite we may have empathy and sympathy to such Operational Creditors, we do not find any jurisdiction vested with us to enter into such domain of commercial wisdom which is exclusive domain of the CoC.

lxii. We also note that this Appellate Tribunal in case of ***Pani Logistics Through its sole proprietor, Kiran M. Jain Vs. Vikas G. Jain & Ors.***

passed in Company Appeal (AT) (Insolvency) No. 205 of 2023 held that once payment to Operational Creditors was not less than the liquidation value, the Resolution Plan can not be questioned only on the ground that Plan value earmarked for them is less or no amount has been provided as long as it met the condition of the Code.

lxiii. We have already noted that ***Essar Steel (Supra)*** clearly stipulates that there can be different treatments to creditors in given circumstances and in such circumstances, the approved Resolution Plan cannot be faulted with.

lxiv. We will again refer to our earlier decision in ***Excel Engineering (Supra)*** , where 100% payments to one category of Operational Creditor (farmers) was made by the CoC but the other Operational Creditors (the Appellants therein) were paid only 1% of claim in the approved Resolution Plan, but the same was held to be legal and in conformity to Section 30(2) of the Code. We consciously observe that present case is also similar where one claim of operational Creditor i.e., Special Operational Creditor/ GoT have been paid in full where as other Operational Creditors have been given nil. In view of ***Excel Engineering (Supra)*** , the present Impugned Order cannot be treated as wrong and illegal.

lxv. The relevant portion of this Appellate Tribunal judgment passed in the matter of ***Excel Engineering (Supra)*** is reproduced as under :-

"12. It is the main argument of the Learned Counsel for the Appellant (an operation creditor) that the Farmers were given 100% of the dues whereas the Appellant has given only 1% of the dues and therefore the Resolution Plan is discriminatory and is in violation of Section 30(2) of the Code.

13. It is seen from the record that the 'Corporate Debtor' is a Sugar Industry and the Farmers are an integral part of the Sugar Industry. We find force in the contention of the Learned Sr. Counsel for the Respondent that more than 4500 Farmers and their families are dependent on the 'Corporate Debtor' factory for their survival and the Plan would not be implementable without making payments to the Farmers as the dues have been pending for the last two years. The Minutes of the CoC Meeting shows that even the 'Secured Financial Creditors' accepted that 100% payment should be made to the Farmers who are the backbone of the Sugar Industry. Section 53 of the Code categorically provides different priorities of payments for Employees, Statutory Dues and other 'Operational Creditors'. Such a classification would depend upon the facts and circumstances and the nature of the industry, and the Modus Operandi of the functioning of the 'Corporate Debtor'....

(Emphasis Supplied)

lxvi. The relevant portion of this Appellate Tribunal judgment passed in the matter of ***Sivana Realty Private Limited (Supra)*** is reproduced as under:-

"24. ...Allottees have been classified in two groups – 'Affected' and 'Unaffected', as noted above, and we have

found the classification justified in the treatment of claims. Learned counsel for the Appellant has failed to point out any violation of any provision of law by aforesaid classification of 'Affected' and 'Unaffected' homebuyers. We, thus, are of the view that the Resolution Plan does not violate any provision of law. ...

27. We, thus, are of the view that commercial wisdom of the Committee of Creditors, which has approved the Resolution Plan under which different treatment has been given to 'Affected Homebuyers' and 'Unaffected Homebuyers', cannot be faulted. We, thus, are of the view that there are no grounds made out to challenge the approval of the Resolution Plan. Further, the Adjudicating Authority has also rightly rejected the objections filed by the Appellant by I.A. No. 933 of 2022."

(Emphasis Supplied)

lxvii. In view of above detailed discussion, we find that commercial wisdom of CoC has been upheld to be supreme, again and again, in catena of judgment of the Hon'ble Supreme Court of India and this Appellate Tribunal which we already noted earlier.

lxviii. We have also seen the few cases of this Appellate Tribunal and the Hon'ble Supreme Court of India like ***Essar Steel (Supra)***, ***Excel Engineering (Supra), Sivana Realty Private Limited (Supra)***, where differential treatments have been accorded to different creditors even in the same category and they have been held to be legal and valid and

found to be inconformity to Section 30(2) of the Code. Thus, we do not find any illegality in the Impugned Order approving the Resolution Plan having discriminatory treatment to Special Operational Creditors.

lxix. In fitness of things, it will be worthwhile to clarify that there is no such category like of Special Operational Creditor as stipulated in the Code or the Regulations, however, we have noted during pleadings that the nomenclature of Special Operational Creditor was perhaps used for sake of convenience to club the claims of the YATCL and Society who were the lessor of the land on which the hotel was situated, otherwise YATCL and Society were also treated as Operational Creditors, but paid in full in commercial wisdom of CoC.

lxx. Be that as it may, although the term Special Operational Creditor is not found in Code or in the Regulations, the fact remains is that it is for the SRA to allocate the funds proposed to be distributed amongst the Creditors based on his overall business Plan and strategy for revival of the Corporate Debtor and to ensure viability and feasibility of such Resolution Plan. Similarly, exercise of the commercial wisdom by CoC is undertaken to look into various parameters including viability and feasibility of the Resolution Plan and once satisfied, as long as the Operational Creditor are provided atleast the liquidation value w.r.t. their claims, such Resolution Plan can be approved as done in present case.

lxxi. We cannot find any fault in such approach. In fine, issue No. I, II & III goes in favour of the Respondents.

lxxii. At this stage, we will like to examine concerns of the Operational Creditors. We note that the Operational Creditors have little say in the resolution of the Corporate Debtor since they are not part of the CoC. At the same time, they are prone to maximum haircut and which may adversely affected their own survival. Legally speaking, in terms of waterfall management under Section 53 of the Code, the Operational Creditors are entitled to claim payments as per liquidation value of the Corporate Debtor or actual proposed payment whichever is more. In most of the cases, for Operational Creditors, liquidation value is nil as CIRP cost, dues towards Secured Creditors, employees, workman, other Financial Creditor takes precedent over Operational Creditor. The Operational Creditor will have a chance only, if any, residual amount remains available as per liquidation value of the Corporate Debtor. However, if the waterfall mechanism as provided under Section 53 of the Code is tweaked, in the sense that instead of straight waterfall mechanism approach, the calibrated waterfall mechanism could be considered, then these may be some chances for the Operational Creditors to get some payments. Their tweaking can be done in several ways. One of the way could be, distribution of corpus available in

Resolution Plan to Operational Creditors in some pre determined percentage of the payments propose to be paid to Financial Creditors in the Resolution Plan. This will ensure that Operational Creditors will get some minimum amount due to insolvency of Corporate Debtor in relation to amount payable to the Financial Creditor in the Resolution Plan. This amount may be much lower in comparison to amount being paid to the Financial Creditors due to obvious and valid reasons. We feel that even this small amount will help such Operational Creditors, specially the smaller Operational Creditors, to tide over the financial crises which happens due to CIRP of the Corporate Debtor. We consciously note that such approach would require legal provision by way of suitable amendments in the Regulations and Code. We request the IBBI to look into this aspect if found feasible after due examination. We would like to make it clear that this only a suggestion for consideration of IBBI and by no way it should be considered as recommendation or directives.

95. <u>Issue (IV) Whether the condition precedents in the approved Resolution Plan violated Code and Regulations.</u>

i. It is the case of the Appellants that the Resolution Plan submitted contains the clause regarding condition precedent. The Appellants submitted that during the 14th CoC Meeting held on 24, 25 and 28.09.2018, they

requested that the Resolution Plan should be clear and unambiguous and there should not be any condition precedent.

ii. The Appellants pleaded that agreeing to conditional Resolution Plan, the payments under Resolution Plan were to be made by the SRA subject to completion of condition precedent, which is not in accordance with the Code and the Regulations.

iii. At this stage, it will be important to understand what is a nature of condition precedent made in the Resolution Plan.

iv. The condition precedent has been defined in Schedule -I of the Resolution Plan i.e., "condition precedent shall have the meaning escribed to such term in Clause 6.1"

6. CONDITION PRECEDENT AND IMPLEMENTATION OF THE RESOLUTION PLAN

6.1 Condition Precedent

The obligation of the Resolution Applicant to implement the Resolution Plan as detailed in **Clause 6** shall commence immediately from the NCLT Approval Date subject to completion, or waiver by the Resolution Applicant, of the following condition, i.e. receipt of the written consent of the Department of Youth Advancement, Tourism and Culture of the Government of Andhra Pradesh ("**YATC**") and of Shilparamam Arts, Crafts and Cultural Society ("**Society**", and together with YATC, "**GoT**") for change of control and restructuring of the Company ("**Condition Precedent**").

(a) Promptly upon, and in any event within 10 (ten) days of the satisfaction and/ or waiver of the Condition Precedent, the Resolution Applicant shall notify the Resolution Professional and the COC in writing ("**CP Satisfaction Notice**") and also set out the date(s) on which it proposes to complete the steps set out in **Schedule 2** (***Resolution Plan Steps***).

(b) The Resolution Applicant shall undertake all efforts as may be commercially reasonable to procure the satisfaction of the Condition Precedent as soon as practicable following the issuance of the LOI, and in any case within 1 (one) year of the NCLT Approval Date. However, if the Condition Precedent is not completed to the satisfaction of the Resolution Applicant, despite such commercially reasonable efforts, notwithstanding any other provision in this Resolution Plan, the EOI and RFP or the Code, the COC shall return the Performance Bank Guarantee in full.

v. From above, it is noted that the condition precedent referred to receipt of written consent of YATCL and society (GoT) for change of control and restructuring of Corporate Debtor. Clause 6.1 also mentioned that on the receipt, the approval of Resolution Plan by the Adjudicating Authority, the SRA shall take steps as set out in Schedule II of the Resolution Plan and shall undertake all efforts to procure the satisfaction of condition precedent within a period of one year of approval of Resolution Plan by the Adjudicating Authority.

vi. It is the case of the Respondents that development and management agreement is co-terminus with lease agreement which tantamount that without prior consent of GoT, the shareholding of the Corporate Debtor cannot be changed and therefore it would be absolutely essential to have such condition precedent.

vii. We note that this Appellate Tribunal in the case of ***Jet Aircraft Maintainance Engineers Welfare Association Vs. Ashish Chhawchharia Resolution Professional of Jet Airways (India) Ltd. & Ors.*** in *Company Appeal (AT) (Ins.) No. 752 of 2021*, held that where it has been stipulated that the condition precedent in the Resolution Plan, is necessary for implementation of Resolution Plan, then such condition precedent would be valid. This judgment was challenged before the Hon'ble Supreme Court of India which upheld the same vide order dated

30.01.2023 passed in Civil Appeal No. 407 of 2023. The relevant portion of this Appellate Tribunal above quoted judgment reads as under:-

> *"109. When we look into the relevant clauses of the plan which has also been captured by the Resolution Applicant in Form H. Para 7.6.1 refers to condition precedents i.e. obligation of the Resolution Applicant to recommence operations as an aviation company subject to fulfillment of conditions after the approval date mentioned therein. Para 7.6.2 deals with fulfilment of condition precedents and Para 7.6.4 deals with automatic withdrawal. In view of the judgment of Hon'ble Supreme Court in "**Ebix Singapore**" (Supra), as noted above, after approval by the CoC, the clause for automatic withdrawal becomes redundant and Resolution Applicant has no jurisdiction to withdraw from the Resolution Plan. The condition precedents as mentioned in Para 7.6.1 are basically condition precedents required for aviation business which are must for any company carrying on aviation business. Enumeration of condition precedent is only for purposes of noticing obligations of the Resolution Applicant to recommence the operations as an aviation company after obtaining necessary approvals. Such condition precedent cannot be said to be any hindrance in the approval of the plan by the Adjudicating Authority. **We, thus, do not find any substance in the submission of the Appellant that the resolution plan ought to have rejected in view of the condition precedent contained in the resolution plan.** The Resolution Applicant has also completed all necessary condition precedents to the*

satisfaction of the Monitoring Committee. We, thus, are of the view that the judgment of Hon'ble Supreme Court in "Ebix Singapore" does not help the Appellant to support his contention that the Resolution Plan is liable to be rejected due to condition precedents."

(Emphasis Supplied)

viii. We have already observed that the transfer of ownership in favour of the new management was dependent on the consent of the YATCL and Society and therefore, the same was treated as condition precedent. This seems to be quite logical and cannot be faulted upon. Thus, the arguments of the Appellant in this regard are not convincing and stand rejected.

96. <u>Issue (V) Whether the provisions of MSMED give protection to MSME status Operational Creditors in CIRP proceedings under the Code and Regulations.</u>

i. We have noted from pleadings that pursuant to the Report of the Insolvency Law Committee dated 26.03.2018, significant changes were made to the Code in the interests of MSMEs, being Section 54-A (pre-packaged insolvency for MSMEs) and Section 240 A (exemption from Section 29-A) and all the these changes were concerned with protecting the interests of MSMEs only in their capacity as a corporate debtor, and not as creditors. To the contrary, the ILC Report consciously made the

decision to not suggest any changes to accord any special status to MSMEs in their capacity as operational creditors. The relevant part of the report is reads as under :-

> *"Regarding the second issue, it was unanimously agreed that important operational creditors which include the important MSMEs usually get paid above the liquidation value, due to their indispensability in the operations of the corporate debtor undergoing CIRP. Therefore, at this juncture, it may not be prudent to re-consider the minimum amount guaranteed to operational creditors, as also discussed in paragraph 18 above."*
>
> *(Emphasis Supplied)*

ii. We note that the legislative intent is clear that MSMEs creditors have no special rights over other creditors. In any event, provisions of the Code have an overriding effect in terms of Section 238 of the Code, which is a 'non-obstante clause' over the MSMED Act, 2006, since the Code is a subsequent legislation, which was promulgated in 2016, i.e., after promulgation of the MSMED Act, 2006.

iii. Although, few protections have been given under the MSMED Act to the MSME, however, the same are not, ipso-facto, would not be applicable to the CIRP process. Only protection made available under the Code to such MSME units find place in Section 54 A and Section 240 A of the Code and this section do not give any protection to the Appellant herein w.r.t., their claims.

iv. As such, the pleadings of the Appellants on the basis of being MSME/ Operational Creditors is not found convincing.

97. Issue (VI) Whether Arbitral Award which came in favour of the Corporate Debtor post CIRP will have impact in the present case.

i. We observe that the Adjudicating Authority had no jurisdiction to impose such conditions with regard to amounts as may be recoverable by the corporate debtor in future. Any amount receivable by the corporate debtor, being an asset of the company, would continue to remain with the Corporate Debtor upon implementation of the resolution plan. After approval of the plan in terms of S.31 of the Code, it becomes binding on all the stakeholders, including the creditors and no party could claim any right against the corporate debtor including the right to set off. In fact, the Resolution Plan provides specifically for the debt payable to stakeholders including creditors and therefore no stakeholders including the creditors can claim any dues from the likely Arbitration Award.

ii. In any case, as per Resolution Plan, the benefit or otherwise arising out of arbitration cases would go in favour of the Corporate Debtor and therefore, the Appellants have no claims for such proceeds.

iii. This Appellate Tribunal cannot enter into arena of the Arbitration Award and the impact thereof, which has already captured into the Resolution Plan.

Conclusion

98. In view of all above detailed discussions of four appeals, we do not find any merit in the pleadings of the Appellants. We also do not find any illegality in the Impugned Order dated 07.02.2020. Thus, all appeals i.e., Company Appeal (AT) (Ins.) No. 426 of 2020, Company Appeal (AT) (Ins.) No. 430 of 2020, Company Appeal (AT) (Ins.) No. 432 of 2020 and Company Appeal (AT) (Ins.) No. 710 of 2020 fail and stand rejected. No costs. IA, if any, are closed.

99. The Chairman IBBI is requested to examine the suggestion contained in para lxxii of Issue No. III at page no. 84 & 85 of this judgment. The Registry is directed to send a copy of this judgment to Chairman IBBI.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Mr. Naresh Salecha]
Member (Technical)

Sim