NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT)(Insolvency) No. 1481 of 2023
& IA No. 5312 of 2023

[Arising out of order dated 23.08.2023 passed by the Adjudicating Authority, National Company Law Tribunal, Chandigarh Bench, Chandigarh in IA No. 659/2023 in CP (IB) No.218/Chd/Chd/2018.]

IN THE MATTER OF:

Yogeshwar Garg
Proprietor
KYK Promoters,
Office No. A-57, Anoop Nagar,
Pankha Road, Uttam Nagar,
New Delhi – 110 059 **...Appellant No.1**

Suresh Kumar
Proprietor
Shree Vinayak Traders,
Office No. Plot No.94E, G/F Floor
Vikas Nagar, Uttam Nagar,
New Delhi – 110 005 **...Appellant No.2**

Usha Garg
Proprietor
KYK Buildcon,
Office No.A-57, Anoop Nagar,
Pankha Road, Uttam Nagar,
New Delhi – 110 059 **...Appellant No.3**

Versus

Mandeep Gujral
Resolution Professional
Jaycon Infrastructure Ltd.
Office at 3073, Sector-46C,
Chandigarh – 160047 **...Respondent No.1**

Rishabh Jain
Director
Maya Enterprises Ltd.
IX/3378, Dharampura,
Gandhi Nagar, New Delhi – 110 031 ...Respondent No.2

Present:

Appellants: **Ms. Shubhangda Singh, Mr. Vipul Talwar, Mr. Ankit Chaudhary, Advocates**

Respondents: **Mr. Abhishek Anand, Advocate**

J U D G M E N T

[Per: Barun Mitra, Member (Technical)]

The present appeal filed under Section 61 of Insolvency and Bankruptcy Code, 2016 ("**IBC**" in short) by the Appellant arises out of the Order dated 23.08.2023 (hereinafter referred to as "**Impugned Order**") passed by the Adjudicating Authority (National Company Law Tribunal, Chandigarh Bench, Chandigarh) in IA No. 659/2023 in CP (IB) No.218/Chd/Chd/2018. By the impugned order, the Adjudicating Authority has allowed IA No. 659 of 2023 and disposed of the main company petition by approving the resolution plan in respect of M/s Jaycon Infrastructure Ltd-Corporate Debtor. Aggrieved by the impugned order, the present appeal has been filed by the Appellants-Operational Creditors with regard to treatment of their claims as being inconsistent with the objectives of the IBC.

2. Coming to the factual matrix, M/s Jaycon Infrastructure Ltd-Corporate Debtor was admitted into Corporate Insolvency Resolution Process ("**CIRP**" in short) on 07.10.2019 following which Interim Resolution Professional was appointed. Public announcement of CIRP was made inviting claims. The three Appellants herein who were Operational Creditors of the Corporate Debtor submitted their respective claims within time to the Respondent No.1/Resolution Professional ("**RP**" in short). Pursuant to receiving and collating the claims of the creditors, the RP constituted the Committee of Creditors ("**CoC**" in short). The CoC comprised of the State Bank of India as sole secured Financial Creditor with a vote share of 90.12% and three other unsecured Financial Creditors having an aggregate vote share of 9.88%. Following publication of Form G, only one resolution plan had been received from Respondent No.2/Successful Resolution Applicant ("**SRA**" in short) which was duly approved by the CoC. The resolution plan was approved by the Adjudicating Authority vide impugned order on 23.08.2023.

3. The Learned Counsel for the Appellant making her submissions stated that though the claims lodged by the Appellants were admitted in full by the RP, they have been paid nil under the resolution plan. It has been submitted that the Appellants have been discriminated under the resolution plan since they have been subjected to 100% hair cut on their admitted claims whereas the Financial Creditors have been paid 16.5% of their admitted claims. The provisions of the IBC have been mis-construed by the Adjudicating Authority in holding that the only value payable to the Operational Creditors under a resolution plan is nil if the liquidation value payable to the Operational Creditors is nil. It has been contended that from bare reading of the provisions as enshrined under Section 30(2) read with Section 53 of the IBC along with

the Regulation 38 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulation, 2016 (hereinafter referred to as the "**Regulations**"), no such implication can be drawn that in case the Liquidation Value of the assets of the Corporate Debtor qua Operational Creditors turns out to be nil, the same shall be held to be a reasonable ground for providing 100% haircut to the claims of the Operational Creditors under any Resolution Plan. This discriminatory treatment of no consideration of their admitted claims goes against the primary objective of the IBC to balance the interest of all stakeholders. It was further contended that it is questionable on the part of the Adjudicating Authority to adopt prioritization of debt qua Corporate Debtor under different categories under Section 53 of the IBC while considering the resolution plan since this was distinct and different stage from the stage of liquidation. It is also the case of the Appellants that Regulation 38(1)(A) of the **Regulations** have not been given due consideration under the resolution plan since the SRA has not provided any reasonable basis to show how the interests of all stakeholders have been balanced while quantifying the amount agreed to be paid to the various stakeholders. Advancing their arguments further it was submitted that the Financial Creditors cannot be paid proportionately higher than the Operational Creditors or be paid before them. Submissions have been further pressed that the claims of the Appellants stand extinguished which is violative of Section 30(2)(e) of the IBC. The Learned Counsel for the Appellant while admitting that the commercial wisdom of the CoC is not to be interfered with, however, argued that the commercial wisdom of the CoC cannot be over expanded to brush aside a significant shortcoming in the decision making of the CoC in approving the present Resolution Plan.

4. Refuting the above submissions, the Learned Counsel for the Respondent No.1 submitted that the present appeal is not maintainable since it is well settled that under the statutory scheme of IBC and the Regulations framed thereunder, the approval of the resolution plan lies solely within the domain of the CoC in the exercise of its commercial wisdom which cannot be transposed by the wisdom of the Adjudicating Authority. It was emphatically asserted that the legislative intent of according primacy to the commercial wisdom of the CoC has been reaffirmed by a catena of judgments of the Hon'ble Supreme Court as in ***Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta & Ors., K. Sashidhar v. Indian Overseas Bank & Ors.,*** and ***Kalpraj Dharamshi & Anr v. Kotak Investment Advisors Ltd & Anr.*** The other limb of argument articulated by the Learned Counsel for the Respondent No.1 was that the question with respect to payments to Operational Creditors under the resolution plan as per IBC is no longer *res-integra* as decided by this Tribunal in ***Dharmindra Constructions Pvt. Ltd. & Anr. v. Rajendra Kumar Jain in CA (AT) (Ins.) No. 1477 of 2022 ("Dharmindra"*** *in short)* wherein it has been held that the Operational Creditors are entitled for minimum of the liquidation value. It was submitted that the liquidation value of the Corporate Debtor is Rs.11.53 crore whereas the admitted claim of the secured Financial Creditor is Rs. 70.24 crore. Thus, in the present case, the amount payable under the resolution plan not being enough to even cover the dues of the secured Financial Creditors, the impugned order cannot be perceived to be one which can be said to suffer from any material irregularity for having provided nil payment to the Appellants since in terms of the valuation report they were not entitled to any payment in the event of liquidation of the Corporate Debtor.

5. We have duly considered the arguments advanced by the Learned Counsel for the parties and perused the records carefully.

6. The short point for our consideration is whether, in the facts of the present case, the Appellants were entitled to any proceeds under the resolution plan at a time when the liquidation value payable to them as Operational Creditors is nil.

7. At this juncture it may be useful to take note of the relevant findings of the Adjudicating Authority in the context of the resolution plan under consideration. In para 21 of the impugned order, we find that the Adjudicating Authority has taken note of the compliance on the part of the SRA to Sections 25(2)(h), 29(A), 30(1), 30(2), 30(4), 31(1) of the IBC and to Regulations 38(1), 38(1A), 38(1B), 38(2), 38(3), 39(2) and 39(4) of the Regulations. The Adjudicating Authority has also noted in para 20 of the impugned order the relevant information furnished by the RP with regard to the amount claimed, amount admitted and the amount proposed to be paid by the present SRA under their resolution plan. The summary of the financial proposal/payment under the resolution plan of the SRA has also been captured at para 23 of the impugned order and in para 33 of the impugned order it has been noticed that the SRA proposes to make payment of Rs.1161.09 lakhs to secured Financial Creditors, Rs.21.95 lakhs payment to workmen and employees and Rs.13.96 lakhs to Operational Creditors (Govt. dues). The impugned order also notes at para 34 that the resolution plan meets the requirement of being viable and feasible for the revival of the Corporate Debtor and that by and large all compliances have been met by the RP and the SRA for making the plan effective after approval. The Adjudicating

Authority at para 35 of the impugned order has recorded its satisfaction that the resolution plan is in accordance with Sections 30 and 31 of the IBC and compliant of Regulations 38 and 39.

8. In the present matter we are concerned with the claim of the Appellants who have been classified as Operational Creditors. There is no dispute with regard to the fact that the liquidation value of the Corporate Debtor is Rs.11.53 crore as per the valuation reports placed at page 55 of the Appeal Paper Book ("**APB**" in short). It is also undisputed that in terms of information mentioned in Form H, the claim admitted in respect of the secured Financial Creditor is Rs.70.24 crore as may be seen at page 60 of APB. The resolution plan envisages amount for other creditors as nil and this category includes the Appellants which has been assailed by the Appellants for being discriminatory and violative of Section 30 of the IBC for having failed to balance the interests of all stakeholders.

9. The contention of the Respondent No.1 is that since the liquidation value is only Rs. 11.53 crore in the present case and the amount payable under the resolution plan is insufficient to cover the dues of the secured Financial Creditor, hence, as per the waterfall mechanism as envisaged under Section 53 of the IBC, the Appellants herein being Operational Creditors shall not be entitled to payment of any proceeds. The Respondent No.1 has therefore contended that the impugned order does not suffer from any material irregularity. In support of their contention, reference has been made to the judgment of this Tribunal in ***Dharmindra*** **(supra).**

10. This brings us to the ratio laid down by this Tribunal in **Dharmindra (supra)** which is to the effect:

> "10. *The judgment of Hon'ble Supreme Court in "Essar Steel India Ltd." has also been noted and relied in the judgment of this Tribunal in "S. Chandriah vs. Sunil Kumar Agarwal" (supra). In paras 22 and 23 the judgment has been dealt with, which are to the following effect:*
>
> > *"22. The Resolution Plan envisages Nil payment to other Creditors. Now we come to the law laid down by the Hon'ble Supreme Court in Essar Steel (supra) in paragraph 72 and 73 of the Judgement following has been laid down:*
> >
> > > *"72. This is the reason why Regulation 38(1A) speaks of a resolution plan including a statement as to how it has dealt with the interests of all stakeholders, including operational creditors of the corporate debtor. Regulation 38(1) also states that the amount due to operational creditors under a resolution plan shall be given priority in payment over financial creditors. If nothing is to be paid to operational creditors, the minimum, being liquidation value - which in most cases 7420 would amount to nil after secured creditors have been paid - would certainly not balance the interest of all stakeholders or maximise the value of assets of a corporate debtor if it becomes impossible to continue running its business as a going concern. Thus, it is clear that when the Committee of Creditors exercises its commercial wisdom to arrive at a business decision to revive the corporate debtor, it must necessarily take into account these key features of the Code before it arrives at a commercial decision to pay off the dues of financial and operational creditors.*
> >
> > *73. There is no doubt whatsoever that the ultimate discretion of what to pay and how much to pay each class or subclass of creditors is with the Committee of*

Creditors, but, the decision of such Committee must reflect the fact that it has taken into account maximising the value of the assets of the corporate debtor and the fact that it has adequately balanced the interests of all stakeholders including operational creditors. This being the case, judicial review of the Adjudicating Authority that the resolution plan as approved by the Committee of Creditors has met the requirements referred to in Section 30(2) would include judicial review that is mentioned in Section 30(2)(e), as the provisions of the Code are also provisions of law for the time being in force. Thus, while the Adjudicating Authority cannot interfere on merits with the commercial decision taken by the Committee of Creditors, the limited judicial review available is to see that the Committee of Creditors has taken into account the fact that the corporate debtor needs to keep going as a going concern during the insolvency resolution process; that it needs to maximise the value of its assets; and that the interests of all stakeholders including operational creditors has been taken care of. If the Adjudicating Authority finds, on a given set of facts, that the aforesaid parameters have not been kept in view, it may send a resolution plan back to the Committee of Creditors to resubmit such plan after satisfying the aforesaid parameters. The reasons given by the Committee of Creditors while approving a resolution plan may thus be looked at by the Adjudicating Authority only from this point of view, and once it is satisfied that the Committee of Creditors has paid attention to these key features, it must then pass the resolution plan, other things being equal."

23. <u>The Hon'ble Supreme Court in the above judgement has laid down that judicial review by the Adjudicating Authority</u>

as well as Appellate Tribunal has to confine as to whether the requirement referred to in Section 30(2) has been met. It was clearly held that the Adjudicating Authority may not interfere with the merits of the commercial decision of the CoC. The limited judicial review available is to see that CoC has taken into account the fact that Corporate Debtor needs to be kept as a going concern, it needs to maximise the value, and interest of all the stakeholders including Operational Creditor have been taken care of. Section 30(2) provides as follows:

> *"30(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 subsection (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. ……"*

11. We are of the view that as per the law as exist today, the Operational Creditors are only entitled for minimum of the liquidation value and there being no breach of any of the provisions of the Code, we are unable to interfere with the impugned order. With observations as above, Appeal is dismissed.

(Emphasis supplied)

11. From what has been noticed hereinabove as per the law which exists as of date, we agree with the Respondent No.1 that the question with respect to payments to Operational Creditors under resolution plan as per the scheme of the IBC is no longer *res-integra.* The Appellants as Operational Creditors are entitled to the minimum entitlement as per Section 30(2)(b) of the IBC. There is no dispute that liquidation value of the Appellants in the present case is nil. That being so, we are not in a position to accept the submissions made by the Appellants that since nil amount has been allocated to them, the plan cannot be accepted. CoC in its commercial wisdom has decided not to allocate any amount to the other creditors while following the water fall mechanism as contained in Section 53 of the IBC. The Appellants have failed to point out any material irregularity or contravention of any provision of law by the CoC in approving the plan. That being the case, the Adjudicating Authority with the limited powers of judicial review available to it, cannot substitute its views with the commercial wisdom of the CoC in rejecting the resolution plan unless it is found to be contrary to the express provisions of law or there is sufficient basis which establishes material irregularity. There can be no fetters on the commercial wisdom of CoC and the supremacy of commercial wisdom of CoC has been reaffirmed time and again by the Hon'ble Supreme Court in a catena of judgements including ***K. Sashidhar v. Indian Overseas Bank (2019) 12 SCC 150 ; Committee of Creditors of Essar Steel India Limited v. Satish***

Kumar Gupta (2020) 8 SCC 531; Maharashtra Seamless Limited v. Padmanabhan Venkatesh (2020) 11 SCC 467; Kalpraj Dharamshi v. Kotak Investment Advisors Limited, (2021) 10 SCC 401 and Ghanashyam Mishra and Sons Private Limited through the Authorized Signatory v. Edelweiss Asset Reconstruction Company Limited through the Director (2021) 9 SCC 657.

12. In view of the foregoing discussions, we are of the view that the resolution plan which has been approved by the Adjudicating Authority does not require any interference. We do not find any cogent reasons to interfere with the impugned order. Not finding any merit in the appeal, the same is dismissed. No costs.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

Place: New Delhi
Date: 18.12.2023

PKM