

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL, NEW DELHI
Company Appeal (AT)(Insolvency) No. 352 & 424 of 2021

[Arising out of common order dated 26th April, 2021 passed by the Adjudicating Authority, National Company Law Tribunal, Ahmedabad Bench, Ahmedabad in I.A. No. 130 of 2021 and I.A. No. 143 of 2021 in CP(IB) No. 197 of 2018]]

Company Appeal(AT)(Insolvency) No. 352 of 2021

IN THE MATTER OF:

1. Synergy Technologies

Pink Bungalow, Opp. Vaibhav Apartment,
Behind Natubhai Circle,
Vadodara- 390 007

.. **Appellant No. 1**

2. Synergy Associates

Having Office at
Plot No. 731, GIDC,
Waghodia,
Vadodara- 391 760

.. **Appellant No. 2**

Versus

1. Shri Parthiv Parikh,

Resolution Professional of
Sanghvi Forging & Engineering Limited
Having Office at:
912, Venus Atlantis Corporate Park,
Anand Nagar Road Prahladnagar,
Ahmedabad – 380 015

.....**Respondent No. 1**

2. State Bank of India

Through General Manager,
Stressed Asset Resolution Group,
Having Office at:
Corporate Centre, 21st Floor, Maker Tower,
The Arcade, World Trade Centre, Cuffee Parade,

Mumbai- 400 005.

.. **Respondent No. 2**

3. Bank of Baroda

Through General Manager
Having Office at:
Baroda Corporate Centre,
Plot No. C-26, G- Block
Bandra Kurla Complex, Bandra (East),
Mumbai- 400 051

.. **Respondent No. 3**

4. Bharat Forge Limited

(Resolution Applicant)
Having Office at:
Mundhwa, Pune Cantonment,
Pune- 411 036, Maharashtra.

.. **Respondent No. 4**

5. Vikram Sanghavi,

Promoter of M/s Sanghvi Forging and
Engineering Private Limited,
Residing at 41, Shree Society,
New Khanderao Road,
Baroda – 390 004

.. **Respondent No. 5**

6. Jayantilal Babulal Sanghavi,

Promoter of M/s Sanghvi Forging and
Engineering Private Limited,
Having address at:
41, Shree Society,
New Khanderao Road,
Baroda – 390 004

.. **Respondent No. 6**

7. Naresh Sanghavi,

Promoter of M/s Sanghvi Forging and
Engineering Private Limited,
Having address at:
41, Shree Society,
New Khanderao Road,
Baroda – 390 004

.. **Respondent No. 7**

Present:

For Appellants : Mr. Gaurav Mitra, Mr. Jain, Ms. Aditi Singh, Mr. Rajendra Beniwal Advocates
Mr. Navin Pahwa, Sr. Advocates, Mr. Jaimain R. Dave

For Respondents: Mr. Karan Valecha, Mr. Hera Dave, Mr. Dheeraj Garg, Advocates for Respondent No. 1

Mr. Bishwajit Dubey, Ms. Neha Shivhare, Ms. Srideepa Bhattacharyya, Advocates for R2 & R3

Mr. Vishnu Shriram, Mr. Tarak Damani, Advocates for R-4

Mr. V.K. Pandey, Mr. Akhil Chadha, Mr. Parish Mishra, Mr. Karan Malhotra, Advocates for R5-7.

With

Company Appeal(AT)(Insolvency) No. 424 of 2021

IN THE MATTER OF:

Vikram Sanghvi

R/o A/8 Parvati Chamber
Near Alpana Cinema
Pratapnagar,
Vadodara- 390 004

.. Appellant

Versus

1. Bank of Baroda

Through General Manager
NCLT and Legal,
Mumbai

.. Respondent No. 1

2. State Bank of India

Through General Manager,
Metals I, Stress Asset Resolution Group
Corporate Center. Mumbai

.. Respondent No. 2

3. Shri Parthiv Parikh,

(Resolution Professional of

Sanghvi Forging & Engineering Limited)
912, Venus Atlantis Corporate Park,
Anand Nagar Road Prahladnagar,
Ahmedabad – 380 015

.. **Respondent No. 3**

4. Bharat Forge Limited

Mundhwa, Pune Cantonment,
Pune- 411 036, Maharashtra.

.. **Respondent No. 4**

For Appellants : **Dr. U.K. Choudhury, Sr. Advocate, Mr. V.K. Pandey, Mr. Akhil Chadha, Mr. Parish Mishra, Mr. Rahul Sharma, Mr. Mansumyer, Mr. Karan Malhotra, Advocates**

For Respondents:

Mr. Bishwajit Dubey, Ms. Neha Shivhare, Ms. Srideepa Bhattacharyya, Advocates for R1 & R2

Mr. Navin Pahwa, Sr. Advocate, Mr. Jaimin R. Dave, Mr. Karan Valeecha, Mr. Hira Dave, Mr. Dheerak Garg. Advocates for R-3

Mr. Vishnu Shriram, Mr. Tarak Damani, Advocates for R-4

Mr. V.K. Pandey, Mr. Akhil Chadha, Mr. Parish Mishra, Mr. Karan Malhotra, Advocates for R5-7.

J U D G M E N T
(VIRTUAL MODE)

DR. ASHOK KUMAR MISHRA, TECHNICAL MEMBER

The Appeals have been filed under Section 61 of the Insolvency & Bankruptcy Code, 2016 (hereinafter '**Code**') against the Impugned Order 26.04.2021 passed by National Company Law Tribunal Ahmedabad Bench, Ahmedabad (henceforth **Adjudicating Authority**) in I.A. No. 130 of 2021 and I.A. No. 143 of 2021 in CP(IB) No. 197 of 2018. Since both the Appeals have been filed against the same impugned order dated 26.04.2021 passed by the

Adjudicating Authority, both the Appeals were heard together and the judgment was reserved on 30.03.2022.

2. Company Appeal(AT)(Insolvency) No. 352 of 2021

A) The Appellants originally filed the claim before the Operational Creditor much prior to the approval of the Resolution Plan i.e., 23.01.2000 and Interim Resolution Professional (in short **IRP**) Mr. Chandra Prakash Jain informed the Appellants vide his order dated 28.02.2020 appearing at page -86 of the Appeal Paper Book (Annexure- A7) as follows:

....

“With reference to the above subject matter we would like to inform you that we have verified the documents and the claim submitted by with the books of M/s Sanghvi Forging & Engineering Limited. On verification it has been found that the Form B submitted by you is incorrect form, as you are not an Operational Creditor of the Corporate Debtor as you have given Unsecured loan.

Please submit the Form C duly notarized and stamped with supporting invoices and ledgers of revised amount of Claim, if any as on 30.08.2019 i.e. date of CIRP at the office of Interim Resolution Professional i.e. D-501, Ganesh Meridian Opp. High Court, S.G. Road, Ahmedabad- 380 060. (Copy of Form C attached for your reference).

....

B) Based on the directions of IRP on the same day i.e., 28.02.2020, the Appellants filed their claims in form –C as ‘Unsecured Financial Creditor’ as advised by IRP. The Appellants have not received any communication from the

IRP since 28.02.200 with regard to the admission/rejection of the claim and the Resolution Plan was approved without their participation as Financial Creditor in Committee of Creditors (in short '**CoC**').

Company Appeal(Insolvency) No. 424 of 2021

C) Here, the Appellant is a shareholder and erstwhile promotor of the Corporate Debtor in CIRP(CD). The CD was incorporated in the year 1989 and is one of the leading forging suppliers for the Core Sector in various grades of steel. The Corporate Debtor is also registered under Ministry of Micro, Small & Medium Enterprises Act (in short MSME).

D) The Corporate Debtor has taken loan from the Respondent Banks for the purpose of meeting its capital expenses and working capital requirement for a sanctioned amount of Rs. 165.33 Crores. Due to cost overruns on account of delay in getting Government permission, lower capacity utilization and higher fixed and interest cost, resulted in losses to the Corporate Debtor and Corporate Debtor became Non-Performing Asset (in short **NPA**) by the Respondents. The Bank of Baroda, classified the Account of Corporate Debtor as NPA on 28.03.2014 while the loan was recalled by the State Bank of India on 17.01.2019. As a result, on an Application filed by Bank of Baroda under Section 7 of the Code, the Adjudicating Authority, vide order dated 30.08.2019, initiated Corporate Insolvency Resolution Process (In sort **CIRP**) against the CD (Annexure-P2) [from pages 73 to 90 of the relevant Paper Book].

E) **CIRP PROCESS ACTIVITY:**

<i>S. No.</i>	<i>Event</i>	<i>Date</i>	<i>Reference</i>
1.	<i>CIRP Commencement Original CIRP expiry</i>	<i>30.08.2019 25.08.2020</i>	<i>Pg. 73-90 Appeal 5th CoC Meeting dated 19.08.2020 Pg. 131 of Reply by R1 & R2</i>
2.	<i>Exclusion of 106 days (20.09.2019-04.01.2020)</i>	<i>13.03.2020</i>	<i>Pg. 52 of Appeal</i>
3.	<i>Revised CIRP Expiry (IA 542/2020 seeking extension/ exclusion allowed vice order 03.09.2020)</i>	<i>23.11.2020</i>	<i>Pg. 53 of Appeal</i>
4.	<i>Revised CIRP Expiry-270 days (IA 806/2020 Extension/ exclusion of 60 days allowed Order dated 01.12.2020)</i>	<i>01.02.2021</i>	<i>Pg. 53 of Appeal and Pg. 297 of Appeal</i>
5.	<i>I.A. No. 71/2021-Extension of 30 days.</i>	<i>Filed on 21.01.2021</i>	<i>Page. 297 of Appeal</i>
	<i>Actions after expiry of CIR Period (01.12.2021) by virtue of order dated 16.03.2021* in IA 71/2021</i>		
6.	<i>13th CoC meeting</i>	<i>01.02.21 (adjourned to 02.02.2021)</i>	<i>Pg. 136-147 (Reply of RA & R2)</i>

7.	<i>E-Voting window</i>	<i>03.02.2021- 12.02.2021</i>	<i>Pg. 145-147 (Reply of R1 & R2)</i>
8.	<i>I.A. No. 130/2021 by filed Appellant- for implementation of OTS by Appellant/stay on e- voting for resolution plan</i>	<i>Filed on 09.02.2021</i>	<i>Pg. 302-310 of Appeal</i>
9.	<i>IA No. 71/2020 listed on 03.02.2021 adjourned to 22.02.2021</i>	<i>03.02.2021</i>	<i>Pg. 297 of Appeal</i>
10.	<i>IA No. 143/2021 – for approval of Resolution Plan of R-4 filed on 18.02.2021</i>	<i>Listed on 22.02.2021 and adjourned to 08.03.2021</i>	<i>Pg. 311 of Appeal</i>
11.	<i>IA No. 71 dismissed*</i>	<i>16.03.2021 (CIR Period expired w.e.f. 01.02.2021</i>	<i>Pg. 312 of Appeal</i>
12.	<i>Impugned Order approving resolution plan (IA No. 143/2021)</i>	<i>26.04.2021</i>	<i>Pg. 48-72 of Appeal</i>

F) The learned Counsel for the Appellant in Appeal No. 352 of 2021 has raised issue that the Adjudicating Authority has approved the Resolution Plan of the Resolution Applicant, vide order dated 26.04.2021 when the objections of the Appellant (in Appeal No. 352/2021) were pending before the Adjudicating Authority as on the date of the Impugned Order. They have also alleged that the Resolution Professional and others have committed perjury by submitting that all the claims received from each class of Creditors, have been collated and

covered in the Resolution Plan i.e. placed for approval appearing at paragraph-11 of the Impugned order. The Appellants in Appeal 352/2021 has already submitted the claim as Financial Creditor as suggested by the Resolution Professional and still the Resolution Professional has failed to include it in the claim under Financial Creditor. As a result of non-consideration of the claim of the Financial Creditor by the Resolution Professional, leading to non-conformity of requirement of Section 30 of the Code in terms of explanation -1 of Section 30(2)(b)(ii) has happened and the Adjudicating Authority atleast not even heard them before approving the Resolution Plan. The approval of the Resolution Plan has violated the mandatory provision of Sections 30(2) and 31(1) of the Code and related regulations.

G) In the case of Appeal No. 424 of 2021, learned Senior Counsel for the Appellant raised multiple issues as depicted below:

- a. CIRP period expired on 01.02.2021 including extension/exclusion period and there was no extension of the period as sought in IA No. 71/2021 and the Adjudicating Authority has passed the following order on 03.02.2021:

...

“The instant application is filed by the RP with a prayer to extend the 30 days’ time as to total 270 days of the CIRP period has expired on 01.02.2021 which also includes lockdown period.

Since the resolution so passed by the CoC, wherein, they have decided to get extension of another 30 days as the CoC received Resolution Plan on 15.12. 2020, due to late filing of the

addendum, hence the CoC has taken the decision for extension of time.

It is further submitted that there is every likelihood that the resolution plan may be approved by the CoC and thereby the Company can be saved from liquidation.

Looking to the facts and circumstances of the case. The Applicant is directed to file the resolution plan after making all deliberation on or before 22.02.2021, and at that point of time, this application will be considered.

List the matter on 22.02.2021.”

- b. Since CIRP expired on 01.02.2021, the Resolution Professional and CoC became functus officio and they cannot use their powers in terms of the provision of Section 12 of the Code and only option available was Section 33 of the Code. CoC could not have convened 13th CoC meeting on 02.02.2021 when its CIRP expired on 01.02.2021 and the resolutions passed therein are non-est and void. It is unfortunate to point out that the CoC has voted during given window of 3.12.2021 – 12.02.2021 as per the Written Submission of the Appellant in this Appeal appearing at pages 144 & 147 of the Reply of Respondent No. 1 and Respondent No. 2. Resolution Professional has committed professional error by filing I.A. No. 143 of 2021 around Mid. February, 2021 when the CIRP process already stood expired on 01.02.2021.

c. Learned Senior Counsel went on to say that the total CIRP period taken was more than 500 days while the code prescribes maximum period of 330 days. Learned Senior Counsel stress that it is a material irregularity under Section 61(3)(ii) of the Code. Learned Senior Counsel have expeditiously made it clear that the Resolution Professional has committed a material irregularity by acting beyond the period of approved CIRP period and also by not including the claim of the Financial Creditor. There is not equity based jurisdiction that the Adjudicating Authority or this Tribunal, under the provision of this Code which is well settled. Even on the ground of Principle of Natural Justice, Appellants are sufferer and no opportunity was given to them to plead his Application – I.A. No. 130/2021. He has also pleaded that the OTS proposal given by the Appellant for Rs. 75 Crores was duly sanctioned by the bank and an amount of Rs. 3.75 Crores was also deposited in August, 2019 and further an amount of Rs. 7.5 Crores was also deposited. Even the Resolution Plan so approved by the Bank, lack feasible and viable as opposed to the OTS proposal which offered almost double amount of the Resolution Plan and the Appellant (MSME Member) is ready to pay Rs. 83 Crores to the Financial Creditor.

SUBMISSION OF RESPONDENT NOS. 2 & 3 (IN APPEAL No. 352/2021)

3. The Financial Creditors/Respondent Nos. 2 & 3 have jointly submitted that the Resolution Plan has resulted into its approval by the CoC and its successful implementation by Successful Resolution Applicant i.e., Respondent No. 4.- M/s Bharat Forge Limited. They have also alleged that the Appellants

used 'forum shopping' as their Interlocutory Application and the resulted issues have already been dismissed by this Tribunal. The present Appeal is filed at a highly belated stage and is merely a subterfuge and a future attempt to prevent the timely and successful resolution of the Corporate Debtor. The learned Counsel for the Respondent Nos. 2 & 3 also submitted that the Appellant has filed an Application bearing No. I.A. No. 315/2021 on 16.04.2021 nearly 60 days after the Resolution Plan was approved by the CoC on 12.02.2021. The Appellants have now estopped from raising any objection at this advanced stage. They also submitted that interference of this Tribunal at this belated stage jeopardized already implemented plan. Whatever delay is there, it has resulted from frivolous litigations. The Appellants are not entitled to make allegation as to the viability of the credential of the Plan approved by the CoC with 100% majority and challenge the commercial wisdom of the CoC. CoC has complied with the requirements of Section 30(2) of the Code and Regulation 38 of IBBI CIRP Regulation. The learned Counsel also submitted that once the CoC has approved the Resolution Plan in its commercial wisdom, then such decision is unjustifiable and finally pleaded for disposal of the Application.

SUBMISSION OF RESPONDENT NOS. 1 & 2 IN APPEAL NO. 424/2021:

4. The learned Counsel for the Respondent Nos. 2 & 3 has submitted that a similar Appeal has been filed by another shareholder of the Corporate Debtor against the same Impugned Order (*Ronak Kundanlal Bhagat & Ors. Vs. Parthiv Parikh and Ors.*) was dismissed without issuing Notice in Company Appeal (AT)(Ins) No. 364 of 2021. They have also alleged that the approval of the *Company Appeal (AT)(Insolvency) No. 352 & 424 of 2021*

Resolution Plan has violated IBBI CIRP Regulation and the Appeal is severely hit by delay and laches and the Appellants are estopped from raising any grievance at this extremely belated stage:

- a. *The Appeal been filed at a highly belated stage and is merely a subterfuge and a futile attempt to prevent the timely and successful resolution of the Corporate Debtor. Firstly, the Resolution Plan submitted by the SRA has been approved by the CoC and the Tribunal and pursuant to the approval of the Plan by the Tribunal vide order dated April 26, 2021 and the same not having been stayed by this Tribunal, the Plan has fructified into successful implementation in August, 2021. On merits and without prejudice to the above, it is submitted that the Appellant is estopped at this belated stage from seeking a consideration of his OTS proposal when the Appellant and his representatives are present during the CoC meetings wherein resolution plans were discussed, placed for approval of the CoC, plans and the addendums thereto were unsealed, opened and deliberated upon in their presence.*
- b. *It is submitted that the entertainment and consideration of appeals like the present one would be completely against the sanctity of time bound resolution process. As has been held time and again, time is of essence under the Code and consideration of the present belated appeal, especially after approval of the Plan, would merely frustrate a timely resolution of the Corporate Debtor. Pertinently, even under of the Report of the Bankruptcy Law Reform Committee dated November 2015 (“**BLRC Report**”) (which formed the*

basis for the enactment of the Code) one of most crucial principle highlighted therein is that time is essence in any resolution process. This was also upheld by the Hon'ble Supreme Court of India in the landmark judgment of **M/s Innoventive Industries Ltd. v. ICICI Bank and Anr. (2018) 1 SCC 407** (Paras 12,16 & 31). The time bound disposal of matters under the Code was also emphasized upon in the landmark judgment of **ArcelorMittal India Private Limited v. Satish Kumar Gupta and Ors. (2019) 2 SCC 1** (Paras 82, 67-69).

- c. Such delays caused due to frivolous litigation render the insolvency process inefficient and expensive and their impact has been highlighted by the Hon'ble Supreme Court in its recent judgment in **Ebix Singapore Private Limited V. Committee of Creditors of Educomp Solutions Limited & Anr., Civil Appeal No. 3324 of 2020** and its connected Matters ("Ebix") (para 249). The Hon'ble Court has categorically held that such acts cause 'commercial uncertainty, degradation in the value of the Corporate Debtor and makes the insolvency process inefficient and expensive."
- d. The appellant has sat on the fence for an extended period of time, is therefore now estopped from raising any objections at this highly advanced stage when the Plan has been successfully implemented after it was approved by the Tribunal vide the Impugned Order.

5. The Appellants have failed to effectively and timely implementation of the OTS proposal. The Appellants cannot derive a right to interference its OTS and thereby oppose CIRP:

...

“a. The Appellant is not entitled to make allegations as to the viability and credentials of the Plan approved by the CoC with 100% majority which has further been approved by NCLT and challenge the commercial wisdom of the CoC.. The Appellant is also not entitled to seek a direction as to the implementation of the OTS which has been rejected by the CoC in the exercise of its commercial wisdom and thereafter, subsequently rejected by the NCLT. Furthermore, there is no provision in the Code or the Regulations whereunder the CoC of a Corporate Debtor can be compelled to consider and/or accept the settlement offered by the Promoters.

*c. It is submitted that the Courts in India have time and again held that commercial wisdom of the CoC is paramount, and that the CoC in its commercial wisdom is empowered to take decisions which is non-justiciable. **In K. Sashidhar v. India Overseas Bank**, (2019) 12 SCC 150 (Paras 33 & 37), the Hon’ble Supreme Court held that “The legislature has not endowed the adjudicating authority (NCLT) with the jurisdiction or authority to analyses or evaluate the commercial decision of CoC... and “The provisions investing jurisdiction and authority in NCLT or NCLAT as noticed earlier, have not made the commercial decision exercised by CoC of not approving the resolution plan or rejecting the same, justiciable.” The commercial wisdom of the CoC is of paramount importance as has been noted by the Hon’ble Supreme Court in subsequent judgments including*

Maharashtra Seamless Limited v. Padmanabhan Venkatesh & Others [Civil Appeal No. 4242 of 2019 (Para 28)].

d. Further, the Hon'ble Supreme Court made similar observations in **Jaypee Kensington Boulevard vs. NBCC (India) Ltd & Ors., [Civil Appeal No. 3395 of 2020]**. Recently, the Hon'ble Supreme Court in **Kalpraj Dharamshi v. Kotak Investment Advisories Ltd.**, [Civil Appeal Nos. 2943-2944 of 2021 (paras 149 & 154-155)] noted the following in respect of commercial wisdom of the CoC:

154. This Court observed that the Court ought to cede ground to the commercial wisdom of the creditors rather than assess the resolution plan on the basis of quantitative analysis...

155. It would thus be clear, that the legislative scheme, as interpreted by various decisions of this Court, is unambiguous. The Commercial wisdom of CoC is not to be interfered with, excepting the limited scope as provided under Sections 30 and 31 of the I & B Code.

e. In fact, reference may also be made to this Hon'ble Tribunal's recent decision in the matter of **Union Bank of India on behalf of the Committee of Creditors of Dewan Housing Finance Corporation Ltd. vs. Kapil Wadhwan & Ors.**, Company appeal (AT)(Ins) No. 370 of 2021 (Para 13), wherein the Tribunal while upholding the wisdom of the Committee of Creditors in approving a resolution plan, stayed the NCLT's order directing consideration of the promoter's settlement proposal, observing that "there would be no end if such reversals are allowed."

e. Further, this Hon'ble Tribunal in its judgment dated November 10,2021 in the matter **Ananta Charan Nayak vs. State Bank of India & Ors. Company Appeal (AT)(Ins) No. 870 of 2021 (Para-9)** had held that 'The acceptance of the settlement proposal by the financial creditor is a matter entirely in the ambit of the financial creditor (SBI) and we do not think that the proceedings before the Adjudicating Authority should have been held up and delay, waiting for a response by the State Bank of India. IBC does not provide for keeping the proceedings in abeyance and the application for admission has to be decided in a stipulated timeframe'.

g. Further, it is a settled principle that even if an improved offer is received subsequently in a bidding process, no consideration ought to be given to such proposals- **Navalkha and Sons v. Sri Ramanya Das and Ors.** [AIR 1970 SC 2037 (Para-6); **Vedica Procon Pvt. Ltd vs. Balleshwar Greens Private Ltd.** [(2015) 10 SCC 94 (Para 53)].

SUBMISSION OF RESPONDENT NO. 3 (IN APPEAL No. 424/2021) & RESPONDENT NO. 1 (IN APPEAL NO. 352/2021/RESOLUTION PROFESSIONAL

6. The learned Senior Counsel for the Resolution Professional has submitted that the Appellant did not submit the supporting documents along with Form. As a result of which, they were not considered as Financial Creditor. The learned Senior Counsel also submitted that the Appellant did not raise the issue at the

appropriate time before the CoC meeting and hence they have not right to raise this issue at this stage. He has also categorically stated that there was no material irregularity as required under Section 61(3)(ii) of the Code. The Plan has been proved by the CoC and their commercial wisdom cannot be challenged. They have also submitted that the members of the CoC have unanimously expressed their commercial wisdom and judiciously approved the Resolution Plan submitted by Bharat Forge Limited i.e., Respondent No. 4, through e-voting that commenced on 03.02.2021 and concluded on 12.02.2021. It is further submitted that the approved Resolution Plan ensures repayment of dues to Financial Creditors as well as Operational Creditors and it is in compliance with requirement of Insolvency and Bankruptcy Code, 2016. This appeal is nothing but a mala fide attempt to stall the implementation of approved resolution plan after failing to honour terms of their own OTS proposal on earlier occasion despite getting multiple opportunities from CoC. In the case of the “**Karad Urban Cooperative Bank vs. Swapnil Bhingardevay**” [(2020 119 taxmann.com 46 (SC)/[2020], the apex Court held that

“The principles laid down in the aforesaid decisions, make one thing very clear. If all the factors that need to be taken into account for determining whether or not the corporate debtor can be kept running as a going concern have been placed before the Committee of Creditors and the CoC has taken a conscious decision to approve the resolution plan, then the adjudicating authority will have to switch over to the hands off mode.”

They also further submitted that the Appellant failed to comply with the OTS. In the present case, CIRP commenced on 30.08.2019 on admission of Company Petition No. 197 of 2018. Being aggrieved, Appellant – suspended Management preferred an appeal before this Tribunal. During the pendency of appeal, Appellant –suspended Management had submitted an OTS proposal vide letter dated 26.09.2019. Thereafter on 21.11.2019, suspended management modified the settlement terms and undertook to comply with the same.

However, the Appellant miserably failed in complying with the terms of OTS proposal. Under the circumstances, vide order dated 02.12.2019, this Tribunal granted an opportunity to the Appellant to settle its dues through the OTS on or before 31.12.2019. In the said order, it was also made clear that in case where Appellant – Suspended Management fails to honour terms of OTS proposal then CIRP will be proceeded in accordance with law.

It was submitted that despite the order of this Tribunal, Appellant – Suspended Management did not comply with the terms of OTS. Therefore, the Respondent No. 1 and No. 2, vide e-mail dated 02.03.2020, herein informed Appellant –suspended management that OTS proposal has technically failed. But considering discussions with investor and the ongoing pandemic, Appellant – suspended Management was granted repeated opportunity to comply with the OTS terms.

It was further submitted that even after that, Appellant –Suspended Management miserably failed to deposit the amount in accordance with OTS

proposal. It was further submitted that Appellant- Suspended management was not granted any extension beyond 10.11.2020 and hence OTS proposal is deemed to be terminated on said date.

They have also cited the judgment of this Tribunal to supplement their stand that Tribunal in the case of **Ram Bahadur Shree Ram and Co. (P.) Ltd.**

V. Bhuvan Madan (2020) 118 taxmann.com 489 (NCLAT inter alia held that:

“6. Thus, it is the settled proposition of law that the commercial wisdom of the Committee of Creditors in approving or rejecting a resolution plan is essentially based on a business decision, which involves evaluation of the resolution plan base on its feasibility besides the Committee of Creditors being fully informed about the viability of the corporate debtor. Such commercial wisdom of the Committee of Creditors with requisite voting majority is non-justiciable and the discretion on Adjudicating Authority is circumscribed to scrutiny of resolution plan as approved by the requisite majority voting share of the financial creditors. The enquiry postulated under Section 31 of the I & B Code is limited to matters covered under Section 30(2) of the I & B Code when the resolution plan does not confirm the stated conditions. Therefore, the Appellants cannot question the commercial wisdom of the Committee of Creditors in rejecting the settlement proposal emanating from the Appellants, with the requisite majority and in approving the resolution plan of SPTL. No material irregularity in corporate insolvency resolution process before the resolution professional has been demonstrated. Merely because the Adjudicating Authority has declined to

direct reconsideration of the already rejected settlement proposal of Appellants does not impinge upon the legality and conformity of the approved resolution plan with the conditions stated in Section 32 of the I & B Code.

It is also submitted that the CoC was duly constituted in accordance with Section 21 of the Code. IRP has issued paper publications inviting the claims from the creditors twice on 07.09.2019 & 13.01.2020. Pursuant to the claims received by the way of the said paper publications, the CoC was constituted consisting of only 2(two) financial creditors viz. State Bank of India and Bank of Baroda.

Name of Bank	Amount of Debt	% of Debt
State Bank of India	110,85,53,949/-	41.59
Bank of Baroda	67,12,65,071/-	58.41

He has also submitted that the said resolution plan is approved and to the best of my Respondent No. 3/Resolution Professional plan is successfully implemented and payments to be made under the plan are duly made. Under the circumstances, Appellant – Suspended Management cannot insist upon acceptance of OTS proposal at this stage more particularly in view of the ratio laid down in **K. Sashidhar vs. Indian Overseas Bank**, reported in (2019) 12 SCC 150.

He has also submitted that the representation of the Operational Creditor is not mandatory under Section 24 of the Code and there is no obligation to approve the Resolution Plan higher than liquidation value. It was also stated that by Respondent No. 3/Resolution Professional that he had filed the Resolution Plan before the Adjudicating Authority well in time. Hence the Application is to be dismissed.

ANALYSIS AND OBSERVATIONS:

7. We have carefully gone through the submissions made by Appellant/ Respondent/Resolution Professional/Successful Resolution Applicant and the input available on record and have following observations:

- a. It is unfortunate to record that IRP has responded to the Appellants vide IRP's letter dated 28th February, 2020 (in Appeal No. 352/2021) that the claim of the Appellants is to be made as Financial Creditor as they have given Unsecured Loan and not as Operational Creditor after verifying records by him and hence the Appellants' claim as Operational Creditor was not accepted and he was asked to fill up Form C on 28.02.2020 and he filed the same on the same day. In spite of that the Resolution Professional (Respondent No. 1) has not considered their claim as Financial Creditor.

Chandra Prakash Jain

FCA, FAIP, Insolvency Professional (IBBI)
Reg. No. IBBI/IPA-001/IP-P00147/2017-18/10311

Date: February 28, 2020

Annexure-A/7

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To,
Synergy Associates,
5, Niral Apt.,
OPP. Blind School,
SUBHANPURA,
VADODARA - 390023

Dear Sir,

Subject: Clarification of your Claim as Financial Creditor in case of M/s Sanghvi Forging & Engineering Limited

Ref: Your claim form received on 23.01.2020 claiming total amount of **Rs 52,57,984/-**

With reference to the above subject matter we would like to inform you that we have verified the documents and the claim submitted by you with the books of M/s Sanghvi Forging & Engineering Limited. On verification it has been found that the Form B submitted by you is incorrect form, as you are not an Operational Creditor of the Corporate Debtor as you have given Unsecured Loan.

Please submit the Form C duly notarized and stamped with supporting invoices and ledgers of revised amount of Claim, if any as on 30.08.2019 i.e. date of CIRP at the office of Interim Resolution Professional i.e. D-501, Ganesh Meridian, Opp. High Court, S.G. Road, Ahmedabad - 380060. (Copy of Form C attached for your reference)

On the basis of the above verification we hereby convey our inability to accept the claim submitted by you.

Thanking You
Yours Faithfully,

Chandra Prakash Jain
Chandra Prakash Jain
(Interim Resolution Professional)

M/s. Sanghvi Forging & Engineering Limited
Regn no. IBBI/IPA-001/IP-P00147/2017-18/10311



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As far as the issue of Appellants percentage of claim with respect to the total Financial Creditor claim is concerned, it is minuscule as submitted by Resolution Professional Shri Parthiv Parikh, who was appointed on the recommendation of CoC and thereafter approved by Adjudicating Authority on 26.05.2020. The total amount of debt of these banks is Rs. 177,98,19,021/- while the Appellant's claim is Rs. 2,25,17,330/- is a very low figure and even had they been included as Financial Creditor, it would have no impact on the decision of the CoC as still it is approved by more than 98% of the value of the Creditors. This submission is also not acceptable. If this practices be allowed, then small and marginal Financial Creditors will get ruined and the same may not be a healthy trend and also not supported by any provisions of the Code and related Regulations.

This matter needs to be referred to IBBI to take an appropriate view and issue appropriate clarification/direction to the Resolution Professionals.

- b. There is no concept of virtual extension of CIRP period. Section 12 is explicitly clear on the subject and the same is reproduced for brevity and clarity.

Section 12: Time-limit for completion of insolvency resolution process.

**12. (1) Subject to sub-section (2), the corporate insolvency resolution process shall be completed within a period of one*

hundred and eighty days from the date of admission of the application to initiate such process.

(2) The resolution professional shall file an application to the Adjudicating Authority to extend the period of the corporate insolvency resolution process beyond one hundred and eighty days, if instructed to do so by a resolution passed at a meeting of the committee of creditors by a vote of ¹[sixty-six] per cent. of the voting shares.

(3) On receipt of an application under sub-section (2), if the Adjudicating Authority is satisfied that the subject matter of the case is such that corporate insolvency resolution process cannot be completed within one hundred and eighty days, it may by order extend the duration of such process beyond one hundred and eighty days by such further period as it thinks fit, but not exceeding ninety days:

Provided that any extension of the period of corporate insolvency resolution process under this section shall not be granted more than once.

²Provided further that the corporate insolvency resolution process shall mandatorily be completed within a period of three hundred and thirty days from the insolvency commencement date, including any extension of the period of corporate insolvency resolution process granted under this section and the time taken in legal proceedings in relation to such resolution process of the corporate debtor:

Provided also that where the insolvency resolution process of a corporate debtor is pending and has not been completed within

the period referred to in the second proviso, such resolution process shall be completed within a period of ninety days from the date of commencement of the Insolvency and Bankruptcy Code (Amendment) Act, 2019.]

However, the Adjudicating Authority provided a leeway that the Resolution Plan is to be submitted within a specified date and at that time he will appropriately consider the extension application. This is a grey area.

c. It is amply made clear that under the Code that there is no equity jurisdiction under the Code which has been made clear in the Hon'ble Apex Code in various judgments as held and given below:

- i) ***Pratap Technocrats Private Limited & Ors. Vs. Monitoring of Reliance Infratel Limited & Anr.*** (Civil Appeal No. 676/2021)
- ii) ***Gujrat Urja Vikas Nigam Limited Vrs. Mr. Amit Gupta & Ors.*** [Civil Appeal No. 9241 of 2019] and
- iii) ***E S Krishnamurthy & Ors. Vrs. M/s Bharath Hi Tech Builders Pvt. Ltd.*** (Civil Appeal No. 3325 of 2020)

In K. Sashidhar v. Indian Overseas Bank & Ors. (2019) 12 SCC 150

the Hon'ble Supreme Court held that the Adjudicating Authority has been endowed with limited jurisdiction as specified in the IB Code and cannot act as a Court of Equity.

d. This is a case where the Financial Creditors are reputed Banks and they have large stake involved. Hence considering this aspect, they have

deliberated the matter and expedited it and finally within a specified date of adjudication, as permitted by Adjudicating Authority, they have submitted duly approved Resolution Plan for its approval. It is also well settled that the wisdom of the CoC is unjustifiable as has been held in the Hon'ble Apex Court Judgment as mentioned below:

- i. The Courts of India have time and again held that the commercial wisdom of the CoC is paramount, and that the CoC in its commercial wisdom is empowered to take decision which is non-justiciable. ***In K. Sashidhar v. India Overseas Bank***, (2019) 12 SCC 150 (Paras 33 & 37), the Hon'ble Supreme Court held that "The legislature has not endowed the adjudicating authority (NCLT) with the jurisdiction or authority to analyses or evaluate the commercial decision of CoC... and "The provisions investing jurisdiction and authority in NCLT or NCLAT as noticed earlier, have not made the commercial decision exercised by CoC of not approving the resolution plan or rejecting the same, justiciable." The commercial wisdom of the CoC is of paramount importance as has been noted by the Hon'ble Supreme Court in subsequent judgments including ***Maharashtra Seamless Limited v. Padmanabhan Venkatesh & Others*** [Civil Appeal No. 4242 of 2019 (Para 28)].
- ii. Further, the Hon'ble Supreme Court made similar observations in ***Jaypee Kensington Boulevard vs. NBCC (India) Ltd & Ors.***, [Civil

Appeal No. 3395 of 2020]. Recently, the Hon'ble Supreme Court in ***Kalpraj Dharamshi v. Kotak Investment Advisories Ltd.***, [Civil Appeal Nos. 2943-2944 of 2021 (paras 149 & 154-155)] noted the following in respect of commercial wisdom of the CoC:

154. This Court observed that the Court ought to cede ground to the commercial wisdom of the creditors rather than assess the resolution plan on the basis of quantitative analysis...

155. It would thus be clear, that the legislative scheme, as interpreted by various decisions of this Court, is unambiguous. The Commercial wisdom of CoC is not to be interfered with, excepting the limited scope as provided under Sections 30 and 31 of the I & B Code.

- iii. In fact, reference may also be made to this Tribunal's recent decision in the matter of Union Bank of India on behalf of the ***Committee of Creditors of Dewan Housing Finance Corporation Ltd. vs. Kapil Wadhwan & Ors.***, Company appeal (AT)(Ins) No. 370 of 2021 (Para 13), wherein the Tribunal while upholding the wisdom of the Committee of Creditors in approving a resolution plan, stayed the NCLT's order directing consideration of the promoter's settlement proposal, observing that "there would be no end if such reversals are allowed."

- iv. Further, it is a settled principle that even if an improved offer is received subsequently in a bidding process, no consideration ought to be given to such proposals- **Navalkha and Sons v. Sri Ramanya Das and Ors.** [AIR 1970 SC 2037 (Para-6); **Vedica Procon Pvt. Ltd vs. Balleshwar Greens Private Ltd.** [(2015) 10 SCC 94 (Para 53)].
 - v. **M/s Innoventive Industries Ltd. v. ICICI Bank and Anr. (2018) 1 SCC 407** (Paras 12,16 & 31).
 - vi. **Ebix Singapore Private Limited V. Committee of Creditors of Educomp Solutions Limited & Anr., Civil Appeal No. 3324 of 2020**
- e. It is also now well settled in law as held by Hon'ble Supreme Court in Para 68 of **Jaypee Kensington Boulevard vs. NBCC(India) Ltd. & Ors.** [Civil Appeal No. 3395 of 2020 has noted that whether a resolution plan and its propositions are leading to maximization of value of assets or not, would be matter of enquiry and assessment of the Committee of Creditors alone.
8. The purpose of the Code apart from others includes following:

..

The objective of the Insolvency and Bankruptcy Code, 2015 is to consolidate and amend the laws relating to reorganization and insolvency resolution of corporate persons partnership firms and individuals in a time bound manner for maximization of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the priority of payment of government dues and to establish an Insolvency and Bankruptcy Fund, and

matters connected therewith or incidental thereto. An effective legal framework for timely resolution of insolvency and bankruptcy would support development of credit markets and encourage entrepreneurship. It would also improve Ease of Doing Business, and facilitate more investments leading to higher economic growth and development.

...

9. All these reflect that the Adjudicating Authority or the Appellate Authority should interfere only on the limited issue of procedure and legal compliance i.e., enumeration in Section 30(2) read with Section 31 and Section 61(3) of the Code. For issue of convenience, the said provisions are enumerated hereunder:

SECTION 30(2) OF IBC:

“The resolution professional shall examine each resolution plan received by him to confirm that each resolution plan—

(a) provides for the payment of insolvency resolution process costs in a manner specified by the Board in priority to the ²[payment] of other debts of the corporate debtor;

(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.

Explanation 2. — For the purpose of this clause, it is hereby declared that on and from the date of commencement of the Insolvency and Bankruptcy Code (Amendment) Act, 2019, the provisions of this clause shall also apply to the corporate insolvency resolution process of a corporate debtor-

(i) where a resolution plan has not been approved or rejected by the Adjudicating Authority;

(ii) where an appeal has been preferred under section 61 or section 62 or such an appeal is not time barred under any provision of law for the time being in force; or

(iii) where a legal proceeding has been initiated in any court against the decision of the Adjudicating Authority in respect of a resolution plan;]

(c) provides for the management of the affairs of the Corporate debtor after approval of the resolution plan;

(d) the implementation and supervision of the resolution plan;

(e) does not contravene any of the provisions of the law for the time being in force;

(f) conforms to such other requirements as may be specified by the Board.

[Explanation. — For the purposes of clause (e), if any approval of shareholders is required under the Companies Act, 2013 (18 of 2013) or any other law for the time being in force for the implementation of actions under the resolution plan, such approval shall be deemed to have been given and it shall not be a contravention of that Act or law.]”

SECTION 31 OF IBC:

Approval of resolution plan.

“31. *(1) If the Adjudicating Authority is satisfied that the resolution plan as approved by the committee of creditors under sub-section (4) of section 30 meets the requirements as referred to in sub-section (2) of section 30, it shall by order approve³ the resolution plan which shall be binding on the corporate debtor and its employees, members, creditors, ¹[including the Central Government, any State Government or any local authority to whom a debt in respect of the payment of dues arising under any law for the time being in force, such as authorities to whom statutory dues are owed,] guarantors and other stakeholders involved in the resolution plan.*

[Provided that the Adjudicating Authority shall, before passing an order for approval of resolution plan under this sub-section, satisfy that the resolution plan has provisions for its effective implementation.]

(2) Where the Adjudicating Authority is satisfied that the resolution plan does not conform to the requirements referred to in sub-section (1), it may, by an order, reject the resolution plan.

(3) After the order of approval under sub-section (1),—

(a) the moratorium order passed by the Adjudicating Authority under section 14 shall cease to have effect; and

(b) the resolution professional shall forward all records relating to the conduct of the corporate insolvency resolution process and the resolution plan to the Board to be recorded on its database.

²(4) The resolution applicant shall, pursuant to the resolution plan approved under sub-section (1), obtain the necessary approval required under any law for the time being in force within a period of one year from the date of approval of the resolution plan by the Adjudicating Authority under sub-section (1) or within such period as provided for in such law, whichever is later.

Provided that where the resolution plan contains a provision for combination, as referred to in section 5 of the Competition Act, 2002, the resolution applicant shall obtain the approval of the Competition Commission of India under that Act prior to the approval of such resolution plan by the committee of creditors.]”

SECTION 61(3) OF IBC:

..

“(3) An appeal against an order approving a resolution plan under section 31 may be filed on the following grounds, namely:—

(i) the approved resolution plan is in contravention of the provisions of any law for the time being in force;

(ii) there has been material irregularity in exercise of the powers by the resolution professional during the corporate insolvency resolution period;

(iii) the debts owed to operational creditors of the corporate debtor have not been provided for in the resolution plan in the manner specified by the Board;

(iv) the insolvency resolution process costs have not been provided for repayment in priority to all other debts; or

(v) the resolution plan does not comply with any other criteria specified by the Board.”

10. Consolidated reading of all these provisions and objects of the Code apart from analysis/observations stated supra, it reveals that the purpose of CIRP is to provide life to organization and not to provide death knell. Death Knell/liquidation should be the last resort. Hence no need to touch the Resolution Plan so implemented by Successful Resolution Applicant (viz. M/s Bharat Forge Limited).

11. Prima facie, there is apparent mistake by the Resolution Professional for not considering the claim of the Appellant Financial Creditor in Company Appeal(AT)(Insolvency) No. 352 of 2021 being Unsecured Loan Holder as per the written statement of his predecessor IRP is not in good taste and accordingly, Financial Creditors, who have received the major chunk from the Resolution Applicant should appropriately refund the original claim, minus any amount received, made by the Financial Creditor as Operational Creditor (as per letter of Interim Resolution Professional dated February 28, 2020 as stated supra) in the same percentage as these Financial Creditors have received from Resolution Applicant i.e., M/s Bharat Forge Ltd. .

With these observations, we are partially allowing the Appeals. No Order as to cost. Pending Interlocutory Application, if any, stands disposed of with this order.

(Justice M. Venugopal)
Member(Judicial)

(Dr. Ashok Kumar Mishra)
Member(Technical)

18th April, 2022

Akc