NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Ins.) No. 1272 of 2019

(Arising out of the Order dated 27.09.2019 passed by the National Company Law Tribunal, Kolkata Bench, Kolkata in CA (IB) No. 736/KB/2019 in CP (IB) No. 61/KB/2018)

IN THE MATTER OF:

West Coast Paper Mills Ltd.
Having its registered office at:
P.B. No. 5, Bangur Nagar,
Dandeli- 581325, District- Uttar Kannada,
Karnataka. **...Appellant**

Versus

1. Bijay Murmuria,
Resolution Professional of Fort Gloster Industries Ltd.
Sumedha Fiscal Services Ltd.,
8B Middleton Street, 6A Geetanjali,
Kolkata- 700071.

2. Committee of Creditors Through Stressed Assets Stabiliozation Fund
Having its registered office at:
3rd Floor, IDBI Tower,
WTC Complex, Cuffe Parade,
Mumbai- 400005.

3. Gloster Limited
Having its registered office at:
21, Strand Road, Kolkata **...Respondents**
West Bengal- 700001.

Present:

For Appellant: **Mr. Sidharth Sharma, Mr. Arjun Asthana, Advocates.**

For Respondents: **Mr. Anand Varma, Mr. Ayush Gupta, Advocates for RP/R1.**
Mr. Shaunak Mitra, Mr. Anil Agarwalla, Ms. Neha Sharma, Advocates for R-3/SRA.

J U D G E M E N T

(13th May, 2024)

INDEVAR PANDEY, MEMBER (TECHNICAL)

This appeal has been filed under Section 61(3) of Insolvency and Bankruptcy Code (in short 'IBC') challenging the impugned order of National Company Law Tribunal, Kolkata Bench, Kolkata (in short 'Adjudicating Authority) in CA (IB) No. 736/KB/2019 in CP (IB) No. 61/KB/2018 (in short main Insolvency application) passed on 27th September, 2019. By this order, Adjudicating Authority rejected the claim of the Appellant to be treated on par with other Financial Creditors and to make the Appellant eligible for distribution of claims as per Resolution Plan.

2. One Jayanta Kumar Panja, an ex-employee of Fort Gloster Industries Limited (Corporate Debtor) filed an application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (in short IBC) for initiation of the Corporate Insolvency Resolution Process on account of default in payment of Rs.1,13,946/- towards his gratuity. The said application bearing CP (IB) No.61/KB/2018 was admitted by the Adjudicating Authority (National Company Law Tribunal, Kolkata Bench, Kolkata) on 09.08.2018. Manish Jain was appointed as the Interim Resolution Professional (IRP) who was replaced by Bijay Murmuria as the Resolution Professional (RP) in the second meeting of Committee of Creditors (CoC) held on 04.12.2018.

3. The RP published Form-G on 05.02.2019 in financial express (English) and in Aajkaal (Bengali) for the purpose of inviting Expression of

Interests (EOIs) in which the last date for submission of EOIs was 20.02.2019. The RP received EOI from two Prospective Resolution Applicants (PRAs) on 20.02.2019 i.e. Prudent ARC Limited and Gloster Limited. In the meanwhile, M/s Hooghly Infrastructure Pvt. Ltd. also filed an application towards EOI. The said application was allowed by the Adjudicating Authority vide order dated 01.04.2019. Thereafter, two resolution plans from M/s Gloster Limited and M/s Hooghly Infrastructure Pvt. Ltd. were received by the RP till the last date of submission of resolution plan i.e. 06.04.2019 (17:00 PM). The RP received the forensic audit/due diligence report of the Corporate Debtor from the Auditor, namely, V. Singhi & Association, Chartered Accountants on 10.04.2019 in which it was stated that there were no preferential transactions, undervalued transactions, transaction defrauding creditors, extortionate credit transactions, fraudulent trading or wrongful trading. The RP apprised the members of the CoC in the 6th meeting about the plans received from the PRAs. It was also brought to their notice that the resolution plan received from M/s Hooghly Infrastructure Pvt. Ltd. had certain inconsistencies in terms of the provisions of the Code. Both the Resolution Applicants submitted their updated resolution plan by 5:00 PM on 19.04.2019 and the corresponding hard copies by 12:00 noon on 20.04.2019. A certificate was given by Saumendra Kabiraj, Advocate that both the Resolution Applicants were eligible in terms of the provisions of Section 29A of the Code but Gloster Limited scored 51 in the terms of qualitative criteria and quantitative criteria of the evaluation matrix as against the score of 30 obtained by M/s Hooghly Infrastructure Pvt. Ltd. And thus, the members of the CoC unanimously

declared Gloster Limited as H1 bidder for the Corporate Debtor. The resolution plan of the Gloster Limited, having been declared as H1 was put to vote through e-voting which was approved by 73.21% voting in which Pegasus Asset Reconstruction Pvt. Ltd., Punjab National Bank & Andhra Bank voted in favour of plan whereas Stressed Assets Stabilization Fund with 26.79% voting share voted against it.

4. The RP filed an application bearing CA (IB) No. 584/KB/2019 under Section 30(6) of the Code before the Adjudicating Authority for seeking approval of the resolution plan of the Fort Gloster Industries Ltd. (CD) submitted by Successful Resolution Applicant (SRA). Adjudicating Authority by a single order dated 27.09.2019 (Impugned Order) decided the claims of various categories of claimants and also approved the Resolution Plan.

Submission of the Appellant:

5. The Appellant West Coast Paper Mills Ltd., is a limited Company having its registered Office in district Uttar Kannada, Karnataka. The Corporate Debtor, M/s Fort Gloster Industries Ltd has its Offices in Kolkata and is involved in the business of manufacture of jute hessian, gunny bags, all types of rubber and PVC cables etc.

6. The claim of the Appellant is that an amount of Rs. 7,15,41,918/- (Rupees Seven crores, fifteen lakhs, forty-one thousand, nine hundred eighteen only) was paid by them on behalf of Corporate Debtor to KDCC Bank Ltd., due to default by the Corporate Debtor and Corporate Guarantee Bond executed by the Appellant. This payment was made on 25.08.2014. The said amount was transferred into a short term inter-corporate deposit

and Corporate Debtor routinely issued balance confirmation to the Appellant.

7. After the initiation of CIRP against the Corporate Debtor, the Appellant filed its claim amounting to Rs. 89,20,02,003.54/- (Rupees Eighty-nine Cores, Twenty Lakhs, Two Thousand and three, paise fifty-four only) which included apart from principal, interest @ 18% per annum. The Appellant claimed before the Adjudicating Authority that he should be treated on par with other Financial Creditors and should be eligible for equal pro rata distribution as per Resolution Plan, which has not been done and no amount has been provided for him. He contended that Resolution Plan is contrary to the provision of IBC and is liable to be rejected.

8. The appellant submitted that the Adjudicating Authority has rejected his claim to be treated on par with unrelated Secured Financial Creditors, rather he has been equated with equity shareholders by the order of Adjudicating Authority. The relevant paragraph-75 of the impugned order reads as under:

> …
>
> *"75. A joint reading of the order directing modification, the Appellate Tribunal judgment and the final order of the Hon'ble NCLT, Allahabad Bench, it appears to us that there is nothing in the judgment showing that an unrelated secured financial creditor is equated with a related financial creditor of the CD. What is observed is clear. The NCLT Bench on the other hand equated a related party with that of equity shareholders or partners as provided under section 53(1) (h) of the Code and ranked lower in level than the obligation due to unrelated financial*

creditors. Non allocation of fund by the resolution applicant, in the case in hand to the related party of the Corporate Debtor do not contravene the water fall mechanism as provided in Section 53(1)(h) of the Code, 2016. Therefore, we do not find any discrimination in the treatment given to the applicant by the resolution applicant. Accordingly, the objection in that regard also appears to be not sustainable under Law."

9. The appellant has raised a fundamental question of law, i.e., "Whether a related party Financial Creditor can be equated with the equity shareholder of the Corporate Debtor? Which inter-alia means that the liquidation value due to a related party financial creditor shall be in accordance with Section 53(1)(h) of the IBC and not in accordance with Section 53(1) (d) of the IBC under the waterfall mechanism.

10. The appellant stated that the impugned judgment is ex facie illegal and in teeth of the judgment passed by Hon'ble Supreme Court in M.K. Rajagopalan (supra) inasmuch as the Hon'ble Supreme Court has categorically rejected the reasoning attributed by the Ld. Adjudicating authority in the present case to dismiss the application being C.A. No. 736/KB/2019.

11. It is further submitted that Appellant, despite being a financial creditor, although related party to the Corporate Debtor, was never provided with minutes of any meeting of the Committee of Creditor ('**CoC'**) of Corporate Debtor.

12. The appellant contends that the Adjudicating Authority, while passing the impugned judgment, held that a related party financial creditor should be equated with the equity shareholder of the corporate debtor under the CIRP. Further, the Adjudicating Authority in the impugned order held that the liquidation value due to a related party Financial Creditor shall be in accordance with Section 53(1)(h) of the I & B Code, 2016 and not in accordance with Section 53(1)(d) of the I & B Code, 2016 under the water fall mechanism.

13. The appellant further submits that the reasons attributed by the Adjudicating Authority in the impugned order in para 75 (supra) are in teeth of the judgment passed by the Hon'ble Supreme Court in M.K. Rajagopalan (supra). He has invited attention to paras 201 to 203 of the aforesaid judgment, which are reproduced below:

> *"201. After taking note of the fact that related party is prohibited to be a part of CoC and is further prohibited to be a resolution applicant or an authorized representative etc., the Appellate Tribunal has rightly observed that involvement of a related party in CIRP in any capacity was seen as giving unfair benefit to the corporate debtor; and that the statutory recognition of related party as a different class would apply even to resolution plan when CoC would decide whether in its commercial wisdom it should pay to related party at all because that would mean paying to the same persons who are behind the corporate debtor. However, thereafter the Appellate Tribunal proceeded to observe that related party was required to be equated with the promoters as equity share-holders and then, further made certain observations about discrimination between related party unsecured financial creditor and other unsecured financial creditors as also between related party operational creditor and other operational creditors. Such far-stretched observations of the Appellate*

Tribunal are difficult to be reconciled with the operation of the statutory provisions.

202. It has rightly been argued on behalf of the appellants and had rightly been observed by the Adjudicating Authority (vide extraction in paragraph 15.4.1 hereinabove) that there was no provision in the Code which mandates that the related party should be paid in parity with the unrelated party. So long as the provisions of Code and CIRP Regulations are met, any proposition of differential payment to different class of creditors in the resolution plan is, ultimately, subject to the commercial wisdom of CoC and no fault can be attached to the resolution plan merely for not making the provisions for related party.

203. On the facts of the present case, we find no reason to discuss this matter any further when it is noticed that the promoter and erstwhile director, the contesting respondent before us, has been holding the position of Chairman of the said related party. Suffice it would be to observe for the present purpose that the Appellate Tribunal has erred in applying the principles of non-discrimination and thereby holding against the resolution plan in question for want of provision for related party."

14. The appellant has drawn the attention to the aforesaid observations of the Hon'ble Supreme Court in M.K. Rajagopalan (supra), where it is apparent that equating related party financial creditor with promoters as equity shareholders is far stretched and difficult to be reconciled with the operation of the statutory provisions.

15. Accordingly, the appellant has pleaded that the impugned judgment has been premised upon erroneous and wrong reasoning which is in teeth of the observations passed by the Hon'ble Supreme court in M.K. Rajagopalan (supra). As a consequence of equating the appellant at par with Equity shareholders, the appellant has been illegally and wrongly discriminated in as much as the claims of Central Government and the State Government;

secured creditors who have exercised their enforcement rights; remaining debts and dues and preference shareholders have been illegally and wrongly given preference over the claim of the Appellant. Accordingly, the present appeal deserves to be allowed and resolution plan deserves to be set aside and/or remanded back to the CoC for ensuring that the resolution plan is not discriminatory against the Appellant.

Submission of Respondents

16. The basic submission of RP who is Respondent No. 1 is that the prayers sought by the appellant are impermissible under the provisions of IBC. The appellant is a related party of Corporate Debtor, and is also an unsecured Financial Creditor. The appellant is not being paid any amount under the resolution plan, which has been approved by CoC and thereafter by the Adjudicating Authority vide order dated 27.09.2019. The whole class of unsecured financial creditors (consisting of the appellant and another related party viz. Gloster Cables Ltd.) are not being paid anything under the said resolution plan. The secured financial creditors (none of whom are related parties of Corporate Debtor) are being paid Rs. 64.20 crores against their admitted claims of Rs.619.24 crores.

17. The respondent has further stated that it's a settled position of law that a resolution plan can provide for differential payment to different classes of creditors as laid down by the Hon'ble Supreme Court in Committee of Creditors of Essar Steel v. Satish Kumar Gupta, (2020) 8 SCC 531, the abovesaid prayer of the appellant is manifestly impermissible in law.

18. The Respondent has further invited our attention to the same Judgment of Hon'ble SC relied upon by the appellant viz. *M.K. Rajagopalan (supra),* wherein it was held that there is no provision in IBC which mandates that a related party should be paid in parity with unrelated parties. Further, it was also held that no fault can be attributed to a resolution plan merely for not making provisions for related parties. The relevant para 202 of Hon'ble SC's aforesaid judgement is extracted in Para 13 hereinabove.

19. Respondent No. 1 has further stated that in view of the M.K. Rajagopalan Judgment (supra) the appellant cannot seek payment under the resolution plan in parity with secured financial creditors, who form a different class of creditors and further a resolution plan is not mandated to make provisions for related parties.

20. It has therefore submitted that the present appeal is completely misconceived in both fact and law and is liable to dismissed.

21. The respondent has further stated the appellant has wrongly accused the resolution professional of recusing from his duties under the provisions of the IBC on account of not interfering in the distribution mechanism provided in the resolution plan. He has submitted that RP is not empowered to interfere in the commercial wisdom of CoC as laid down by Hon'ble Supreme Court in '*Arcelormittal India (P) Ltd. v. Satish Kumar Gupta'*, (2019) 2 SCC 1, the role of the RP is limited to ensuring that the resolution plan received by him is compliant with Section 30 (2) of the IBC before placing the same before the Committee of Creditors for their consideration.

22. The Respondent No.2 Committee of Creditors has not entered their submissions in the matter.

23. Respondent No. 3 SRA (Gloster Limited), has submitted that the annual report and accounts of the Corporate Debtor for the year 2017-18 shows that the appellant is a promoter entity holding 33% shares in the Corporate Debtor. The said annual report of the Corporate Debtor shows that the West Coast at the material time was a related party.

24. Respondent No. 3 further invited attention to the Clause 32 of Section VI of the resolution plan which provides as follows: -

> *"32. All contracts between the Corporate Debtor and its Related Parties shall stand terminated with immediate effect without any further act, deed or instrument and all Liabilites and obligations of the Corporate Debtor to such Related Parties shall be discharged and be permanently extinguished."*

Thus, under the resolution plan all claims of the related parties against the corporate Debtor stood extinguished.

25. The SRA states that CD had only two unsecured financial creditors of the corporate debtor at the time of CIRP initiation, and the RP received claim from both of them. Both the unsecured financial creditors at the material time were related parties. The details of Claims filed and claims admitted by RP of both these creditors are given below:

Name of the unsecured financial creditors	**Claim amount filed**	**Claim amount admitted**
(a) West coast	Rs. 89.20 crores	Rs. 89.20 crores
(b) Gloster Cables Ltd.	Rs. 15.49 crores	Rs. 15.49 crores
Total	Rs. 104.69 crores	Rs. 104.69 crores

26. The resolution plan in para 7.5 deals with unsecured financial creditor in the following manner:

> *7.5. Unsecured financial creditors*
>
> *7.5.1 Amount- claim filed and admitted under this head is Rs. 104.69 crores, since the entire amount is relating to claim made by the related parties, RA proposes to pay NIL amount under this head".*

27. The Respondent No. 3 has submitted that since no payment is proposed to any unsecured financial creditor, there can be no question of discrimination of unsecured financial creditor i.e. all the unsecured financial creditors of the Corporate Debtor have received the same treatment viz. Nil payment and there has been no discrimination what so ever amongst the same class of creditors.

28. The respondent has further submitted that the only issue raised in the present appeal is whether such a treatment i.e. Nil payment given to related parties in a resolution plan is permissible under the IBC. There were conflicted judgments of the Adjudicating Authority/ Appellate Tribunal as to whether a related party could be discriminated viz a viz other creditors of a same class. The entire controversy on this point is now settled by the Judgment of the Hon'ble Supreme Court in the case of M.K. Rajagopalan (supra).

29. The Corporate Debtor in the case of M. K. Rajgopalan (Supra) in Hon'ble Supreme Court was Appu Hotels Ltd. and the promoters had

granted nearly Rs. 100 crores as unsecured loan to the Corporate Debtor. Under the resolution plan the related party unsecured financial creditors were discriminated vis-à-vis other unsecured financial creditors. The adjudicating authority rejected the objection raised by the related party unsecured financial creditors by observing that in the scheme of the Code there was no provision, which mandatorily required payment to the related party in parity with the unrelated party.

30. In the appeal filed against the order of Adjudicating Authority, it was held by Appellate Tribunal that IBC treats the related party as a separate category for specified purposes viz. excluding from CoC under Section 21 and disqualifying them from being resolution applicant under Section 29 (A), but IBC does not treat related party as a separate class for any other purpose and the related parties, financial or operational creditor cannot be discriminated against under the resolution plan, denying their right to get payment under the resolution plan only on being a related party. The relevant paragraph 173 of the Judgment of Appellate Tribunal is given below:

> *"173. Thus, it is clear that IBC treats related parties as a separate category for specified purposes, excluding from the CoC under Section 21 and disqualifying them from being Resolution Applicants under section 29A. However, the IBC does not treat Related Party as a separate class for any other purpose. Therefore, a rationale nexus must exist for any classification between the object sought to achieve the classification and sub-classification. Therefore, the Related Party financial or operational creditor cannot be discriminated against under the Resolution Plan, denying their right to get*

payments under the Resolution Plan only on being a Related Party. It is also made clear that by getting only payment under the Resolution Plan, related party creditors could in no way sabotage the CIRP."

31. In the Judgment of Hon'ble SC in M. K. Rajagopalan (supra) the points for determination for related party were framed by Hon'ble Supreme Court in para 155 on the following lines:

"E. Whether the Appellate Tribunal has erred in applying the principles of non-discrimination in relation to related party of corporate debtor and thereby holding against the resolution plan in question for want of provision for related party?"

32. The respondent invites the attention to para 202 of Hon'ble Supreme Court's judgement in M. K. Rajagopalan (supra) the relevant extracts of the same is given below:

"202. It has rightly been argued on behalf of the appellants and had rightly been observed by the Adjudicating Authority (vide extraction in paragraph 15.4.1 hereinabove) that there was no provision in the Code which mandates that the related party should be paid in parity with the unrelated party. So long as the provisions of Code and CIRP Regulations are met, any proposition of differential payment to different class of creditors in the resolution plan is, ultimately, subject to the commercial wisdom of CoC and no fault can be attached to the resolution plan merely for not making the provisions for related party."

33. The Respondent No. 3 submits that the aforesaid Judgment of the Hon'ble Supreme Court squarely applies to the present case, where no payment has been provided in the resolution plan for the related parties. Hon'ble Court conclusively held that a related party can be discriminated

against vis-a-vis a non-related party and a resolution plan cannot be faulted merely for not making provisions for related parties.

34. Respondent further submits that in the present case no payment is proposed to be made to any unsecured financial creditor, whether related party or unrelated party and therefore no question of discrimination arises in the present case.

35. The respondent submits that the contention of the appellant has been that its claim amount has not been included in the resolution plan and the Adjudicating Authority has equated the related party with equity shareholders and the same is not permissible under the aforesaid judgment passed by Hon'ble Supreme Court and therefore, the aforesaid judgment does not apply in this case. Whereas, the case of appellant challenging the resolution plan before the Adjudicating Authority was on the ground that the resolution plan does not provide for equal pro rata distribution of the proceeds for the applicant as a financial creditor. The point that the appellant has been equated with equity shareholders was made by the appellant and not by SRA or Resolution Applicant.

36. The respondent finally submits that whether the appellant is equated with equity shareholder or not is totally irrelevant, because it is admittedly an unsecured financial creditor and there is no payment allocated in the resolution plan for any unsecured financial creditor.

Analysis and Findings

37. We have heard the appellant, Respondent No. 1 (Resolution Professional) and Respondent No. 3 (SRA). The Respondent No. 2 (Committee of Creditors) though impleaded, did not make any submission.

38. The present appeal was adjourned sine-die vide an order of two Members of this bench of Appellate Tribunal on 10.04.23 as the counsel for the appellant relied upon the orders of two-member bench decision of this Tribunal in the case of 'Dr. Periasamy Palani Gounder Vs. Mr. Radhakrishnan Dharmarajan, 2022 SCC OnLine NCLAT 86' which had been challenged in Hon'ble SC in Civil Appeal No 1682-1683 of 2022 'M. K. Rajgiopalan Vs Dr. Periasamy Palani Gounder & Anr' and the same is pending adjudication. The aforesaid order is reproduced below:

> *"10.04.2023:-* ***Counsel for the Appellant strongly relied upon a two member bench decision of this Tribunal rendered in the case of 'Dr. Periasamy Palani Gounder Vs. Mr. Radhakrishnan Dharmarajan, 2022 SCC OnLine NCLAT 86'*** *but also mentioned that the aforesaid said judgment is challenged in Civil Appeal No. 1682-1683 of 2022 'M.K. Rajagopalan Vs. Dr. Periasamy Palani Gounder & Anr.' which is pending adjudication before the Hon'ble Supreme Court.*
>
> *2. Keeping in view of the aforesaid facts and circumstances, we are of the considered opinion that hearing of this case be adjourned sine die to await the decision in Civil Appeal No. 1682-1683 of 2022.*
>
> *3. Accordingly, this case is hereby adjourned sine die to await the decision in Civil Appeal No. 1682-1683 of 2022.*
>
> *4. But it is clarified that the argument of the Respondent shall be heard on all issues after the decision of the Hon'ble Supreme Court in Civil Appeal No. 1682-1683 of 2022.*

5. Counsel for the RP has submitted that he has already filed some documents i.e. 5th, 6th & 7th minutes of meetings of the CoC through e-filing. He has handed over the hard copy of the same, which are taken on record."

(Emphasis supplied)

39. Subsequently it was ordered to be listed for hearing on the application filed by RP vide IA no. 3805 of 2023 after the judgement of Hon'ble Supreme Court in M. K. Rajgopalan (Supra).

40. The following issues need to be decided in the instant appeal: -

i. Whether the appellant has been treated as equity shareholder by the Adjudicating Authority while approving the resolution plan; and

ii. Whether the appellant has been discriminated vis-à-vis other Financial Creditors

41. The appellant in particular has made a reference to the order of Adjudicating Authority disposing of their application in para 75 of the said order where there is a mention of a related party being equated with equity shareholders or partners as provided under Section 53 (1) (h) of the Code. This issue has been taken in isolation by the appellant the issue under reference relates to a judgment passed by NCLT, Allahabad Bench. The relevant paras are Para 74 and 75 of the impugned order. The same are reproduced below:

"74. An Unsuccessful Bidder in the above said Company Application No. 59 of 2018 filed an appeal before the Hon'ble Appellate Tribunal. The Hon'ble Appellate Tribunal in CA (AT)

Insolvency No. 408 of 2018, confirmed the order of direction issued by the NCLT, Allahabad Bench directing the RP in the said case to modify the resolution plan as per the observation in the above said judgement. The Ld. Counsel also referred to us the order passed by the Hon'ble NCLT, Allahabad Bench in CP No. (IB) 13/ALD/2017 by approving the modified resolution plan wherein it is mentioned that all the Financial Creditors and Operational Creditors of the Corporate Debtor were equally treated. According to the Ld. Counsel for the applicant, the Committee of Creditors in the above said case, accepted the modified resolution plan by 100% vote share wherein the Unsecured Financial Creditors were treated at par with the Operational Creditors. To stress her argument, she relied upon paragraph no. 12 of the said judgement. It read as follows:-

> *"Pursuant to the liberty granted by the Hon'ble Appellate Tribunal, RLL modified its resolution plan (Modified Plan) on 17.10.2018 and the Modified Plan was discussed by COC in its meeting held on 20.09.2018. Modified terms of Resolution Plan were acceptable to Operational Creditors, Unsecured Financial Creditors. Further, pursuant to the direction of the Hon'ble Appellate Authority under order dated 20th September, 2018 the Applicant filed a Report dated 20th October, 2018 to the Hon'ble Appellate Authority."*

75. A joint reading of the order directing modification, the Appellate Tribunal judgment and the final order of the Hon'ble NCLT, Allahabad Bench, it appears to us that there is nothing in the judgement showing that an unrelated secured financial creditor' is equated with a related financial creditor of the CD. What is observed is clear The NCLT Bench on the other hand equated a related party with that of equity shareholders or partners as provided under section 53(1) (h) of the Code and ranked lower in level than the obligation due to unrelated financial creditors. ***Non allocation of fund by the resolution***

applicant, in the case, in hand, to the related party of the Corporate Debtor do not contravene the water fall mechanism as provided in Section 53(1)(h) of the Code, 2016. Therefore, we do not find any discrimination in the treatment given to the applicant by the resolution applicant. Accordingly, the objection in that regard also appears to be not sustainable under Law."

(Emphasis supplied)

42. The operating part of the order of Adjudicating Authority emphasised in bold above clearly shows that the Resolution Applicant has not made any discrimination in the treatment given to Applicant. The reference to section waterfall mechanism and reference to Section 53 (1) (h) of the IBC appears to be a typographical mistake and it should have been 53(1)(d). This would be further clear from the relevant portions of the resolution plan, (in para 25 herein-above) where the claim of the Appellant was admitted as Unsecured financial creditor and the same plan was approved by the Adjudicating Authority.

43. Further The resolution plan in para 7.5 deals with unsecured financial creditor in the following manner:

7.5. Unsecured financial creditors

7.5.1 Amount- claim filed and admitted under this head is Rs. 104.69 crores, since the entire amount is relating to claim made by the related parties, RA proposes to pay NIL amount under this head".

44. It is clear from the aforesaid discussion that both the CoC and Adjudicating Authority has treated the appellant as unsecured Financial

Creditor. There are two entries in the category of unsecured financial creditors, in the resolution plan, one being West Coast Papers and second one is Gloster cables Ltd. In both these cases full amount of claim filed by them has been admitted by the RP. They were admitted as part of CoC. Later on, after their being identified as related parties, the RP informed the concerned parties that they could not attend the CoC meetings henceforth. The SRA has proposed NIL amount to the claimants under this head on account of them being related parties. Appellant in its submission has also accepted that he is a related party unsecured creditor. The resolution plan reflecting the status of Appellant as related party unsecured financial creditor has been approved by the CoC and Adjudicating Authority. In view of position explained above, we are of the view that the appellant has not been treated as equivalent to equity shareholder and such contention of Appellant is devoid of any merit.

45. The main contention of the appellant has been that he has been discriminated against in payment of claims vis-à-vis other financial creditors and in this regard, he had relied upon the Judgment of this Tribunal rendered in the case of *'Dr. Periasamy Palani Gounder Vs. Mr. Radhakrishnan Dharmarajan, 2022 SCC OnLine NCLAT 86'*. The appellant now claims that since he as a related party financial creditor has been equated with equity shareholders in the aforesaid judgement of the Adjudicating Authority, the same is in teeth of judgment passed in the case of M.K. Rajagopalan (supra). The appellant relies on para 201 & 202 of the Judgment, the extract of which is given below:

"201. However, thereafter the Appellate Tribunal proceeded to observe that related party was required to be equated with the promoters as equity share-holders and then, further made certain observations about discrimination between related party unsecured financial creditor and other unsecured financial creditors as also between related party operational creditor and other operational creditors. Such far-stretched observations of the Appellate Tribunal are difficult to be reconciled with the operation of the statutory provisions.

202. It has rightly been argued on behalf of the appellants and had rightly been observed by the Adjudicating Authority (vide extraction in paragraph 15.4.1 hereinabove) that there was no provision in the Code which mandates that the related party should be paid in parity with the unrelated party. So long as the provisions of Code and CIRP Regulations are met, any proposition of differential payment to different class of creditors in the resolution plan is, ultimately, subject to the commercial wisdom of CoC and no fault can be attached to the resolution plan merely for not making the provisions for related party."

46. We would examine this contention of appellant in the light of judgment of Hon'ble Supreme Court in the M.K. Rajagopalan (supra). The relevant points of determination relevant to this case is given in para 155 (E) of the Judgment. The relevant discussion and decision in this regard is given in paras 198 to 203 of the Judgment;

Point E- the matter concerning related party

198. Another factor taken into consideration by the Appellate Tribunal has been in relation to the so-called discrimination in the resolution plan in relation to a related party of the corporate debtor.

199. Learned counsel for the appellant in Civil Appeal No.1827 of 2022 has referred to several decided cases to

submit that therein, even when certain dues of related parties were admitted, the resolution plans not providing for any payment to such related parties were upheld by this Court; and that the principles of non-discrimination would not be applicable to the decision of CoC. It has been argued on behalf of the resolution professional that none of the statutory requirements are of any mandate that a provision has to be made in the resolution plan for payment to the related parties. According to the learned counsel, the need is, essentially, to ensure that the plan provides for payment to financial creditors (including dissenting financial creditors) entitled to vote. Thus, the plan in question cannot be said to be standing in contravention of any mandatory requirements. Per contra, the learned counsel appearing for the related party would submit that even when related party is to be treated as a separate class in terms of the principles laid down by this Court in Phoenix ARC (supra), so as to be excluded from CoC, there is no reason that they be treated as separate class when it comes to payment of dues under the resolution plan. It is submitted that failure to provide for discharge of debt of the related party is in violation of Section 30(2)(b), (e) and (f) of the Code. The submissions made on behalf of the related party and the observations of the Appellate Tribunal are difficult to be accepted.

200. The lengthy discussion of Appellate Tribunal in regard to the related party (the parts whereof have been reproduced in paragraph 19.7 hereinabove) depict rather unsure and irreconcilable observations of the Appellate Tribunal.

201. After taking note of the fact that related party is prohibited to be a part of CoC and is further prohibited to be a resolution applicant or an authorized representative etc., the Appellate Tribunal has rightly observed that involvement of a related party in CIRP in any capacity was seen as giving unfair benefit to the corporate debtor; and that the statutory recognition of related party as a different class would apply even to resolution plan when CoC would decide whether in

its commercial wisdom it should pay to related party at all because that would mean paying to the same persons who are behind the corporate debtor. However, thereafter the Appellate Tribunal proceeded to observe that related party was required to be equated with the promoters as equity share-holders and then, further made certain observations about discrimination between related party unsecured financial creditor and other unsecured financial creditors as also between related party operational creditor and other operational creditors. Such far-stretched observations of the Appellate Tribunal are difficult to be reconciled with the operation of the statutory provisions.

202. It has rightly been argued on behalf of the appellants and had rightly been observed by the Adjudicating Authority (vide extraction in paragraph 15.4.1 hereinabove) that there was no provision in the Code which mandates that the related party should be paid in parity with the unrelated party. So long as the provisions of Code and CIRP Regulations are met, any proposition of differential payment to different class of creditors in the resolution plan is, ultimately, subject to the commercial wisdom of CoC and no fault can be attached to the resolution plan merely for not making the provisions for related party.

203. On the facts of the present case, we find no reason to discuss this matter any further when it is noticed that the promoter and erstwhile director, the contesting respondent before us, has been holding the position of Chairman of the said related party. Suffice it would be to observe for the present purpose that the Appellate Tribunal has erred in applying the principles of non-discrimination and thereby holding against the resolution plan in question for want of provision for related party.

47. It is seen from the records that the Appellant was aware of the fact, that it was being treated as a related party and was accordingly removed

from the Committee of Creditors. The same is evident from emails dated 25.01.2019 and 16.02.2019 sent by the RP to the appellant. However, the Appellant never challenged its treatment as a related party at any stage of the insolvency resolution proceedings, despite have complete knowledge of its status as that of a related party. In this case, the Appellant was held to be a related party of the Corporate Debtor. This has been admitted by the Appellant in his submission also.

48. In this case there are two parties including the appellant who are unsecured financial creditors and both of them were held to be related parties of the Corporate Debtor. The claims filed by both the related parties were admitted by the RP and CoC. However, Nil amount has been provided for both the related parties in the resolution plan approved by the Adjudicating Authority. The claim of the appellant is that he should be kept in the same class as other financial creditors and provision be made for him also in the resolution plan.

49. We have seen that in the instant case, among the financial creditors, only secured financial creditors (not related to Corporate Debtor) are being paid Rs. 64.20 crores against their admitted claims of Rs. 619.24 crores. The appellant who is an unsecured financial creditor and related party to Corporate Debtor does not fall in that category as per IBC.

50. The Judgment of Hon'ble Supreme Court in M.K. Rajagopalan (supra) fills the gap in legislation specifically in this aspect of discrimination against related party of Corporate Debtor. The relevant issue framed by Hon'ble Supreme Court in paragraph 155 (E) of the Judgment is extracted below:

*"**Points for determination***

155. For what has been noticed hereinabove and looking to the overall scenario, the following principal points arise for determination in this batch of appeals……

(A)

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(E) Whether the Appellate Tribunal has erred in applying the principles of non-discrimination in relation to related party of corporate debtor and thereby holding against the resolution plan in question for want of provision for related party?"

…

51. We find the issue framed squarely covers the present appeal where a related party creditor has prayed for parity with other financial creditors.

52. Hon'ble Supreme Court has given its findings about the related party creditor in paras 198 to 203 of the M.K. Rajagopalan (supra). Paras 198 to 201 discuss the issue in hand in detail and para 202 gives the findings of the Hon'ble Court. The Court has upheld the stand of Adjudicating Authority that there was no provision of the code, which mandates that the related party should be paid in parity with unrelated party. Any prohibition of differential payment to different class of creditors in the resolution plan is ultimately, subject to the commercial wisdom of CoC and no fault can be attached to the resolution plan merely for not making provisions for a related party, so long as provision of the IBC and CIRP regulations are met.

53. The Court observed in Para 203 of the Judgment of M.K. Rajagopalan (supra) that in the case under reference, promoter and erstwhile director

who was also a contesting respondent in the matter, was also holding the post of Chairman of the said related party. It held that the Appellate Tribunal has erred in applying the principles on non-discrimination between related and non-related parties and held back the resolution plan.

54. We have seen that the Judgment of M.K. Rajagopalan (supra) squarely applies to the facts of the present case. The CoC and Adjudicating Authority were well within their rights not to treat a related party unsecured creditor on par with secured financial creditors. We, therefore, find no infirmity in the order of Adjudicating Authority in this regard.

55. Thus, in view of the aforesaid discussion, we do not find any merit in the present appeal and the same is hereby dismissed. There would be no order as to costs. Interlocutory Application, if any, are closed.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Mr. Naresh Salecha]
Member (Technical)

[Mr. Indevar Pandey]
Member (Technical)

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