NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

COMPANY APPEAL (AT) (INSOLVENCY) NO. 59 of 2022

(Arising out of the Order dated 05th October, 2021 passed by the Learned Adjudicating Authority (National Company Law Tribunal, Ahmedabad Bench, Court – I), in IA/654(AHM)/2021 in CP (IB) 497/7/AHM/2019)

IN THE MATTER OF:

BNK Power Solution Pvt. Ltd.
House No.9, Dev Villa,
Devsthan near Dainik Jagran Press
Faizabad Road,
Lucknow.
E-mail: info@bnkpowersolution.com **...Appellant**

Versus

1. Mr. Rajkumar Poddar
Resolution Professional of
Vadraj Energy (Gujarat) Ltd.,
1201/02 "D" Block, Ashok Towers,
Dr. S.S. Rao Road, Parel,
Mumbai – 400012. **...Respondent No. 1**

2. Alpha Alternatives Holdings Pvt. Ltd.
8th Floor, Ashford Center,
Shankarrao Naram Marg, Lower Parel,
Mumbai, Maharashtra – 400013.
E-mail: AAInvestorRelations@alt-alpha.com **...Respondent No. 2**

3. Algebra Endeavour Pvt. Ltd.
34th Floor, Sunshine Tower,
Senapati Bapat Marg,
Near Kamgar Krida Maidan,
Dadar (West), Mumbai,
Mumbai City, Maharashtra, 400013.
E-mail: compliance@alt-alpha.com **...Respondent No. 3**

4. Vadraj Energy (Gujarat) Ltd.
Through Resolution Professional,
Survey No.186,
Village Mora Taluka: Choryasi,
Surat, Gujarat – 394510.

E-mail: ashok@abgcement.com **...Respondent No. 4**

Present

For Appellants:	**Dr. Swaroop George, Mr. Tanmay Cheema & Mr. Sarthak Gupta, Advocates.**
For Respondent No. 1:	**Mr. Kunal Godhwani, Advocate.**
For Respondents 2 to 4:	**Mr. Yashvardhan & Mr. Tarun Bhushan, Advocates.**

J U D G E M E N T

(02.05.2023)

[Per: Dr. Alok Srivastava, Member (T)]

1. The present Appeal arises out of the Judgement dated 05.10.2021 (in short 'Impugned Order') passed by the Adjudicating Authority (National Company Law Tribunal, Ahmedabad Bench) in IA 654/2021 in CP (IB) 497/7/AHM/2019. The Appellant is aggrieved by the Impugned Order of the Adjudicating Authority which approves the resolution plan filed by Respondents 3 & 4 ('R-3 & R-4') that discriminates between the operational creditors who are similarly placed, and also discriminates between the operational creditors and the financial creditors in respect of payments under the approved resolution plan. Respondent No. 1 *'Rajkumar Poddar'* (R-1) is the Resolution Professional ('RP') of the corporate debtor *'Vadraj Energy (Guj) Limited'*.

2. In brief, the facts of the case are that the Appellant Company is an operational creditor of the corporate debtor and in the Corporate Insolvency Resolution Process (in short 'CIRP') of the corporate debtor initiated on 08.01.2020, the Appellant filed its claim along with 'Form-B' containing proof of the claim to the Interim Resolution Professional ('IRP') vide letter dated 29.01.2020, and its claim amounting to Rs.2,53,85,908/- related to the operational debt with regard to the operations and maintenance services provided by the Appellant to the corporate debtor in its power plants.

3. The Appellant has further submitted that the work orders and invoices relating to the operational debt were submitted by him along with claim form vide letter dated 29.01.2020, whereafter the RP, through an email dated 29.06.2020, requested for submission of certain documents relating to the claim and the Appellant through email dated 30.06.2020 informed the RP that all the documents requested by the RP through email dated 29.06.2020 will be sent to RP by 01.07.2020. Thereafter, the Appellant submitted the requested documents vide email dated 01.07.2020 to the RP. In reply, the RP, vide email dated 01.07.2020, informed the Appellant that the photocopies of the Attendance Sheets were not legible and requested for clear copies to be sent to the RP, which were duly sent by the Appellant by email dated 03.07.2020, and which contain duly verified attendance sheets for the months of July, 2018 and March, 2019. The Appellant has alleged that despite submission of all the relevant documents in proof of his claim, the claim of the Appellant was reduced arbitrarily and erroneously by the Appellant to

Rs.1,13,63,918/- whose information was received vide email dated 25.07.2020, whereupon the Appellant again sent an email dated 29.07.2020 with further proof and clarifications in support of his claim, but the RP informed the Appellant that it could not accept the Appellant's claim, since it was submitted after 30.06.2020.

4. The RP has further informed the Appellant that bills provided by him did not have adequate proof of verification and hence only claim amounting to Rs.1,13,63,918/- would be admitted. The Appellant has further stated that the claim of the corporate debtor that it told the Appellant to stop providing its services after 30.06.2018 was not correct because the Appellant had not been informed formally that it had to stop its services after 30.06.2018 and therefore it continued to provide services to the corporate debtor, and hence, the Appellant's claim of operational debt of Rs.2,53,85,908/- is genuine and correct and should have been admitted.

5. The Appellant has further stated that, after a long gap of time, he was informed by the RP vide email dated 15.10.2021, that the Adjudicating Authority had, vide Order dated 05.10.2021 in IA 654/AHM/2021 in CP (IB) 497/2019 approved the resolution plan submitted by the resolution applicants, who are R-2 & R-3, who had jointly submitted the successful resolution plan.

6. We heard the oral arguments advanced by the Learned Counsels for both the parties and perused the relevant record.

7. The Learned Counsel for the Appellant has submitted that the CIRP against the corporate debtor Vadraj Energy (Guj) Limited was initiated on 08.01.2020, whereafter a public announcement was published in the newspapers asking the creditors of the corporate debtor to submit their claims with proofs to the IRP, and so the Appellant, through letter dated 29.01.2020, submitted its claim amounting to Rs.2,53,85,908/- along with proof of the claim. This claim was regarding the operational debt owed by the corporate debtor to the Appellant regarding operation and maintenance services provided by the Appellant to the corporate debtor in its power plants. The Learned Counsel for the Appellant has further submitted that the RP, after examining the claim submitted by the Appellant, informed the Appellant that its claim amounting to Rs.1,13,63,918/- was admitted. Thereafter the Appellant submitted further proof regarding the balance amount which was not admitted but he was informed by the RP that no claim submitted beyond 30.06.2020 would be considered. He has further submitted that much later, vide email dated 15.10.2021, the Appellant was informed by the RP that a resolution plan with respect to the corporate debtor had been approved by the Adjudicating Authority, wherein, against the admitted claim of Rs.1,13,63,918/- the Appellant had received 'NIL' amount as payment.

8. The Learned Counsel for the Appellant has further submitted that even though it was stated in the resolution plan that a sum of Rs.10 Lakh would be paid to the operational creditors which would include statutory dues, related party dues, dues of unsecured creditors and any other claims, the Appellant as an operational creditor received 'NIL' payment, which is deviation from the approved resolution plan, and further there is no discussion in the Impugned Order as to why the operational creditors were being paid 'NIL' amount. He has further argued that while the financial creditors are getting more than 18% as payment against their claimed amounts, the operational creditors would get less than 1% of their dues and against of total acknowledged operational debt of Rs.22,05,34,302/-, the resolution plan only envisages of payment of Rs.10 Lakhs. He has claimed that neither the Committee of Creditors ('CoC') nor the Adjudicating Authority has provided any justification for discrimination meted out to operational creditors vis-à-vis the financial creditors and further there is discrimination between the Appellant and other operational creditors.

9. The Learned Counsel for Appellant has further contended that the RP did not ascertain the Liquidation Value as is stipulated in the IBC before evaluating the payments to operational creditors under the proposed resolution plan which was subsequently approved by the Adjudicating Authority.

10. The Learned Counsel for the Appellant has referred to the Judgement of the Hon'ble Supreme Court in the matter of ***State Tax Officer (1) Vs. Rainbow Papers Limited (2022 SCC OnLine SC 1162)*** to contend that the financial creditors who constitute the CoC cannot secure their own dues at the cost of dues owed to government authorities and other creditors.

11. The Learned Counsel for the Respondent/RP has argued that after the admission of the corporate debtor into CIRP, the CoC was constituted comprising of State Bank of India, Punjab National Bank and Union Bank of India. He has further argued that the Appellant was duly informed by the RP that on the basis of proof submitted by him with regard to his claim, it was admitted only to the extent of Rs.1,13,63,918/- and if the Appellant was not satisfied with the amount admitted he could have approached the Adjudicating Authority in Appeal, but he neither approached the Adjudicating Authority nor raised any issue about rejection of the balance amount from the amount claimed by him. On the basis of the admitted claims, a resolution plan was submitted by Respondents No. 2 & 3, which was duly examined by the RP and finally approved by the CoC in its meeting dated 23.08.2021 with 100% voting share. He has claimed that the Appellant never raised any objection or challenge to the contents of the resolution plan or the approval thereof by the CoC, and is now coming at a very late stage, after the resolution plan was approved by the Adjudicating Authority, raising objection about the amount of his admitted claim and also the payments envisaged in the resolution plan.

12. The Learned Counsel for the Respondent/RP has further submitted that duty of the RP has to merely examine and ensure that the resolution plan meets the requirements of Section 30(2) and this duty was performed sincerely and diligently by the RP whereafter the CoC approved the modified resolution plan in its meeting dated 23.08.2021. He has pointed out that the Appellant has not made out any ground alleging violation of Section 30(2) of the Code against the RP. Further he has referred to the judgement of the Hon'ble Supreme Court in the matter of ***K. Sashidhar Vs. Indian Overseas Bank & Ors., [(2019) 12 SCC 150],*** which holds that the jurisdiction to be exercised by the Adjudicating Authority while approving a resolution plan, and further wherein it is emphasized that the Adjudicating Authority's jurisdiction is limited to scrutinizing the resolution plan as approved by the CoC within the confines of Section 31 of the Code. He has thus submitted that no such ground or infringement of Section 30(2) or violation of any other legal provision has been raised by the Appellant in the instant Appeal.

13. The Learned Counsel for the Respondent/RP has further referred to the Judgement of the Hon'ble Supreme Court in the matter of ***Committee of Creditors of Essar Steel India Limited Vs. Satish Kumar Gupta & Ors., [(2020) 8 SCC 531],*** wherein it has been categorically held that the ultimate discretion of what to pay and how much to pay each class or sub-class of creditors is with the CoC and that the Adjudicating Authority cannot interfere with the decision taken in exercise of commercial wisdom of the CoC and the limited judicial review available is to only see that the CoC has taken into account the need to maximise the value of its assets and no legal provision of the IBC is violated, and once the Adjudicating Authority is satisfied on this account it must approve the resolution plan.

14. The Learned Counsel for Respondent/RP has further referred to the Part II of the successful resolution plan wherein payment to operational creditors is recorded, and which notes that 'the Resolution Applicants proposed to make a payment of Rs.10,00,000/- (Rupees 10 Lakh only) to operational creditors (which includes statutory dues, related party dues, dues of unsecured creditors and any other claims) which amount shall be proportionately distributed based on their admitted claim'. Regarding the issue of alleged discrimination between the payments to financial creditors and operational creditors, he has clarified that Section 30(2)(b) provides that payment of debts of operational creditors in the approved resolution plan should be in consonance with the requirements of Section 30(2)(b), and further Explanation I to clause (b) of Section 30(2) lays down that a distribution which is in accordance with the provisions of the clause (b) shall be considered as fair and equitable to the operational creditors. He has argued that this is how the distribution to operational creditors has been dealt in the resolution plan. He has also argued that the Appellant did not challenge the admission of his reduced claim at the time when the Appellant received information about the admission of its claim, and the same cannot be challenged now at a much later stage, particularly after the approval of the resolution plan. In support he has cited the judgment of Hon'ble Supreme Court in the matter of ***Jaypee Kingston Boulevard Apartments Welfare Association & Ors. Vs. NBCC (India) Limited & Ors., [(2022 (1) SCC 401]*** regarding any possible discrimination between the payments to operational creditors and financial creditors. He has referred to the judgement of the Hon'ble Supreme Court in the matter of ***K. Sashidhar (Supra)*** to emphasize that the appeal to NCLAT regarding the approval of resolution plan is to be done only to the limited extent whether the plan meets with the requirements of Section 30(2) and Section 31(2) read with Section 31(1) of the Code, which is not the case in the present matter.

15. The two issues that arise for consideration in the present Appeal are:-

(i) Whether the Appellant can raise the issue of admission of reduced amount of his claim, at a much belated stage, after the approval of resolution plan?

(ii) Whether the approval of the resolution plan can be challenged on the basis of discrimination between the financial creditors and operational creditors based on payments to be made to them under the approved resolution plan?

16. We note that the Appellant submitted his claim along with 'Form-B' vide letter dated 29.01.2020, which was for an amount of Rs. 2,53,85,908.00/- which was followed by an email dated 29.06.2020 from the RP requesting for submission of certain documents by the Appellant. Thereafter, the Appellant replied through email dated 30.06.2020 informing the RP that the requested documents shall be sent by 01.07.2020, and thereafter the Appellant vide email dated 01.07.2020 submitted to the RP the requested documents viz. copy of agreement between the Appellant/BNK Power Solutions Pvt. Ltd. and the corporate debtor/Vadraj Energy (Guj) Limited, certified copy of bills and copies of manpower/personnel attendance sheets duly approved by the corporate debtor. It is further noted that the RP, vide email dated 25.07.2020, admitted the claim of the Appellant to the extent of Rs.1,13,63,918/-. The email dated 04.08.2020 from the corporate debtor (attached at Page 156 of the Appeal Paper Book) addressed to the operational creditor/Appellant in this regard notes as follows:

> *"Dear Mr. Mayank Singh,*
>
> *This is with reference to your letter dt. 29.09.2020 in respect of your claim enclosing herewith the correspondence of Mr. Nagendra Singh, Mr. Satya Pal Singh and Mr. Surya Choube. The Correspondence does not justify your claim as the Plant was close on 21.06.2020 and therefore we cannot accept your claim post 30.06.2020.*
>
> *Mr. V P Sharma has also informed that the bills were not approved by corporate debtor and hence we can only accept your claim of Rs.1,13,63,918/-.*
>
> *Thanking You.*
>
> *Raj Kumar Poddar*
> *Resolution Professsional of*
> *Vadraj Energy (Gujarat) Limited."*

17. Further, it is noted that some further clarifications were sent by the Appellant vide email dated 08.08.2020, and also by letter dated 08.08.2020, which was replied to by the RP by email dated 02.09.2020 (attached at Page 163 of the Appeal Paper Book), which is as follows:

> *"Dear Sir,*
>
> *This is with reference to your email dt. 08.08.2020 with respect to your claim on subject CD.*
>
> *We have been informed by the ex-management that after 30.06.2020 the plant was closed and nothing was required to be done.*
>
> *Further, there was nobody who was authorize to sing any documents and hence, your Invoices post June 2018 are not tenable and thus not acceptable. Therefore, only amount of Rs.1,13,63,918/- is admitted.*
>
> *Thanking You.*
>
> *Raj Kumar Poddar*
> *Resolution Professional of*
> *Vadraj Energy (Gujarat) Limited"*

18. Thus, it is quite clear that the Appellant had been informed without any ambiguity and with clarity that since the power plant was closed w.e.f. 30.06.2020, only an amount of Rs.1,13,63,918/- was admitted against his submitted claim. We further note that through email dated 15.10.2021, the RP informed the Appellant that NCLT, Ahmedabad had approved the resolution plan for the corporate debtor vide its order dated 07.10.2021 and his admitted claim has received 'NIL' allocation as per the approved resolution plan.

19. It is thus clear that after the RP had finally informed the Appellant vide email dated 02.09.2020 that only an amount of Rs.1,13,63,918/- was admitted, the Appellant did not take any further action about either preferring an appeal before the Adjudicating Authority on the matter of admission of reduced claim, nor took up the matter with the RP, and it is therefore logical and safe to presume that he accepted the admission of his claim at Rs.1,13,63,918/-. We are, therefore, of the clear opinion that once the resolution plan has been approved vide the Impugned Order the issue of any claim could not be agitated or brought up at this late stage. While holding this, we are guided by the judgement of the Hon'ble Supreme Court in the matter of ***Ghanshyam Mishra and Sons Private Limited Vs. Edelweiss Asset Reconstruction Company Limited, [2021 SCC OnLine SC 313],*** wherein it is held by the Hon'ble Supreme Court that once a resolution plan has been approved by the Adjudicating Authority, no further claims can be considered. We also follow the Judgement of the Hon'ble Supreme Court in the matter of ***Jaypee Kingston Boulevard Apartments Welfare Association & Ors. (Supra)*** that once the Appellant did not challenge the admission of a reduced amount against the submitted claim, the same cannot be challenged after approval of the resolution plan.

20. Regarding the allocation of payments to various classes of creditors, the Learned Counsel for the Resolution Professional has argued that the Liquidation Value of the Corporate Debtor was assessed as Rs. 34,22,46,797/- which is mentioned in para 5 of the Impugned Order, whereas the debt of the financial creditors itself is Rs. 593,68,95,085/-. After taking into account the waterfall mechanism envisaged under Section 53 of the IBC, the entire amount of Rs. 34,22,46,797 /- would be exhausted in the payment of the CIRP costs, workmen dues, and dues owed to the secured financial creditors which are much in excess of Rs. 34,22,46,797 /- and no amount would remain for payment to the operational creditors as required by section 30(2)(b) and the waterfall mechanism of section 53.

21. We note that Section 30(2)(b) of the IBC lays down the manner in which 'debts' of operational creditors are to be made. Section 30(2)(b) of the Code is as follows:

> ***"30(2)(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."*

22. It is seen that the resolution plan proposed payments to the operational creditors including Appellant as 'NIL', which was in accordance with the liquidation value of the corporate debtor. Thus the payments to operational creditors in the approved resolution plan is in consonance with Section 30(2)(b) of the IBC, and hence, it has been correctly approved by the CoC by the Adjudicating Authority and does not require any interference.

23. On the issue of discrimination in payments *inter se* between the financial creditors and operational creditors, we note the judgment of Hon'ble Supreme Court in the matter of ***Pratap Technocrats (P) Ltd. & Ors. Vs. Monitoring Committee of Reliance Infratel Limited & Anr.,*** wherein it is held that the Section 30(2)(b) is to be looked into with regard to the payments to operational creditors. The relevant portion of this Judgement is as follows:

> ***"31.*** *Section 5(7) defines the expression "financial creditors" while Section 5(8) defines the expression "financial debt". The expression "operational creditor" is defined in Section 5(20), while the expression "operational debt" is defined in Section 5(21). Now, insofar as the operational creditors are concerned, there are specific requirements which have been spelt out in sub-section (2)(b) of Section 30. Section 30(2)(b) requires the RP to confirm upon examination that the resolution plan."*

24. Also, in the matter of ***Committee of Creditors of Essar Steel India Limited (Supra)*** the following is held by the Hon'ble Supreme Court:

> ***"72.*** *This is the reason why Regulation 38(1-A) 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 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 sub-class 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 re-submit 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."

….

***"129.** As has been held in this judgment, it is clear that Explanation 1 has only been inserted in order that the Adjudicating Authority and the Appellate Tribunal cannot enter into the merits of a business decision of the requisite majority of the Committee of Creditors. As has also been held in this judgment, there is no residual equity jurisdiction in the Adjudicating Authority or the Appellate Tribunal to interfere in the merits of a business decision taken by the requisite majority of the Committee of Creditors, provided that it is otherwise in conformity with the provisions of the Code and the Regulations, as has been laid down by this judgment."*

25. The above judgements make it quite clear that the CoC has to adequately balance the interest of all the stakeholders including the operational creditors and the NCLT/NCLAT have to only see whether the resolution plan meets with the requirements of Section 30(2) and Section 31 of the Code and there is no residual jurisdiction to examine the business decision of the CoC. This has clearly been done in the present case by the CoC and the Adjudicating Authority while approving the resolution plan. We also note that in the grounds stated by the Appellant in the appeal there is no pleading as to how the resolution plan goes against the requirement of Section 30(2) and Section 31 of the Code and hence there is no reason for the Adjudicating Authority to have interfered with the decision of the CoC in approving the resolution plan.

26. The Appellant has relied on the Judgement of the Hon'ble Supreme Court in the matter of ***State Tax Officer (1) (Supra),*** wherein the following is held by the Hon'ble Supreme Court:

> ***"54.*** *In our considered view, the Committee of Creditors, which might include financial institutions and other financial creditors, cannot secure their own dues at the cost of statutory dues owed to any Government or Governmental Authority or for that matter, any other dues."*

27. The Judgement in the matter of ***State Tax Officer (1)(Supra)*** lays down that the members of CoC cannot secure their own dues at the cost of statutory dues owed to government or governmental authority or any other dues. It is also laid down in section 53 that payment to various creditors is to be done in accordance with a distribution scheme as specified therein, and furthermore the payment to operational creditors is to be done in accordance with Section 30(2)(b) of the Code. In such a situation, it is clear that the law lays down a certain manner in which payment to operational creditors and other creditors have to be made and if a resolution plan envisages payment in accordance with these provisions, such payments cannot be said to be not in accordance with law or to contravene any of the provisions of the law.

28. In light of the above, we don't see any reason why the resolution plan approved by the Impugned Order should be interfered with, and therefore, we dismiss the appeal.

29. In the facts of the case, there is no order as to costs.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Dr. Alok Srivastava]
Member (Technical)

New Delhi

2nd May, 2023

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