

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI
Company Appeal (AT) (Ins) No. 618 of 2021
&
I.A. No. 1647 of 2021

IN THE MATTER OF:

**Kanoria Chemical & ...Appellant
Industries Ltd.**

Registered Address:
'KCI Plaza', 6th Floor,
230C, Ashutosh Chowdhury
Avenue,
Kolkata-700019.

Versus

Mr. Vijendra Kumar Jain, ...Respondent No. 1
Erstwhile Resolution professional,
Transparent Energy System Pvt.
Ltd.,
1507, B Wing, One BKC,
Plot No. C-66, G Block, BKC,
Bandra East, Mumbai-51.

Transparent Energy System Pvt. ...Respondent No. 2
Ltd.,
Registered Office:
1st Floor, Pushpa Heights,
Bibwewadi Corner,
Pune – Satara road,
Pune-411037.

Mr. Ashok Atre, ...Respondent No. 3
Resolution Applicant,
Flat No. 3 & 4, Ameya Apartment,
CTS No. 1210/B, Deccan
Gympkhana,
Shivajinagar, Pune-411004.

Present:

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For Appellant : Mr. Aaditya Vijay Kumar, Mr. Akshit Mohan, Advocates
For Respondents : Ms. Udit Singh, Advocate for R-1/RP.
Mr. Aatreya Singh, Advocate for R-2 & 3

JUDGMENT
(Date: 11.4.2023)

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

1. This appeal has been filed by the Appellant Kanoria Chemical & Industries Ltd. under section 61 of the Insolvency and Bankruptcy Code, 2016 (in short 'IBC') assailing the order dated 16.4.2021 (in short 'Impugned Order') passed by the Adjudicating Authority (National Company Law Tribunal, Mumbai Bench) in IA No. 07/MB/2021 in CP (IB)No. 3448/MB/2018. The Adjudicating Authority, by the Impugned Order has approved the Resolution Plan under section 30(4) of the IBC with respect to the corporate debtor "Transparent Energy System Pvt. Ltd.".

2. The conspectus of the case is that, on an application under section 9 of the IBC, the corporate debtor was admitted into Corporate Insolvency Resolution Process (in short 'CIRP') vide order dated 8.3.2019 and pursuant to the admission order a public announcement was made on 9.3.2019 by the Internal

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Resolution Professional (in short 'IRP') about the initiation of CIRP of corporate debtor and calling upon creditors to file claims in the CIRP. The Appellant filed its claim on 3.6.2019 and vide its communication dated 16.6.2020 provided the Resolution Professional Vijendra Kumar Jain with detailed computation of principal and interest amount claimed by the Appellant along with KYC documents.

3. The Appellant has stated that in response to the public announcement and filing of claims in Form B vide communication dated 3.6.2019, he received an e-mail dated 29.6.2019 from the then Interim Resolution Professional Shri Ashish Vyas that his claim as per books of the corporate debtor had been admitted to the extent of Rs.16,78,510.35 as against his claim of Rs.6,68,36,789.36. After a change in the Resolution Professional, the Appellant received e-mail dated 21.5.2020 from the new Resolution Professional Shri Vijendra Kumar Jain (Respondent No.1) asking the appellant to submit excel sheet of the total claim amount including interest calculated from the date of the arbitration award, and also to submit copies of KYC documents, which was done by the Appellant vide e-mail dated 16.6.2020. Thereafter, the Appellant did not get any information about the

admitted amount of his claim from the Resolution Professional, even though he continued to send several e-mails and reminders to the Resolution Professional (R-1) to get an update regarding his admitted claim. The Appellant has further stated that his legal counsel finally received an e-mail dated 15.4.2021 from the Resolution Professional Shri Vijendra Kumar Jain that the resolution plan was under submission to NCLT, Mumbai Bench, which is pending approval, but he still did not get any information about the acceptance or otherwise of his claim in the proposed resolution plan. He finally received a letter dated 30.4.2021 from the Resolution Professional (R-1) informing him about the approval of the Resolution Plan by NCLT, Mumbai on 16.4.2021 with the portion relevant to the Appellant's claim reproduced in the said letter.

4. We heard the arguments of the Learned Counsels of the Appellant and Respondents and perused the record.

5. The Learned Counsel for the Appellant has argued that he is challenging the approval of the resolution plan by the Adjudicating Authority since the Appellant's claim, which is borne out of the arbitral award in his favour, has not been considered in accordance of with the provision in section 30(2)(b) of the IBC and

furthermore, the Successful Resolution Applicant was ineligible under section 29-A of the IBC to file the resolution plan for the resolution of the corporate debtor. The Learned Counsel for the Appellant has further argued that after the Appellant secured an arbitral award against the corporate debtor, he filed his claim as an operational creditor in Form B on 3.6.2019 informing the then Resolution Professional Shri Ashish Vyas of the details of his claim and disclosing that since he had secured arbitral award dated 19.3.2015 for Rs.68,36,288.36, he filed an application for execution of the arbitral award and that another application under section 34 of the Arbitration and Conciliation Act, 1996 was filed by the corporate debtor, which is pending before Commercial Court, Vadodara. He has stated that thus, the Appellant has made appropriate disclosure before the Resolution Professional about the existence of the section 34 application against the arbitral award, and he argued that since there was no stay on the arbitral award and the Appellant had submitted the details of his claim including a copy of the arbitral award and excel sheet showing the total amount of claim along with KYC documents, there was no reason for his entire claim to have been admitted. He has further argued that the Resolution Professional vide e-mail dated 29.6.2019 had informed him that the Appellant's claim was

admitted as per the books of the corporate debtor, and when he received an e-mail dated 21.5.2020 from Shri Vijendra Kumar Jain, the new Resolution Professional asking him to inform the total claim amount including interest from the date of arbitration award, he understood that his claim which had already been submitted and informed about it vide e-mail dated 29.6.2019 of the Interim Resolution Professional, and complete documents provided by him the Resolution Professional Shri Vijendra Kumar Jain would be admitted in full. He has added that all documents sent by him were put in the record by the Resolution Professional Shri Jain and therefore, his understanding that his full claim would be admitted was not without basis.

6. The Learned Counsel for Appellant has further submitted that on not receiving any information about the admission of his full claim amount, he continued to pursue the matter with the Resolution Professional through his legal counsel with follow-up e-mails dated 17.2.2021, 2.3.2021, 7.4.2021, 14.4.2021 and 15.4.2021, but he did not receive any reply till he received an e-mail dated 15.4.2021 when he was informed by the office of Resolution Professional that the resolution plan had been submitted to NCLT, Mumbai Bench, which was pending for

approval. He has added that thereafter vide a letter sent by speed post-dated 30.4.2021, he was informed by the Resolution Professional (R-1) that the matter of approval of the resolution plan was finally heard by the Adjudicating Authority on 11.2.2021 and vide order dated 16.4.2021, the resolution plan was approved and further the said communication dated 30.4.2021 included in detail how his claim had been treated in the resolution plan.

7. The Learned Counsel for Appellant has referred to the communication dated 30.4.2021 received from the Resolution Professional Shri Vijendra Kumar Jain and stated that while his claim had been admitted by the Resolution Plan on the basis of the arbitration award, his claim was not accepted in the resolution plan for payments on the spurious basis that is petition challenging the award was pending before the competent court, and therefore as was stated in clauses (a), (b), (c) and (d) of the said communication dated 30.4.2021, the reasons for non-acceptance of claim in the resolution plan were stated, which was not in the right of the Resolution Applicant for making such statement. He has added that the Resolution Professional, when he examined the resolution plan submitted by the Successful Resolution Applicant as required by section 30(2)(b) of the IBC,

should not have accepted such a statement that ‘the arbitration award is void *ab initio*’ and that ‘the entire process between the award and distinction and unlawful’. These statements in the resolution plan were statements without any legal bases and therefore the Resolution Professional was duty bound to examine the resolution plan and see that it satisfied the provision of section 30(2), which action was not diligently and dutifully taken by the Resolution Professional.

8. The Learned Counsel for Appellant has referred to the reply of Respondent No. 2/Successful Resolution Applicant to argue that the resolution plan makes a distinction between various categories of the operational creditors for making payments, which is seen from as given in Annexure R/2-7 annexed with the reply of R-2, and which is an extract from the approved resolution plan. He has further argued that the basis of making categories such as F, G, H, I, J, K and L is not explained as to what such categories mean and why the Appellant’s claim as operational creditor was placed in category ‘H’ and the total amount to be paid to the Appellant was kept as ‘zero’. He has further argued that the Resolution Professional was duty bound to ensure that his claim should have been paid to the extent of liquidation value as

required under section 30(2)(b) and further Regulation 35 of the CIRP Regulations enjoins that a fair and liquidation value shall be calculated in accordance with the prescribed and transparent procedure. He has further referred to the Impugned Order, wherein paragraph 9 shows payments to be made for various stakeholders/creditors and all the operational creditors who have filed their claims, which are admitted, have been clubbed together. He has further contended that the new management of the corporate debtor after successful resolution was headed and represented by Shri Ashok Atre and others, who were part of the Board of Directors of the corporate debtor when it went under CIRP. He has further pointed out to paragraph 17 of the Impugned Order to contend that there is no indication as to how the Adjudicating Authority was satisfied that the resolution plan complied with the requirement of section 30(2)(b) of the IBC and Regulations 37 and 38 of CIRP Regulations since the payments to various categories of operational after their unexplained categorisation was not in accordance with law.

9. The Learned Counsel for Appellant has referred to the judgment of the Hon'ble Supreme Court in the matter of **Committee of Creditors of Essar Steels v. Satish Kumar Gupta**

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[CA 8766-67/2019] and **Swiss Ribbons vs. Union of India & Ors** **[(2019 4 SCC 17)]** to point out that the operational creditors cannot be differentiated when they are from same class and those operational creditors who had filed claims which were admitted should have been given payments at least equal to the liquidation value, and therefore payments to different classes of operational creditors have not been in a fair and equitable manner. He has further argued that the R-3 is the promoter and director of R-2, who stood disqualified under sections 164 and 167 of The Companies Act, 2013 and therefore the reins of the corporate debtor could not have been given in the hands of such disqualified persons after insolvency resolution of the corporate debtor.

10. The Learned Counsel for R-2 and R-3 has focused his arguments on the contention that various judgments allow categorisation and classification between operational creditors on the basis of rational criteria. He has cited the case of **Gail India Ltd. vs. Ajay Joshi, RP of Alok Industries and Ors. [MANU/NL/0437/2021]** decided on 4.10.2021, wherein this Tribunal has held that there is no embargo on the classification of operational creditors into separate/different classes for deciding the way in which the money is to be distributed, as such an action

would be covered within 'Collective Commercial Wisdom' of the Committee of Creditors. The relevant observation in this judgment is as hereunder:-

“72. In reality, there is no embargo for the classification of Operational creditor(5) into separate/different classes for deciding the way in which the money is to be distributed to them by the 'Committee of Creditors' because of the fact, undoubtedly, they do have the subjective final discretion of 'Collective Commercial Wisdom' in relation to (1) The amount to be paid (2) The quantum of money to be paid, to a certain category or the incidental category of creditors, of course, nicely balancing the interests of the 'Stakeholders' and the 'Operational Creditors', as the case may be. Suffice it for this Tribunal to pertinently make a significant mention that it cannot be lost sight of that the 'Appellant's' claim is not relatable to the supply of goods or services so as to keep the 'Corporate Debtor' as a 'Going Concern'. It is to be remembered that the 'Appellant' had commenced 'Arbitration proceedings' in regard to its claim emanating from the 'Gas Sale Agreement'. In fact, the 'Appellant's' claim pertains to supposed obligation to pay for goods, even where, these were not made use of as 'take or pay obligation'. Looking at from any angle, the impugned order dated 08.03.2019 passed by the Adjudicating Authority (National Company Law Tribunal), Ahmedabad Bench in dismissing the I.A. 41/2019 in IA 259/2018 (filed by the Applicant for Appellant) in CP (IB) 48/2017 does not suffer from any material irregularity or patent illegality in the eye of Law. Resultantly the instant 'Appeal' sans merits.”

11. The Learned Counsel for R-2 and R-3 has also referred to the judgment of this Tribunal in the matter of **Excel Engineering & Ors. vs. Vivek Murlidhar Dabhade, RP of New Phaltan Sugar Works Ltd. & Ors. [MANU/NL/0884/2022]**, wherein this

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Tribunal has held that there is no embargo on the classification of operational creditors who can be classified into separate and different classes and that operational creditors were paid as per section 30(20(b) of the Code coupled with Regulation 38 of the Corporate Insolvency Process Regulations. He has also referred to Hon'ble Supreme Court's judgment in the matter of **Bank of Baroda & Ors. vs. MBL Infrastructures Limited & Ors. [MANU/SC/0060/2022]**, wherein it is held that once the resolution plan approved by the Adjudicating Authority has been implemented substantially, then in the interest of a large number of shareholders and thousands of employees, the process should not be disturbed, so that on-going operations of the corporate debtor for resolution of the corporate debtor can continue.

12. The Learned Counsel for R-1 has defended the action taken by Shri Vijendra Kumar Jain (R-1) stating that he took over as Resolution Professional in February 2020, whereafter he sent e-mail dated 21.5.2020 asking for details of the claim from the Appellant, and this establishes the bonafide of R-1 in dealing with the claim of the Appellant. She has further claimed that the Information Memorandum included an amount of Rs.11,46,28,813 as admitted claim of the Appellant and this claim was considered

and included in the proposed resolution plan, which was to provide 'zero' payment to the Appellant, this resolution plan was approved by the Committee of Creditors and the Adjudicating Authority. She has further referred to the fair and liquidation value of the corporate debtor done by a registered valuer, which was Rs. 15,29,34,330 and Rs.11,43,51,143 respectively, and this information is included in the additional affidavit filed by R-1 in paragraph 4 (additional affidavit submitted vide dy. No. 41799 dated 9.12.2022). On this basis, she has claimed that there is no malafide action on the part of R-1 and all the facts were put up before the Resolution Applicant through the Information Memorandum, and the proposed resolution plan was considered and approved by the Committee of Creditors in its commercial wisdom.

13. The Learned Counsel for Appellant has argued in rejoinder that if a fair and liquidation value of the corporate debtor was so small as is claimed by the Resolution Professional, how was it possible that other operational creditors received reasonable payments, whereas the Appellant received 'zero' payment.

14. The following issues arise for decision in the present appeal:-

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- (i) Whether the treatment of the claim of the Appellant filed in pursuance of the arbitral award was done inappropriately in the resolution plan and thereafter approved by the Adjudicating Authority in accordance with law?
- (ii) Whether the Successful Resolution Applicant, which is represented by the same persons, who were also part of the Board of Directors of the corporate debtor which went into CIRP, were ineligible to submit a resolution plan as per section 29-A of the IBC?
- (iii) Whether R-1 failed his duty to communicate admitted claim amount of the Appellant to him during the CIRP and also in the examination of the submitted resolution plan before its approval by the Adjudicating Authority?

15. We note that the resolution plan includes the following in respect of payments to be made to the operational creditors:-

Sr. No.	Name of Operational Creditor	Amount Claimed	Amount Admitted	Difference (if any)	Remarks
					for Corporate Debtor.
98	PAWAN AGENCY	2,69,615	2,66,995	2,620	
99	Mattes Engineering GmbH	29,23,617.17	25,70,394.85	3,53,222	Refer Note 1 below
100	Solutions Techniques	4,67,280.00	4,67,280.00	-	
101	Rudra Enterprises	4,15,104.00	3,63,760.00	51,344	Refer Note 1 below
102	Kanoria Chemicals and Industries Ltd.	11,46,28,813	11,46,28,813	-	The Creditor has claimed based on arbitration award and interest upto the date of CIRP initiation. TESPL (Corporate Debtor) has filed petition u/s 34 of Arbitration Act, challenging the award of entire amount and the challenge petition is pending
103	Mr. J. G. Pendse	15,00,000	15,00,000	-	
		33,06,02,503	29,87,19,557	3,18,82,946	

Note 1: The accepted claims of the Operational creditors are as per the books of the Corporate Debtor and the acceptance of such claims have been communicated to the creditors respectively.

(Note: Reproduced from page 47 of R-2's Reply Affidavit)

16. The payments that were approved to be made to operational and financial creditors is included in Annexure R/2-7 (page 67 of R-2's Reply Affidavit) which is as follows:-

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Annexure R/2 - 7

Summary of Payments as per Approved Resolution Plan of Transparent Energy Systems Private Limited
Payment Period from 16/04/2021 to 31/08/2021 (Rs. In Lakhs)

Workmen and Employees				
Sr. No.	Category	Amount Paid		Amount Total Paid after approval of Resolution Plan
		Upto 30th June 2021	1st July to 31st August 2021	
1	A	23.85	0	23.85
2	B	36.15	18.12	54.27
3	C	0.09	23.01	23.1
4	D	0	47.56	47.56
5	E	0	2.64	2.64
	Total	60.09	91.33	151.42

Operational Creditors who have filed a claim

Sr. No.	Category	Amount Paid		Amount Total Paid after approval of Resolution Plan
		Upto 30th June 2021	1st July to 31st August 2021	
6	F	0	12.27	12.27
7	G	0	4.39	4.39
8	H	0	0	0
	I	0	0.63	0.63
	Total	0	17.29	17.29

Residual claims of Operational Creditors

Sr. No.	Category	Amount Paid		Amount Total Paid after approval of
		Upto 30th June 2021	1st July to 31st August 2021	
9	J	0	0.57	0.57
10	K	0	1.39	1.39
11	L	0	0.06	0.06
	Total	0	2.02	2.02

Payment to Financial Creditors

12	State Bank of India	-	132.78	132.78
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Statutory Payments

Sr. No.	Category	Amount Paid		Amount Total Paid after approval of
		Upto 30th June 2021	1st July to 31st August 2021	
13	Provident Fund	0	5.85	5.85
14	Professional Tax	0	0	0
15	ESIC	0	2.19	2.19
16	LWF	0	0.01	0.01
17	Nagar Panchayat Tax	0	0.42	0.42
18	Supplier TDS	0	0	0
19	Traces TDS	0	0	0
	Total	0	8.47	8.47

17. In addition to the above, the following was communicated by the Resolution Professional/R-1 vide his letter dated 30.4.2021 to the Appellant which is essentially about the manner in which the claim of the Appellant was treated in the resolution plan:-

“Quote

On 11th November, 2002, Kanoria Chemicals and Industries Ltd. (KCIL) proceeded against TESPL, by invoking Arbitration for adjudication of the dispute in respect of the agreement for supply of Multi Stage Evaporators. The basic grievance was the alleged non-performance of the plant resulting in claims for return of amount paid, damages, reimbursement of additional costs incurred along with interest. The purported claim was of an amount of Rs.947.42 lakhs as against the value of the Plant in question was only Rs. 134 Lacs.

TESPL defended the claims of KCIL by proving the inability of the KCIL to provide feed or inputs as per contractual specifications. TESPL also filed counterclaims for recovery of balance 10% payment and other damages. The dispute is for non-performance of the effluent treatment plant (Multi Stage Evaporators) supplied by TESPL. The arbitration award of Rs. 668 Lacs plus future interest was pronounced against TESPL, in May 2015 unlawfully by only two arbitrators when the third arbitrator had resigned and his post was vacant. TESPL challenged the award under Section 34 of the Arbitration and Conciliation Act, 1996 in District Court at Ankleshwar in 2015 on numerous grounds including the patent illegality and deficiency in the process of making the award only by the two arbitrators. A copy of the petition of TESPL for challenging the award is enclosed as Annexure D. The award challenge petition was transferred to Vadodara Commercial Court in 2017 due to introduction on Commercial Courts and in 2019 it has been remanded back to District Court of Ankleshwar District Courts due to dissolution of Commercial Courts in Gujarat.

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In 2018, Kanoria Chemicals has filed application for execution of award before Pune Civil Court and it is pending for hearing. In the month of June 2019, TESPL received claim as per IBC code from KCIL and it was forwarded to the IRP who was then in-charge. The updated Information Memorandum received by the Resolution Applicant (RA) on 28.05.2020 includes the claim from KCIL with a specific remark about pending award challenge petition. The said claim has been admitted by the Resolution Professional (R) based on the arbitration award, pending the petition from the Corporate Debtor (CD) for challenging the award before Competent Court.

The RA, being fully aware of the facts of the dispute between TESPL and KCIL, has considered this claim on the following background –

a) The basis of the claim is the arbitration award which has been challenged by TESPL and the challenge petition is pending.

b) The arbitration award is void ab initio as it has been made by two arbitrators after resignation of third arbitrator and without following the mandatory process of deliberations among the members of the arbitral tribunal.

c) The entire process of making the award has been defective and unlawful.

d) The outgoing arbitrator, in his letter of resignation, had specifically elaborated about the blatantly defective award making process followed by the other two arbitrators and the resultant miscarriage of justice as grounds for his resignation.

e) The basic value of contract (excluding taxes and duties) for supply of Multistage Evaporators was only Rs. 134 Lacs.

f) The liability of TESPL for non-performance of plant was capped at 10% of the contract value and KCIL has already held back this amount with itself during the course of the contract.

g) KCIL, in spite of being the beneficiary of the award, has not shown any initiative in early hearing and disposal of the award challenge petition from TESPL

h) On the other hand, KCIL has shown undue initiative in pursuing the application for execution of award pending award challenge petition.

The RA, in light of the above facts, has given NIL value to this claim in the Resolution Plan.

Further the RA submits that it will write off the amount of 16,78,510.00 appearing as receivable from its books and the RA will also be entitled to omit the contingent liability appearing in the latest Annual Report of the CD on account of this litigation.

All the rights of KCIL with regard to their claims against TESPL would stand exhausted on approval of the resolution plan by the Adjudicating Authority (AA).

All the pending legal proceedings between KCIL and TESPL will stand dismissed/ disposed of on approval of the resolution plan by the AA. KCIL has filed execution application before Civil Court, Pune. This application will stand dismissed/disposed of as explained above

Unquote”

18. Admittedly, the Appellant submitted his claim in ‘Form B’ to the Resolution Professional vide communication dated 3.6.2019 (attached at pp. 141-147 of the Appeal Paperbook), wherein the Appellant has made a clear disclosure that his claim pertains to an arbitration award dated 19.3.2015 and that an execution application thereof is filed by the Appellant and also an

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application under section 34 of the Arbitration and Conciliation Act, 1996 filed by the corporate debtor were pending adjudication. Therefore, it is clear that the Appellant made a clear disclosure about the arbitration award as well as the pendency of execution application and application under section 34 filed by the corporate debtor. We also note that there is no 'stay' in any of the two proceedings as stated above. We also note that vide e-mail dated 29.6.2019, the claim of the Appellant to the extent of Rs.16,78,510.35 was stated to be admitted as per books of the corporate debtor and thereafter by an e-mail dated 21.5.2020 sent by R-1, details about the claim made by the Appellant were sought from the appellant, whereafter the appellant submitted all related documents along with Excel sheet showing the calculation of the total amount claimed alongwith KYC documents vide e-mail dated 16.6.2020 (attached at page 151 of the appeal paperbook). Thereafter, we note five e-mails sent by the Appellant or his legal counsel between 17.2.2021 and 15.4.2021 (attached at pp. 153-155 of the appeal paperbook) clearly showing the Appellant's concern about the precise amount admitted in his claim and also that he was pursuing the matter with the Resolution Professional quite regularly. It is also noted that in response to all these email communications, R-1 replied through email dated 15.4.2021 that

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the resolution plan was under submission and consideration of the Adjudicating Authority. The facts stated by both the rival parties and emails on record make it amply clear that R-1 did not communicate to the appellant the precise quantum of his admitted claim, which he was required to do under CIRP Regulations.

19. We finally note that through a letter dated 30.4.2021 sent by the Resolution Professional (R-1) by speed post to the Appellant, he was informed about the approval of the resolution plan extracting the manner in which the claim of the Appellant was dealt with in the approved resolution plan, and this extract has been reproduced in an earlier paragraph in this judgment.

20. On examining the various e-mail communications exchanged between the earlier Successful resolution Professional and R-1 and the Appellant, it is clear from the e-mail sent by Shri Ashish Vyas the then Resolution Professional on 29.6.2019 that the claim of the Appellant to the extent of Rs.16,78,15,035 was admitted in the CIRP. Thereafter, there was change in the Resolution Professional and by another e-mail dated 21.5.2020 sent by the Resolution Professional/R-1 Shri Vijendra Kumar Jain it is seen quite clearly that he sought details of the claim amount

and its quantum, along with KYC particulars, which were sent by the Appellant. The same e-mail also notes that ‘on scrutiny of claims list of corporate debtor, I could observe that your claim has not been admitted’. It is, therefore, not logical for the Resolution Professional R-1 to have stated in email dated 21.5.2020 that once a claim, even though of reduced amount than what was claimed in Form B, was admitted and the matter was informed by the erstwhile Interim Resolution Professional Ashish Vyas, that the Appellant’s claim had not been admitted. while we would like to give the benefit of doubt to R-1 on this score on the basis that with the change of the Resolution Professional perhaps the documents and papers were not transferred in full or in time to R-1 from the previous resolution Professional, yet we are of the view that once the Appellant had submitted complete details about the arbitration award, and the calculation of claimed amount in excel sheet and KYC documents, the admitted amount of the claim should have been communicated to the Appellant, while observing so, we are conscious of the fact that the appellant sent several emails in follow-up to the Resolution Professional. The work of updating and verification and final determination of the amount of claims is to be done by the Resolution Professional as per Regulations 12,

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12A, 13 and 14 of the CIRP Regulations. The list of creditors shall be maintained by the Resolution Professional and made available to the persons filing the claims in accordance with sub-regulation (2) of Regulation 13 and based on the record submitted by the parties it is clear that the Appellant could not get to know the amount of his claim finally admitted by the Resolution Professional despite continuous follow-up. The Resolution Professional has clearly failed in his duty in this regard.

21. We note that Hon'ble Supreme Court has held in the matter of **Swiss Ribbons (supra)** that different classes of creditors is allowed, but there should be a rational basis for differentiation of classes. The relevant portion of the judgment is as hereunder:-

“45. Quite apart from this, the United Nations Commission on International Trade Law, in its Legislative Guide on Insolvency Law [—UNCITRAL Guidelines] recognizes the importance of ensuring equitable treatment to similarly placed creditors and states as follows:

*“Ensuring equitable treatment of similarly situated creditors”
7. The objective of equitable treatment is based on the notion that, in collective proceedings, creditors with similar legal rights should be treated fairly, receiving a distribution on their claim in accordance with their relative ranking and interests. This key objective recognizes that all creditors do not need to be treated identically, but in a manner that reflects the different bargains they have struck with the debtor. This is less relevant as a defining factor where there is no specific debt contract with the debtor, such as in the case of damage claimants (e.g. for environmental damage) and tax authorities. Even though the principle of equitable treatment may be*

modified by social policy on priorities and give way to the prerogatives pertaining to holders of claims or interests that arise, for example, by operation of law, it retains its significance by 12 UNCITRAL Legislative Guide on Insolvency Law ensuring that the priority accorded to the claims of a similar class affects all members of the class in the same manner. The policy of equitable treatment permeates many aspects of an insolvency law, including the application of the stay or suspension, provisions to set aside acts and transactions and recapture value for the insolvency estate, classification of claims, voting procedures in reorganization and distribution mechanisms. An insolvency law should address problems of fraud and favouritism that may arise in cases of financial distress by providing, for example, that acts and transactions detrimental to equitable treatment of creditors can be avoided.

46. The NCLAT has, while looking into viability and feasibility of resolution plans that are approved by the committee of creditors, always gone into whether operational creditors are given roughly the same treatment as financial creditors, and if they are not, such plans are either rejected or modified so that the operational creditors' rights are safeguarded. It may be seen that a resolution plan cannot pass muster under Section 30(2)(b) read with Section 31 unless a minimum payment is made to operational creditors, being not less than liquidation value. Further, on 05.10.2018, Regulation 38 has been amended. Prior to the amendment, Regulation 38 read as follows:

—38. Mandatory contents of the resolution plan.—

(1) A resolution plan shall identify specific sources of funds that will be used to pay the—

(a) insolvency resolution process costs and provide that the [insolvency resolution process costs, to the extent unpaid, will be paid] in priority to any other creditor;

(b) liquidation value due to operational creditors and provide for such payment in priority to any financial creditor which shall in any event be made before the expiry of thirty days after the approval of a resolution plan by the Adjudicating Authority; and

(c) liquidation value due to dissenting financial creditors and provide that such payment is made before any

recoveries are made by the financial creditors who voted in favour of the resolution plan.¶

Post amendment, Regulation 38 reads as follows:

—38. Mandatory contents of the resolution plan.—

(1) The amount due to the operational creditors under a resolution plan shall be given priority in payment over financial creditors.

(1-A) A resolution plan shall include a statement as to how it has dealt with the interests of all stakeholders, including financial creditors and operational creditors, of the corporate debtor.

xxx xxx xxx¶

47. The aforesaid Regulation further strengthens the rights of operational creditors by statutorily incorporating the principle of fair and equitable dealing of operational creditors' rights, together with priority in payment over financial creditors."

It is evident from the above observation of Hon'ble Supreme Court in the matter of **Swiss Ribbons(supra)** that equitable treatment should be meted out to financial and operational creditors in the insolvency resolution of a company. This judgment establishes a basic requirement in insolvency resolution, but it is distinguishable as in the present case, different categories have been stipulated from amongst operational creditors. The basis of such categorization is not clearly spelt out, and moreover the Appellant which has filed claim on the basis of an arbitral award has been given 'zero' payment even though there is no 'stay' or varying of the arbitral award.

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22. We further note that the resolution plan includes a number of categories of operational creditors as listed in the “Summary of Payments” and these categories are labelled as F, G, H, I, J, K and L (page 67 of reply affidavit of R-2), but there is neither any explanation nor any legend to explain or clarify what these categories mean or are respond to. The extensive quote from the approved resolution plan regarding the manner in which the claim of the Appellant was dealt with in the resolution plan which is contained in R-1’s letter dated 30.4.2021 is shocking, to put it mildly. This extract in the resolution plan goes into detail about the arbitration proceedings and goes on to claim that “the arbitration award of Rs.6.68 lakhs plus future interest was pronounced against TESPL in May, 2015 unlawfully by only two arbitrators, when the third arbitrator has resigned and his post was vacant.” The objectionable portion in resolution plan which relates to the manner in which Appellant’s claim was dealt with, further goes on to state as follows:-

“The RA, being fully aware of the facts of the dispute between TESPL and KCIL, has considered this claim on the following background –

a) The basis of the claim is the arbitration award which has been challenged by TESPL and the challenge petition is pending.

b) The arbitration award is void ab initio as it has been made by two arbitrators after resignation of third arbitrator and without following the mandatory process of deliberations among the members of the arbitral tribunal.

c) The entire process of making the award has been defective and unlawful.

d) The outgoing arbitrator, in his letter of resignation, had specifically elaborated about the blatantly defective award making process followed by the other two arbitrators and the resultant miscarriage of justice as grounds for his resignation.

xx xx xx xx

The RA, in light of the above facts, has given NIL value to this claim in the Resolution Plan.

xx xx xx xx

All the rights of KCIL with regard to their claims against TESPL would stand exhausted on approval of the resolution plan by the Adjudicating Authority (AA)."

23. It is thus clear the Successful Resolution Applicant, which is represented by the same persons, which were on the Board of Directors of the corporate debtor under CIRP, has gone ahead and made a legal analysis about the arbitration process which it certainly did not have the jurisdiction or right to do so. To say that the arbitration award is 'void *ab initio*' and 'the entire process

of making the ward is defective and unlawful' is abrogating the authority which is only available to a court of competent jurisdiction. These comments are not only prejudicial but also smack of an illegal attempt to deny to the Appellant his lawful and just claim. We note that the Successful Resolution Applicant is represented by the same persons who were on the Board of Directors of the corporate debtor, which went into insolvency resolution. While it is potently objectionable and completely undesirable for a prospective resolution Applicant to make such comments about a valid judicial process, who find it surprising that these comments escaped the eyes of R-1, the Resolution Professional, and the Adjudicating Authority when examining the resolution plan under section 30(2)(b). We are, therefore, of the view that the Resolution Professional R-1 failed in his duty by not pointing out such objectionable comments when placing the Resolution Plan for consideration of Committee of Creditors and the Adjudicating Authority. We are of the view that the portion of the resolution plan as extracted in para 17 of this judgment is fit to be deleted from the Approved Resolution Plan.

24. We also take note of the requirement of section 30 (2)(b) of IBC, whereby the fair and liquidation value of the corporate debtor

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is to be considered while deciding on the payments to be made to various classes and categories of creditors. Moreover, if the operational creditors are classified in different categories, as is seen from the “Summary of Payments” table in the approved resolution plan and the basis of such categorisation has to be made explicitly clear which is not apparent from the record submitted before us. It is also clear that categories F, G and I of the operational creditors have been made some payments, whereas category H has been provided ‘zero’ payment. Looking at the claims of operational creditors such as Pawan Agency, Mattes Engineering GmbH, Solutions Techniques, Rudra Enterprises and Mr. J.G. Pendse, we note that even their claims were admitted, but the record submitted by R-1 does not make clear as to what amount or percentage of their admitted claims these operational creditors were paid, but it is clear that these operational creditors were paid some amount which was more than ‘zero’. Since there was no stay in the execution proceedings or any order of the competent court regarding varying the arbitration award insofar as the arbitral award in favour of response to section 34 application, we are of the view that the Appellant should be paid appropriately, and looking to the facts of this case and submitted documents, it

should be the highest of the percentages (of admitted claim) that the operational creditors F, G and I categories have been paid.

25. In the present case, the said judgment is distinguished on the basis that the Appellant did not deserve 'zero' payment since the arbitration award by the competent court was neither quashed, stayed or varied, as there was no contrary order against the award, and therefore his claim should have been appropriately admitted by the resolution Professional and considered for payment in the approved resolution plan.

26. We peruse the judgment of the Hon'ble Supreme Court in the matter of **Bank of Baroda & Ors. (supra)**, which is as under:-

"61. Having held so, we would like to come to the last part of our order. Though the very resolution plan submitted by the Respondent No. 3, being ineligible is not maintainable, much water has flown under the bridge. The requisite percentage of voting share has been achieved. We may also note that the percentage has been brought down from 75% to 66% by way of an amendment to Section 30(4) of the Code.

63. We need to take note of the interest of over 23,000 shareholders and thousands of employees of the Respondent No. 1. Now, about Rs. 300 crores has also been approved by the shareholders to be raised by the Respondent No. 1. It is stated that about Rs. 63 crores has been infused into the Respondent No. 1 to make it functional."

27. We note that corporate debtor is now being run by the Successful Resolution Applicant since the approval of the resolution plan on 16.4.2021 by the Adjudicating Authority and it has been almost two years since the transfer of the corporate debtor to the Successful Resolution Applicant, it would not be appropriate to unravel the entire process starting from the approval of the resolution plan to now.

28. We also take note of the following two judgments cited by the Learned Counsel for Respondents No. 2 and 3:-

(i) “Gail India Ltd. Vs. Ajay Joshi RP of Alok Industries Ltd. and Ors.(supra)

(ii) Excel Engineering and Ors.(supra)

Both the above judgments of this Tribunal are distinguished on the basis of the fact while the judgments correctly held, there is no embargo for the classification of operational creditors into separate/different classes for deciding the way in which the money is to be distributed to them by the Committee of Creditors. In the facts of the present case, this judgment is distinguishable on the basis that the Appellant Kanoria Chemical & Industries Ltd. was kept in a separate category and approved payment of ‘zero’ amount only on the basis of an incorrect classification.

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29. The Learned Counsel for Appellant has raised the issue that Shri Ashok Atre, who was heading the Board of Directors of the corporate debtor before it went into insolvency resolution is now disqualified as per sections 164 and 167 of the Companies Act, 2013 and therefore, the management of the company after insolvency resolution cannot be handed over to the same person. We pursued sections 164 and 167 of the Companies Act, 2013. Section 164 lays down conditions under which a person shall not be eligible for appointment as director of a company. It is clear that Shri Ashok Atre is himself neither of unsound mind nor an undischarged insolvent and also that he is not convicted or disqualified by any court or tribunal to hold the office of a director of a company. The section 167 gives the conditions in which the office of director shall become vacant and noticeably Shri Ashok Atre has not vacated the office of director under any of the conditions mentioned in section 167 of the Companies Act, 2013. We further notice section 240-A of the IBC, which is as follows:-

“240-A. Application of this Code to micro, small and medium enterprises. – (1) Notwithstanding anything to the contrary contained in this Code, the provisions of clauses (c) and (h) of section 29A shall not apply to the resolution applicant in respect of corporate insolvency resolution process or pre-packaged insolvency resolution process of any micro, small and medium enterprises.

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(2) Subject to sub-section (1), the Central Government may, in the public interest, by notification, direct that any of the provisions of this Code shall—

- (a) not apply to micro, small and medium enterprises; or*
- (b) apply to micro, small and medium enterprises, with such modifications as may be specified in the notification.*

(3) A draft of every notification proposed to be issued under subsection (2), shall be laid before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions.

(4) If both Houses agree in disapproving the issue of notification or both Houses agree in making any modification in the notification, the notification shall not be issued or shall be issued only in such modified form as may be agreed upon by both the Houses, as the case may be.

(5) The period of thirty days referred to in sub-section (3) shall not include any period during which the House referred to in sub-section (4) is prorogued or adjourned for more than four consecutive days.

(6) Every notification issued under this section shall be laid, as soon as may be after it is issued, before each House of Parliament.

Explanation.— For the purposes of this section, the expression "micro, small and medium enterprises" means any class or classes of enterprises classified as such under sub-section (1) of section 7 of the Micro, Small and Medium Enterprises Development Act, 2006 (27 of 2006) .”

Further, section 238 of the IBC lays down that the provisions of IBC shall have effect, notwithstanding anything inconsistent therewith contained in any other law in force or any instrument

having effect by virtue of any such law. Quite clearly, the operation of section 238 of IBC shall be applicable to micro, small or medium enterprise and thus section 240-A shall come into play. Section 240-A prescribes that the provision of clauses (c) and (h) of section 29-A shall not apply to resolution applicant in respect of CIRP of any MSME, admittedly the corporate debtor in the present case is a MSME and this fact is not disputed by the Appellant. Therefore, any order view clauses (c) and (h) of section 29-A of the IBC shall not apply in respect of a resolution applicant in the present CIRP of the corporate debtor, and therefore, there is no disqualification or ineligibility attached to Shri Ashoke Atre or any member of the previous management of the corporate debtor in playing as a prospective resolution applicant in the CIRP of the corporate debtor.

30. On the basis of discussion in the aforesaid paragraphs, we decided the three issues stated in paragraph 14 of this judgment as follows:-

- (i) The Appellant was incorrectly classified as an operational creditor with payment of 'zero' amount on the basis of prejudicial and objectionable analysis of arbitration process

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by Successful Resolution Applicant as stated in the Resolution Plan. Therefore, the Applicant should be paid an amount equal to the amount permissible to the operational creditor receiving maximum percentage of payment against admitted claim, from among all the various categories of operational creditors in the resolution plan.

- (ii) The Successful Resolution Applicant was entitled to submit a resolution plan, since it is permitted under section 240-A of the IBC to submit a resolution plan in respect of the corporate debtor, which is an MSME.
- (iii) We are, therefore, of the view that the comments made in the resolution plan which has been quoted from pages 62 to 65 of the reply affidavit of R-2 are completely uncalled for and are liable to be deleted from the approved resolution plan.
- (iv) The Resolution Professional Shri Vijendra Kumar Jain should have been more dutiful and alert in responding to various e-mails of the Appellant regarding admitted amount of his claim, and further he should have brought the

objectionable comments made by the Successful Resolution Applicant regarding the arbitration award in the arbitration process which was included in the resolution plan to the notice of Committee of Creditors as also the Adjudicating Authority, which he failed to do so, and therefore he is reprimanded regarding this failure in the call of his duty.

- (v) In view of the fact that due to incorrect and prejudicial treatment of the Appellant's claim by the successful resolution applicant in the resolution plan, the Appellant had to engage in unnecessary litigation to get his just due, we order that a litigation cost of rupees One Lakh shall be paid by Successful resolution applicant to the Appellant within 30 days of this order and submit an affidavit regarding the payment before this Tribunal.

31. The above-mentioned directions shall be complied with within 30 (thirty) days of this judgment, and R-1, the erstwhile Resolution Professional shall ensure compliance of direction (i) above.

32. With the above-stated directions, we allow the appeal and dispose it off accordingly.

[Justice Rakesh Kumar]
Member (Judicial)

[Dr. Alok Srivastava]
Member (Technical)

New Delhi
11th April, 2023

/aks/