NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No.1061 of 2020

[Arising out of Order dated 20th October, 2020 amended on 21st October, 2020 passed by the National Company Law Tribunal, Kolkata Bench, Kolkata in IA (IB) No. 805/KB/2020 in CP (IB) No. 1221/KB/2018]

IN THE MATTER OF:

India Resurgence ARC Private Limited
Reg Off: 3rd Floor, Unit 304 Piramal Tower,
Peninsula Corporate Park,
Lower Parel Mumbai – 400 013.

...Appellant

Versus

1. M/s. Amit Metaliks Limited
Resolution Applicant,
Reg Address: Raturia Angadpur Industrial Area,
P.O. Angadpur, Durgapur, West Bengal – 713 215.

Also at:
238B, A.J.C. Bose Road, 3rd Floor,
Kolkata – 700 020.

2. VAP Udyog Private Limited
Reg Address: Centre Point 21, Hemanta Basu Sarani,
4th Floor, Suite No. – 437
Kolkata, West Bengal – 700 001.

Through Mr. Raj Singhania
Resolution Professional
Central Plaza, 5th Floor, Room No. 5A,
41 B B Ganguly Street, Kolkata, West Bengal – 700 012.

....Respondents

Present:

For Appellant: **Mr. Sanjeev Singh, Ms. Kajal Bhatia and Mr. Prashant Tripathi, Advocates**

For Respondents: **Mr. Kumarjit Banerjee, Mr. Gaurav Gupta and Mr. Aakash Khattar, Advocates for R-1.**
Mr. Raj Singhania, Interim Resolution Professional in person for R-2.

J U D G M E N T

BANSI LAL BHAT, J.

Corporate Insolvency Resolution Process qua 'M/s VAP Udyog Pvt. Ltd.' (Corporate Debtor) was set in motion by Adjudicating Authority (National Company Law Tribunal) Kolkata Bench Kolkata by admitting CP(IB)No. 1221/KB/2018. Committee of Creditors approved Resolution Plan of 'M/s Amit Metaliks Ltd.' (Respondent No.1) with 95.35% voting shares. Upon consideration of application being I.A. (IB) No.805/KB/2020 filed by the Resolution Professional, the Adjudicating Authority approved the Resolution Plan of Respondent No.1 (Successful Resolution Applicant) in terms of order dated 20th October, 2020 which has been assailed by 'India Resurgence ARC Pvt. Ltd.' - the dissenting Secured Financial Creditor having a vote share of 3.94% and a COC Member, through the medium of instant appeal primarily on the ground that the approved Resolution Plan failed to deal with the interests of the all the stakeholders including the Appellant who was offered a meagre amount of slightly over Rs.2 Crores as against its admitted claim of an amount exceeding Rs.13 Crores without even considering the valuation of the security held by the Appellant in its Resolution Plan which had a valuation of approximately Rs.12 Crores.

2. It is contended on behalf of Appellant that while approving the Resolution Plan value and quality of security interest of the Appellant was not

considered by the Successful Resolution Applicant and the Committee of Creditors. It is contended that the manner of distribution and priority of share based on the value of security interest of a Secured Financial Creditor pursuant to Amendment in Section 30(4) of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'I&B Code') has been overlooked. Reliance is placed on the judgement of Hon'ble Apex Court in ***'Committee of Creditors of Essar Steel India Limited Vs. Satish Kumar Gupta and Others' (Civil Appeal No. 8766-67 of 2019)'***, (2019) SCC OnLine SC 1478, to buttress the point that in considering the fairness of distribution, underlying security value and the quality of security has to be taken into consideration. Learned counsel for Appellant has also relied upon Regulation 39(4) of the IBBI (Insolvency Resolution process for Corporate Persons) Regulations, 2016 as amended w.e.f. 28th November, 2019 wherein secured, unsecured and dissenting secured financial creditors are differentiated in terms of the amounts to be paid under a Resolution Plan. It is submitted that the principle of equality cannot be stretched to treating unequal's equally as that will destroy the very objective of the I&B Code. It is further submitted that while unamended Section 30(4) of the I&B Code failed to consider the value of the security interest within the ambit of feasibility and viability, the amendment was effected to ensure that the manner of distribution must take into account the order of priority among creditors, including the priority and value of security interest of a secured creditor. It is submitted that Respondent No.1 having failed to consider the underlying security interest in favour of Appellant, the impugned order approving the Resolution Plan cannot be sustained.

3. Per contra it is submitted on behalf of Respondent No.1 that the interpretation sought to be given by Appellant to Section 30(4) of the I&B Code as amended has already been dealt with by the Hon'ble Apex Court in ***'Committee of Creditors of Essar Steel India Limited Vs. Satish Kumar Gupta and Others' (Supra)***, wherein it was held that the I&B Code gives the Committee of Creditors flexibility to approve or not to approve a Resolution Plan which may take into account different classes of creditors specified in Section 53 and different priorities and values of security interests of a secured creditor. It is pointed out that the Hon'ble Apex Court has categorically stated that the Committee of Creditors, while exercising its discretion may look into these considerations including different priorities and values of security interests of secured creditors only as a guideline in arriving at a business decision for acceptance or rejection of a Resolution Plan. It is accordingly submitted that only a discretion is vested in the Committee of Creditors to take into account value of security interest of a Creditor in approving a Resolution Plan, it being only a guideline and the discretionary consideration being a business decision. Such discretion itself is a commercial consideration reserved for the Committee of Creditors and as such beyond the purview of review in appeal under I&B Code. It is lastly submitted that an appeal on account of purported non-compliance under Section 30(4) of I&B Code is not maintainable.

4. Heard learned counsel for the parties and perused the record. Section 3(10) of the I&B Code provides that the "Creditor" means any person to whom a

debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decree holder. Holding that the equitable treatment of creditors is equitable treatment only within the same class, the Hon'ble Apex Court in ***'Committee of Creditors of Essar Steel India Limited Vs. Satish Kumar Gupta and Others',*** (2019) SCC OnLine SC 1478, observed that reorganization is a collective remedy designed to find an optimum solution for all parties connected with a business in the manner provided by the Code. Protecting creditors in general is, no doubt, an important objective but protecting creditors from each other is also important which means that the I&B Code should not be read so as to imbue creditors with greater rights in a bankruptcy proceeding than they would enjoy under the general law, unless it is to serve some bankruptcy purpose. Dealing with the importance of valuing security interest separately from interests of creditors who do not have security, the Hon'ble Apex Court taking note of the World Bank Report of 2015 which stated that a cramdown on dissentient creditors would pass muster under an insolvency law if such creditors will receive, under a resolution plan, an amount at least equal to what such creditors would receive in a Liquidation Proceeding being "Liquidation Value" dealt with the issue of all creditors being treated identically as under:-

> *"85. Indeed, if an "equality for all" approach recognising the rights of different classes of creditors as part of an insolvency resolution process is adopted, secured financial creditors will, in many cases, be incentivised to vote for liquidation rather*

than resolution, as they would have better rights if the corporate debtor was to be liquidated rather than a resolution plan being approved. This would defeat the entire objective of the Code which is to first ensure that resolution of distressed assets takes place and only if the same is not possible should liquidation follow.

86. Financial creditors are in the business of lending money. The RBI Report on Trend and Progress of Banking in India, 2017-2018 reflects that the net interest margin of Indian banks for Financial Year 2017-2018 is averaged at 2.5%. Likewise, the global trend for net interest margin was at 3.3% for banks in the USA and 1.6% for banks in the UK in the year 2016, as per the data published on the website of the bank. Thus, it is clear that financial creditors earn profit by earning interest on money lent with low margins, generally being between 1 to 4%. Also, financial creditors are capital providers for companies, who in turn are able to purchase assets and provide a working capital to enable such companies to run their business operation, whereas operational creditors are beneficiaries of amounts lent by financial creditors which are then used as working capital, and often get paid for goods and services provided by them to the corporate debtor, out of such working capital. On the other hand, market research

carried out by India Brand Equity Foundation, a trust established by the Ministry of Commerce and Industry, as regards the oil and gas sector, has stated that the business risk of operational creditors who operate with higher profit margins and shorter cyclical repayments must needs be higher. Also, operational creditors have an immediate exit option, by stopping supply to the corporate debtor, once corporate debtors start defaulting in payment. Financial creditors may exit on their long-term loans, either upon repayment of the full amount or upon default, by recalling the entire loan facility and/or enforcing the security interest which is a time consuming and lengthy process which usually involves litigation. Financial creditors are also part of a regulated banking system which involves not merely declaring defaulters as non-performing assets but also involves restructuring such loans which often results in foregoing unpaid amounts of interest either wholly or partially.

87. All these differences between financial and operational creditors have been reflected, albeit differently, in the judgment of Swiss Ribbons [Swiss Ribbons (P) Ltd. v. Union of India, (2019) 4 SCC 17]. Thus, this Court in dealing with some of the differences has held:

"50. According to us, it is clear that most financial creditors, particularly banks and financial institutions, are secured creditors whereas most operational creditors are unsecured, payments for goods and services as well as payments to workers not being secured by mortgaged documents and the like. The distinction between secured and unsecured creditors is a distinction which has obtained since the earliest of the Companies Acts both in the United Kingdom and in this country. Apart from the above, the nature of loan agreements with financial creditors is different from contracts with operational creditors for supplying goods and services. Financial creditors generally lend finance on a term loan or for working capital that enables the corporate debtor to either set up and/or operate its business. On the other hand, contracts with operational creditors are relatable to supply of goods and services in the operation of business. Financial contracts generally involve large sums of money. By way of contrast, operational contracts have dues whose quantum is generally less. In the running of a business, operational creditors can be many as opposed to financial creditors, who lend finance for the set-up or working

of business. Also, financial creditors have specified repayment schedules, and defaults entitle financial creditors to recall a loan in totality. Contracts with operational creditors do not have any such stipulations. Also, the forum in which dispute resolution takes place is completely different. Contracts with operational creditors can and do have arbitration clauses where dispute resolution is done privately. Operational debts also tend to be recurring in nature and the possibility of genuine disputes in case of operational debts is much higher when compared to financial debts. A simple example will suffice. Goods that are supplied may be substandard. Services that are provided may be substandard. Goods may not have been supplied at all. All these qua operational debts are matters to be proved in arbitration or in the courts of law. On the other hand, financial debts made to banks and financial institutions are well documented and defaults made are easily verifiable.

51. Most importantly, financial creditors are, from the very beginning, involved with assessing the viability of the corporate debtor. They can, and therefore do,

engage in restructuring of the loan as well as reorganisation of the corporate debtor's business when there is financial stress, which are things operational creditors do not and cannot do. Thus, preserving the corporate debtor as a going concern, while ensuring maximum recovery for all creditors being the objective of the Code, financial creditors are clearly different from operational creditors and therefore, there is obviously an intelligible differentia between the two which has a direct relation to the objects sought to be achieved by the Code.

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75. Since the financial creditors are in the business of moneylending, banks and financial institutions are best equipped to assess viability and feasibility of the business of the corporate debtor. Even at the time of granting loans, these banks and financial institutions undertake a detailed market study which includes a techno-economic valuation report, evaluation of business, financial projection, etc. Since this detailed study has already been undertaken before sanctioning a loan, and since financial creditors have trained employees to assess viability and feasibility,

they are in a good position to evaluate the contents of a resolution plan. On the other hand, operational creditors, who provide goods and services, are involved only in recovering amounts that are paid for such goods and services, and are typically unable to assess viability and feasibility of business. The BLRC Report, already quoted above, makes this abundantly clear.

76. Quite apart from this, the United Nations Commission on International Trade Law, in its Legislative Guide on Insolvency Law (the UNCITRAL Guidelines) recognises 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 recognises 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 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 reorganisation 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.""

5. Again, dealing with equitable treatment to similarly situated creditors the Hon'ble Apex Court observed:-

> *"88. By reading para 77 (of Swiss Ribbons [Swiss Ribbons (P) Ltd. v. Union of India, (2019) 4 SCC 17]) de hors the earlier paragraphs, the Appellate Tribunal has fallen into grave error. Para 76 clearly refers to the UNCITRAL Legislative Guide which makes it clear beyond any doubt that equitable treatment is only of similarly situated creditors. This being so, the observation in para 77 cannot be read to mean that financial and operational creditors must be paid the same amounts in any resolution plan before it can pass muster. On the contrary, para 77 itself makes it clear that there is a difference in payment of the debts of financial and operational creditors, operational creditors having to receive a minimum payment, being not less than liquidation value, which does not apply to financial creditors. The amended Regulation 38 set out in para 77 again does not lead to the conclusion that financial and operational creditors, or secured and unsecured creditors, must be paid the same amounts, percentage wise, under the resolution plan before it can pass muster. Fair and equitable dealing of operational creditors' rights under the said regulation involves the resolution plan stating as to how it has dealt with the interests of operational creditors, which is not*

the same thing as saying that they must be paid the same amount of their debt proportionately. Also, the fact that the operational creditors are given priority in payment over all financial creditors does not lead to the conclusion that such payment must necessarily be the same recovery percentage as financial creditors. So long as the provisions of the Code and the Regulations have been met, it is the commercial wisdom of the requisite majority of the Committee of Creditors which is to negotiate and accept a resolution plan, which may involve differential payment to different classes of creditors, together with negotiating with a prospective resolution applicant for better or different terms which may also involve differences in distribution of amounts between different classes of creditors.

89. Indeed, by vesting the Committee of Creditors with the discretion of accepting resolution plans only with financial creditors, operational creditors having no vote, the Code itself differentiates between the two types of creditors for the reasons given above. Further, as has been reflected in Swiss Ribbons [Swiss Ribbons (P) Ltd. v. Union of India, (2019) 4 SCC 17], most financial creditors are secured creditors, whose security interests must be protected in order that they do not go ahead and realise their security in legal proceedings, but instead are incentivised to act within the framework of the

Code as persons who will resolve stressed assets and bring a corporate debtor back to its feet. Shri Sibal's argument that the expression "secured creditor" does not find mention in Chapter II of the Code, which deals with the resolution process, and is only found in Chapter III, which deals with liquidation, is for the reason that secured creditors as a class are subsumed in the class of financial creditors, as has been held in Swiss Ribbons [Swiss Ribbons (P) Ltd. v. Union of India, (2019) 4 SCC 17]. Indeed, Regulation 13(1) of the 2016 Regulations mandates that when the resolution professional verifies claims, the security interest of secured creditors is also looked at and gets taken care of. Similarly, Regulation 36(2)(d) when it provides for a list of creditors and the amounts claimed by them in the information memorandum (which is to be submitted to prospective resolution applicants), also provides for the amount of claims admitted and security interest in respect of such claims."

6. Section 30(4) of the I&B Code provides that the Committee of Creditors may approve a Resolution Plan by a vote which shall not be less than 66% of voting share of Financial Creditors. Such approval is to be done after considering the feasibility and viability of the Resolution Plan, the manner of distribution proposed therein having regard to the order of priority amongst the creditors in terms of the waterfall mechanism laid down in Section 53 of the

I&B Code including the priority and value of security interest of Secured Creditor besides other requirements specified by IBBI. On a plain reading of this provision it is manifestly clear that the considerations regarding feasibility and viability of the Resolution Plan, distribution proposed with reference to the order of priority amongst creditors as per statutory distribution mechanism including priority and value of security interest of Secured Creditor are matters which fall within the exclusive domain of Committee of Creditors for consideration. These considerations must be present to the mind of the Committee of Creditors while taking a decision in regard to approval of a Resolution Plan with vote share of requisite majority. As regards amendment introduced in Section 30(4), be it seen that the amendment that it, introduced vide Section 6 (b) of Amending Act of 2019 vests discretion in the Committee of Creditors to take into account the value of security interest of a Secured Creditor in approving of a Resolution Plan. It's a guideline and not imperative in terms, which may be taken into account by the Committee of Creditors in arriving at a decision as regards approval or rejection of a Resolution Plan, such decision being essentially a business decision based on commercial wisdom of the Committee of Creditors. In this regard the observations of Hon'ble Apex Court in ***'Committee of Creditors of Essar Steel India Limited Vs. Satish Kumar Gupta and Others' (Supra)*** are significant. The Hon'ble Apex Court observed as under:-

> *"131. The challenge to sub-clause (b) of Section 6 of the Amending Act of 2019, again goes to the flexibility that the*

Code gives to the Committee of Creditors to approve or not to approve a resolution plan and which may take into account different classes of creditors as is mentioned in Section 53, and different priorities and values of security interests of a secured creditor. This flexibility is referred to in the BLRC Report, 2015 (see para 56 of this judgment). Also, the discretion given to the Committee of Creditors by the word "may" again makes it clear that this is only a guideline which is set out by this sub-section which may be applied by the Committee of Creditors in arriving at a business decision as to acceptance or rejection of a resolution plan. For all these reasons, therefore, it is difficult to hold that any of these provisions is constitutionally infirm."

7. It abundantly clear that the considerations including priority in scheme of distribution and the value of security are matters falling within the realm of Committee of Creditors. Such considerations, being relevant only for purposes for arriving at a business decision in exercise of commercial wisdom of the Committee of Creditors, cannot be the subject of judicial review in appeal within the parameters of Section 61(3) of I&B Code. While it is true that prior to amendment of Section 30(4) the Committee of Creditors was not required to consider the value of security interest obtaining in favour of a Secured Creditor while arriving at a decision in regard to feasibility and viability of a Resolution Plan, legislature brought in the amendment to amplify the scope of considerations which may be taken into consideration by the Committee of

Creditors while exercising their commercial wisdom in taking the business decision to approve or reject the Resolution Plan. Such consideration is only aimed at arming the Committee of Creditors with more teeth so as to take an informed decision in regard to viability and feasibility of a Resolution Plan, fairness of distribution amongst similarly situated creditors being the bottomline. However, such business decision taken in exercise of commercial wisdom of Committee of creditors would not warrant judicial intervention unless creditors belonging to a class being similarly situated are not given a fair and equitable treatment.

8. We find no merit in this appeal, it is accordingly dismissed.

[Justice Bansi Lal Bhat]
Acting Chairperson

[Dr. Ashok Kumar Mishra]
Member (Technical)

NEW DELHI

2nd March, 2021

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