

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Comp. App. (AT) (Ins.) No. 438 of 2020 & I.A. No. 1440 of 2020

(Arising out of the Order dated 07.02.2020 passed by the National Company Law Tribunal, Hyderabad Bench, Hyderabad, in I.A No. 433, 447 & 448/2018 & I.A. No. 32, 61, 950, 960 & 961 of 2019 in C.P. (IB) No. 248/7/HDB/2017.)

IN THE MATTER OF:

Laxmi Narayan Sharma

(Suspended director/ promoter)

Promoter of Corporate Debtor,

Plot. No. 105, 8-2-120/117/2/105, B Block,

Park View Enclave, Banjara Hills,

Hyderabad 500033, Telangana

...Appellant

Versus

1 Subodh Kumar Agrawal

Former Resolution Professional of

Golden Jubilee Hotels Private Limited,

1, Ganesh Chandra Avenue,

3rd Floor, Room No. 301,

Kolkata – 700013.

...Respondent No. 1

2. Bank of Baroda,

Baroda House, Mandvi,

Baroda- 390006, Gujarat

Corporate office at

Corporate Financial Services Branch

1st Floor, 3-6-262/2, Thirumala

Estates Building, Himayatnagar,

Hyderabad-500029, Telangana, India.

Represented by its Deputy General Manager.

...Respondent No. 2

3. Dena Bank,

Share Bazar Branch,

Dena Bank House, 31/33,

Ambala Doshi Marg, Mumbai – 400023

Represented by its Deputy General Manger.

...Respondent No. 3

4. Punjab National Bank

Large Corporate Branch,
Represented by its Deputy General Manager.
Sifi Chambers, Road No. 1,
Banjara Hills, Hyderabad – 500034.

...Respondent No. 4

5. Syndicate Bank

Corporate Finance Branch,
Represented by its Assistant General Manager
1st Floor, Opposite to NIMS,
Punjagutta, Hyderabad – 500082.

...Respondent No. 5

6. Corporation Bank,

Large Corporate Branch,
Represented by its Assistant General Manager
Plot No. 8, Road No. 1,
2nd Floor, Film Nagar, Hyderabad – 500033.

...Respondent No. 6

7. Jammu and Kashmir Bank,

Represented by its Assistant General Manager
22-7-110, SYJ Shopping Mall, Pathergatti,
Hyderabad – 500002.

...Respondent No. 7

8. Punjab and Sind Bank

Represented by its the Branch Manager
Abids Road, Metro Estate,
Hyderabad – 500001.

...Respondent No. 8

9. Bank of Maharashtra,

Represented by its the Branch Manager
Safilguda Branch, R.K. Nagar,
Malkajgiri, Hyderabad – 500047.

...Respondent No. 9

10. BREP Asia II Indian Holding Co. II (NQ) Pte. Ltd.

77, Robinson Road
#13-00 Robinson 77,
Singapore – 068896
Email: vijay.kaundal@srglaw.com

...Respondent No. 10

11. EIH Limited.

Promoter of Corporate Debtor and hotel

operator under Operation and management.

...Respondent No. 11

Present

For Appellants: Mr. Suraj Prakash, Mr. Mrinal Litoria & Ms. Priyanka Solanki, Advocates.

For Respondents: Mr. Arun Kathpalia, Sr. Advocate with Mr. Pankaj Vivek, Advocate for R-2,3,5 6, 8 and 9.

Dr. Abhishek Manu Singhvi, Sr. Adv. with Mr. Gyanendra Kumar, Mr. Aviral Singhal, Mr. D. Kapila, Adv. for SRA

Mr. Abhijeet Sinha, Sr. Adv. with Mr. Arijit Mazumdar, Ms. Akanksha, Ms. Anushka Dey, Adv. for R-11

J U D G E M E N T

(11.12.2024)

NARESH SALECHA, MEMBER (TECHNICAL)

1. This appeal has been filed by Laxmi Narayan Sharma who is the Suspended Director/ Promoter of the Corporate Debtor against the Impugned Order dated 07.02.2020, passed in I.A. No. 433, 447 & 448/2018 & I.A. No. 32, 61, 950, 960 & 961 of 2019 in CP (IB) No. 248/7/HDB/2017.

Subodh Kumar Agrawal is the Respondent No. 1 herein who is former Resolution Professional of M/s Golden Jubilee Hotels Private Limited/ Corporate Debtor.

There are eight Financial Creditors i.e., Bank of Baroda, Dena Bank, Punjab National Bank, Syndicate Bank, Corporation Bank, Jammu and Kashmir

Bank, Punjab and Sind Bank and Bank of Maharashtra of the Corporate Debtor, who are Respondent No. 2 to Respondent No. 9 herein.

BREP Asia II Indian Holding Co. II (NQ) Pte. Ltd. is the Respondent No.10 herein who is the Successful Resolution Professional (**'SRA'**) of the Corporate Debtor.

EIH Limited is one of the Promoters of the Corporate Debtor and hotel operator under operation and management and is Respondent No. 11 herein.

2. The Appellant stated that he is the promoter / suspended director of corporate debtor who is controlling majority shareholder holding 84% of the paid up capital of Corporate debtor, Golden Jubilee Hotels Pvt Ltd, (in short "**GJHPL**") through holding company, Core Hotel Venture Pvt Ltd., (in short "**Core**") where in remaining 16% in equity is held by EIH Limited/ Respondent No. 11. The Appellant explained that the GJHPL, prior to commencement of CIRP, was under common board of directors nominated by appellant and ETH Limited in the ratio of 84:16. The Appellant submitted that the Corporate debtor is engaged in the business of hospitality and is running five star hotel under the brand name "Trident" at Madhopur, Hyderabad and is going concern with annual turnover of around Rs. 130 Crores and operational profit of around Rs. 50 Crores declared even during CIRP.

3. The Appellant stated that the shareholder agreement was executed among the stakeholders i.e. GJHPL, Core, Maha Hotels Projects Pvt. Ltd. (**'MHPPL'**),

and EIH on 28.08.2009, wherein parties agreed that the Corporate Debtor will be under joint control and management. The Appellant stated that under section 2(69) of Companies Act, 2013, the Appellant and Respondent No. 11 are the promoters of the Corporate Debtor and gets covered by the provisions of Section 29A of the Code.

4. The Appellant stated that the shareholder agreement was reflected in the Article of Association ('AoA') of the GJHPL and as per Article 107, the quorum for the meeting of board would not be complete without participation of one of the nominated directors of EIH/ Respondent NO. 11 herein, whereas as per Article 110, important decisions regarding affairs of Corporate Debtor cannot be taken without specific consent of EIH i.e, Respondent No. 11 herein. The Appellant submitted that in the arbitration award passed by Arbitral Tribunal dated 26/02/2020 in the proceedings filed by EIH challenging termination of management agreement by GJHPL, it was held that affirmative consent of EIH as provided in the articles of GJHPL is contrary to provisions of Companies Act.

5. The Appellant gave the background of the Corporate Debtor and stated that the Hotel Project was envisaged by Government of Telangana (erstwhile Govt of AP) and competitive bids were invited for development of hotel on plot of land on leasehold basis and project was awarded to consortium which include the Appellant and EIH and lease was executed by Youth Advancement Tourism

and Culture Department ('YATCL') on 09.05.2007 in favour of corporate debtor for a period of 33 years, i.e. upto 2040. Corporate debtor also executed development and management agreement with YATCL on 09.05.2007, executed by the Corporate Debtor as Lessee on behalf of Consortium. Subsequently, on 11.06.2009 another lease was executed between corporate debtor and the Shilparaman Arts, Crafts and Cultural Society ('Society') for additional plot of land. Both the leasehold lands form part of the hotel project consisting two towers out of which only one tower is in operation and the Appellant was making all efforts to complete second tower to make it operational which got stalled, due to commencement of CIRP. The Appellant highlighted that Corporate Debtor entered into two separate lease agreement with YATCL and Society, which are two separate entities.

6. The Appellant stated that for the construction of the said Hotel, over the period of 2009 to 2016, GJHPL availed various financial assistance and credit facilities from a consortium of Banks i.e., the Respondent No. 2 to Respondent No. 9 herein. The said Consortium of Banks executed various Facilities Agreements, dated 02.09.2009, 02.02.2013, 13.09.2014 and 29.03.2016 and also entered into inter se agreements governing the terms of the consortium, being the "Agreements Inter se Participating Banks" dated 02/09/2009, 02/02/2013, 13/09/2014 and 29/03/2016. GJHPL's Hotel has become operational in the

month of September, 2013 and achieved huge recognition and reputation in short span of period.

7. The Appellant submitted that in terms of sanctioned loans, the Corporate Debtor was obligated to route the entire sales turnover through Trust and Retention Account (“**TRA**”) which was done upto 30.09.2015, however, after October, 2015 EIH limited/ Respondent No. 11 in collusion with Bank of Baroda/ Respondent No. 2 opened new account in the name of corporate debtor with United Bank of India and sale proceeds of approximately Rs. 80 Crores were diverted through this account with consent of Bank of Baroda. The Appellant alleged that Bank of Baroda/ Respondent No. 2 permitted siphoning off of Rs. 80 Crores contrary to loan agreements stipulating that these funds were to be deposited in TRA account for repayment to lenders.

8. The Appellant informed that the Corporate debtor filed Writ Petition No. 12041/2016 against United Bank of India for recovery of loss of Rs. 80 Crores which is being pursued by Resolution Professional. Diversion of funds by EIH remained the prime reason of delay in servicing the debt which culminated into commencement of CIRP. The Appellant submitted that the Writ petition filed is pending adjudication.

9. The Appellant submitted that diversion of funds by EIH for other activities is against the interest of Corporate Debtor. The Appellant assailed the conduct of EIH who, despite being partner, deceived the Corporate Debtor

therefore, the Corporate Debtor was forced to terminate operation and management agreement executed with EIH which culminated into initiation of arbitration proceedings by EIH Limited wherein GJHPL and CORE filed counter claims. Appellant submitted that award in the arbitration proceedings was written prior to commencement of CIRP but could not be signed and delivered due to commencement of moratorium and on vacation of moratorium by impugned order, the Arbitral Tribunal pronounced its award on 26.02.2020, without taking into account of the developments post CIRP.

10. The Appellant stated that in the JLF meeting held on 27.09.2017, after discussion with the joint lenders, GJHPL offered a revised proposal of OTS of Rs. 505 Crores for fund base facilities and the banks after discussion with the joint lenders, indicated that the resolution which was being positively considered by the Consortium members i.e., Dena Bank, Syndicate Bank, Corporation Bank, Punjab National Bank, The Jammu and Kashmir Bank, Punjab & Sind Bank and Bank of Maharashtra. However, the Respondent No. 2 Bank i.e., Bank of Baroda made it clear in the meeting that they wanted to approach the Adjudicating Authority for proceeding CIRP against the Corporate Debtor.

11. The Appellant submitted that the Respondent No 2 inclination to approach the Adjudicating Authority was not approved by the JLF, as all other members of the JLF were inclined towards accepting the proposed Corrective

Action Plan of GJHPL. The Appellant stated that in spite of not having the requisite approval by the JLF, on 17.10.2017, Respondent No 2 approached the Adjudicating Authority, by way of an application under Section 7 of the Code.

12. The Appellant stated that on getting notice from the Adjudicating Authority, Corporate debtor unsuccessfully challenged filing of Section 7 application before Hon'ble High court under writ jurisdiction, where the Bank of Baroda/ Respondent No. 2 before the Hon'ble High court contended *that "the petitioner has not provided effective measures on repayment to the satisfaction of lender consortium more particularly to 1st Respondent/lead banker and the remedy under the code was pursued. It was further contended that the scheme of consideration or adjudication before NCLT and stated that the petitioner will have reasonable opportunity by the interim resolution professional and the petitioner can come up with remedial measure / mechanism to clear the outstanding debt for holding the application filed before NCLT."* The Bank of Baroda further stated that *"the SETTLEMENT can be placed before the IRP under the code for consideration and decision."* The Appellant emphasised that Hon'ble High court did not adjudicate or gave any finding on the OTS and writ was dismissed on the sole ground that filing of petition under section 7 of the Code is one of the statutory remedies available and adjudication of disputed question of facts is outside the writ jurisdiction.

13. The Appellant submitted that as more than 75% of the lenders by number and 70.31% by value had approved the resolution proposal, the restructuring plan deemed to come into effect from that day itself, ie., 06.02.2018, being a date prior to the passing of the Order admitting application filed under Section 7 of the Code. However, on 27.02.2018, the Adjudicating Authority admitted the Company petition filed by Bank of Baroda/ Respondent No. 2 and appointed Respondent No. 1, the Interim Resolution Professional.

14. The Appellant stated that the Adjudicating Authority in para 8 inter alia observed and directed "*there cannot be any prejudice likely to cause to the respondent by initiating the instant CIRP and whatever, grievances / contentions of the respondent can very well be placed before the interim resolution professional and all the financial creditors will be formed committee of creditors to decide the CIRP. The other lenders of respondent can also place their stated acceptance of One- time settlement etc before the committee of creditors.*"

15. The Appellant mentioned that that by E-mail and letter dated 31.10.2018 submitted to the CoC, Appellant placed settlement proposal for an amount of Rs. 430 Crores which was payable to all the financial creditors with proposal to make direct payment to operational creditors and further requested all the financial creditors to approve the same and take appropriate steps to withdraw the petition. The Appellant stated that the said proposal of Rs. 430 Crores was

more than the Floor price fixed by CoC in their 14th meeting of CoC held on 28.09.2018, but the CoC instead of accepting the proposal of the Appellant, which was in interest of the Corporate Debtor, deliberately accepted the Resolution Plan of SRA, contrary to the provisions of the Code.

16. The Appellant submitted that he unsuccessfully challenged order of admission of petition filed under section 7 of the Code by order dated 07.02.2017 by filing appeal before this Appellate Tribunal in Company Appeal (AT) (Ins) No. 84 of 2018, which was dismissed by this Appellate Tribunal order dated 06.09.2018.

17. The Appellant stated that the failure to provide the copy of resolution plan to the suspended director denying the opportunity to raise objections is violative of principles of natural justice. The Appellant admitted fact that the copy of the resolution plan was provided to the appellant only in pursuance to order/directions issued by Adjudicating authority dated 08/02/2019, whereas, the plan was stated to have been approved in the meeting held on 18/12/2018, therefore, as held by Hon'ble Supreme Court in the matter of **Vijay Kumar Jain Vs Standard Chartered Bank and Ors.** [(2019) SCC Online SC 103], the plan is liable to be rejected. It is the case of the Appellant that the Resolution Plan should be sent back to the CoC for reconsideration with directions to consider all the objections of the Appellant.

18. The Appellant alleged that CoC took arbitrary non-consideration of settlement of Appellant as promoters which was better than Resolution Plan approved by CoC within majority of 68.26% in favour of SRA and the CoC failed to consider offer of settlement of Appellant despite being better than the Resolution Plan of SRA .

19. The Appellant submitted that the Resolution Plan is contrary to provisions of Section 30(2) of Code read with Regulation 38(1) (A) of CIRP Regulations since as per para 8 of Resolution Plan Operational Creditors have been divided into two categories i.e., Special Operational Creditor w.r.t., (YATCL and Society) and Operational Creditor. The Appellant stated that no amount has been given to Operational Creditors, whereas the special creditors have been offered to pay 42 Crores i.e., 100% of claims. The Appellant pleaded that this discrimination is contrary to section 30(2) read with CIRP regulation 38(1) and 1A stipulating amount due to the operational creditors shall be given priority in payment over financial creditors. The Appellant assailed the Impugned Order which upheld the discriminatory payment among Operational Creditors by holding that Special Operational Creditors, as the lessors of land are on different footing as compared to other operational creditors. The Adjudicating Authority justified discrimination of payment among Operational Creditor by classifying two Operational Creditor as special operational creditor and general operational creditor on the ground that non-payment to the lessor of land would result in

halting operation of the hotel of the Corporate Debtor which would be detrimental to the interest of the stakeholders of the Corporate Debtor.

20. The Appellant stated that the Adjudicating authority failed to appreciate that the corporate debtor prior to the CIRP was being prejudicial by the arbitrary notices issued by Special Operational Creditor, filed statement of claim before Arbitral Tribunal comprising of Sh. Justice (Retd) V.V.S. Rao, challenging the arbitrary and illegal notices issued raising illegal demands of which proceedings were concluded prior to the CIRP and finally the award was pronounced on 25/02/2020, holding that the notices issued by Special Operational Creditor, being the lessor is illegal, contrary to the lease agreement and development management agreement and further awarded the cost of Rs. 28.20 Crores in favour of the corporate debtor and against the Special Operational Creditor along with interest which comes to arounds Rs. 40 Crores. It is the case of the Appellant that passing of such award itself justify the reconsideration of the resolution plan.

21. The Appellant submitted that the Adjudicating authority in para 58 upheld non-payment to the operational creditor by placing reliance only on "commercial wisdom" of the COC, without appreciating the facts that non-payment to the operational creditor of their claim of more than Rs.100 Crores may result in insolvency of operational creditors and the Adjudicating authority also failed to appreciate that plan submitted by SRA on 19.10.2018, which was

considered in the meeting of CoC held on 04.12.2018, had a provision of payment of Rs. 5 Crores for operational creditor other than the lessor. The Appellant reiterated that providing zero amount to operational creditors is contrary to objective of the code.

22. The Appellant stated that the plan is not feasible and viable contrary to Regulation 38(3)(b) which mandate the Resolution Plan has to demonstrate that it is feasible and viable. The Appellant stated that the CoC failed in considering feasibility and viability of the plan and considered the plan as mode of recovery of its debt which is contrary to the object of the Code.

23. It is the case of the Appellant that the SRA has no experience in the Hospitality Sector and principally is an investor interested in investing only for gain and in all probabilities will sell off to third party by pocketing the gain at the cost and expense of public at large and promoters who are losing their hard-earned money. The Appellant elaborated that the Resolution Plan is not viable in absence of any provision for its implementation which is evident from the condition precedent in the Resolution Plan. The Appellant mentioned that the SRA in Resolution Plan proposed to covert tower II of the hotel project to the office complex which was never envisaged. The Adjudicating Authority disposed of objections raised by the Appellant in various IA's summarily and granted approval to the Resolution Plan in the impugned order.

24. The Appellant alleged that no detail of distribution of funds has been provided in the Resolution Plan which is silent about distribution of funds among Financial Creditors and special operational creditors and contingent payments are proposed without any clarity and unambiguous distribution of funds which is one of the mandatory conditions for approving Resolution Plan under the Regulations.

25. The Appellant stated that there has been collusive act of EIH Ltd. and its attempt to continue as operator contrary to section 29A of Code as EIH Ltd. was 16% promoter of the Corporate Debtor and hence is person not eligible under section 29A of Code, to be part of resolution applicant in any manner. The Appellant emphasised that the Parliament under amended provisions of section 29A of the Code enlarged the scope of ineligibility by introducing the phrase "Acting in Concert". The Appellant submitted that the Hon'ble Supreme Court of India in case of *Arcelormittal India Pvt. Ltd. Vs Satish Kumar Gupta in Civil Appeal Nos. 9402-9405 of 2015* in para 29 to 63 in detail dealt with the see-through provision including the definition of promoter, control and management. The Appellant submitted that by applying the parameters laid down by Hon'ble Supreme Court, the EIH Ltd. being promoter of the Corporate Debtor cannot be permitted, to continue as operator of the Hotel on the precedence of independent person because of alleged execution of separate management agreement.

26. It is the case of the Appellant that the approved Resolution Plan stipulates that if condition precedents are not satisfied within one year from the date of approval of Resolution Plan by Adjudicating Authority, it will expire automatically expire and the resolution plan will be null and void. The Appellant submitted that this make the Resolution Plan as conditional and hence not valid Resolution Plan.

27. The Appellant stated that the Resolution Professional published advertisement for Expression of Interest in May 2018, pursuant to which Blackstone along with three other entities submitted their bids for resolution plan. The Appellant mentioned here that Sattva and Blackstone are partners in India and have invested together in projects and have even cited each other's technical qualifying credentials, thus as related parties have acted in concert to takeover GJHPL at throwaway value. The Appellant submitted that the Resolution Plans submitted by Blackstone and Sattva clearly reveals that one of the Resolution Plans is copied from the other. The Appellant assailed the Respondent No. 1 who did not bring the fact before the CoC that the bids have been rigged and thus has committed material irregularity.

28. Concluding his arguments, the Appellant pleaded that the Impugned Order passed by the Adjudicating Authority deserves to be set aside.

Pleadings of Respondent No. 1

29. Per contra, the Respondent No. 1 of the Corporate Debtor denied the allegations of the Appellants labelling these as baseless.

30. The Respondent No. 1 submitted that he placed the OTS proposal of the Appellant before the meeting of CoC and it was for the CoC to consider the OTS proposal of the Appellant as deemed fit, subject to compliance of provision of the Code and regulations. The Respondent No. 1 stated that he was not the authorised person to decide OTS proposal of the Appellant. It is the case of the Respondent No. 1 in any case, the Appellant cannot seek or demand the CoC to accept OTS as a matter of statutory right. The Respondent No. 1 stated that it is the commercial wisdom of CoC whether to accept or reject the OTS offered by the Appellant. The Respondent No. 1 submitted that the CoC did not consider OTS of the Appellant fit to be approved and this was pure commercial wisdom of the CoC which cannot be questioned by the Appellant.

31. The Respondent No. 1 submitted that the Appellant's OTS proposal is not eligible to be considered as the Appellant was in charge of the affairs of the management in the and is hit by the provisions of Section 29A of the Code as per ratio of judgement of Hon'ble Supreme Court of India in the matter ***Arcelor Mittal Nippon Steel India Ltd. Vs. Essar Bulk Terminal Ltd. (Civil Appeal No. 5700 Of 2021)*** and ***Committee of Creditors of Essar Steel India Limited vs***

Satish Kumar Gupta and Ors.(Civil Appeal No.8766-67 of 2019) where in the erstwhile promoter's offer for OTS had been rejected.

32. The Respondent No. 1 elaborated that the COC is having ultimate power under the code and the regulations to decide on the commercial aspects of the resolution plan placed before and engaging in deliberations and discussions with the resolution applicants on the various aspects of the bids in the course its evaluation, keeping the spirit and objective of the code, the members of the COC have deliberated extensively and taken a collective decision by exercising their commercial wisdom in approving the resolution plan which has been submitted by the SRA. The Hon'ble Supreme court in the case of ***K Shashidhar Vs. Indian Overseas Bank & Ors in CIVIL APPEAL No.10673/2018*** categorically has held that commercial wisdom of the CoC cannot be subjected to judicial scrutiny and the same is not justiciable before the adjudicating authority or the appellate authority.

33. The Respondent No. 1 denied the allegation of the Appellant that the whole process of e-voting was rigged and manipulated. The Respondent No. 1 submitted that the Appellant is not empowered under the Code to verify the record of the E- voting process of the decision of the CoC. The Respondent stated that minutes was circulated to all the COC members and participants and none of the voting members has put any objection on the voting result.

34. The Respondent No. 1 denying contentions of the Appellant that while approving the Resolution Plan, the CoC has ignored the Evaluation Matrix which was provided in the RFRP documents. The Respondent No. 1 submitted that he has taken all the steps under the Code and the regulations in verifying meeting and placing the valid resolution bids received before the meeting of the CoC which decides the same in the interest of the Corporate Debtor.

35. Denying the allegation of the Appellant that the CoC failed to discuss on the feasibility and viability of the Resolution Plan, the Respondent No. 1 submitted that in the 20th CoC meeting held on 18.12.2018, he informed the CoC that under Section 30(4), the CoC has to decide on the feasibility and viability of the Resolution Plan. The Respondent No. 1 stated that the collective decision of the CoC on the feasibility and viability of the Resolution Plan was positively expressed by the CoC members by way of approval of the Resolution Plan submitted by M/s Blackstone through e-voting held on 20.12.2018 & 21.12.2018.

36. The Respondent No. 1 stated that the impugned order dated 07.02.2020 is in accordance with the law which correctly dismissed the Interlocutory Application filed by the Appellant and also approved the Resolution Plan of the SRA duly recommended by the CoC.

37. Concluding the arguments, the Respondent No. 1 requested this Appellate Tribunal to dismiss the Appeal with an exemplary cost.

Pleadings of Respondent Nos., 2,3,5,6,8 & 9

38. The Respondents denied all the contentions of the Appellant as mentioned in the Company Appeal (AT) (Ins) No. 438 of 2020 filed by ex-management contending that copy of resolution plan was not furnished inspite of demand; that the OTS offered by appellant was for higher amount; that the approved Resolution Plan is for lesser than liquidation value; and that the Operational creditors are discriminated against as “NIL” payment to them.

39. The Respondents submitted that they approved the Resolution Plan with 68.26% of voting wherein claims of Financial Creditors was Rs. 949 Crores and claims of Operational Creditor was Rs. 106.57 Crores. The Liquidation value of the Corporate Debtor was assessed to be Rs.458 Cr. (Replacement Cost Method) and Rs. 448 Cr. (DCF Value Method). The CoC elaborated that The Resolution plan provides for a payment of 37% of admitted claim for the secured Financial Creditors (including dissenting Financial Creditors) and also to bring in capital funds of Rs.180 Cr.

40. The Respondents denied the allegations of the Appellant regarding discriminating treatment to Special Operational Creditors. The Respondents submitted that the Special Operational Creditors being land owners were paid in full to ensure viability and feasibility of the Resolution Plan for revival of the Corporate Debtor. The Respondents gave details fo payments to be made as per Resolution Plan. The Respondents submitted that though Rs.60.14 Crores has

been admitted as against a claim of Rs. 200.08 Crores with regard to Operational Creditor, the plan provides for 'Nil' amount to operational Creditors being NIL liquidation value as per Sec. 53 of the Code.

41. The Respondents submitted that if the Actual Special Operational Creditor Amount is higher than the Society Claim, then the difference between the Actual Special Operational Creditor Amount and the Society Claim will be added to Rs.384 cr. and shall be deemed to be the restated Upfront Financial Commitment. The amounts payable to Government Agencies (classified as Special Operational Creditor) i.e. the lessor of the Land on which the hotel business of the Corporate Debtor runs, are admitted to the tune of 41.99 Crores and the plan provides for payment in full.

42. The Respondents submitted that the Appellant was attending the CoC meetings and was aware of the terms of resolution plan, hence no prejudice was caused to him. The Respondents stated that there was no plea by appellant before the Adjudicating Authority that any prejudice was caused to him due to non- furnishing of proposed resolution plan. The Respondents submitted that the Appellant participated in all meetings and discussed the said plan offered by Respondent No. 10 and then only sought the copy of resolution plan.

43. The Respondents stated as on date 04.12.2018 when Resolution Professional declined to furnish a copy of the resolution plan to appellant, the position of law was that the ex-management was not entitled to a copy of the

proposed resolution plan. The ex- management accepted this position of law and did not assail the decision Resolution Professional of the dated 04.12.2018.

44. The Respondents submitted that the challenge to acceptance of Resolution Plan and merits/demerits thereof is non-justiciable by the Adjudicating Authority or even this Appellate Tribunal as commercial wisdom of CoC is supreme. Requisite vote was polled in favour of approval of Resolution Plan.

45. The Respondents stated that the issue of OTS and JLF stood closed with order dated 06.09.2018 in Co. Appeal (AT) (Ins) No. 84/2018 which holds that JLF stands disbanded on 12.02.2018 and that no OTS was ever approved by JLF.

46. The Respondent denied the allegations of the Appellant that the value of the OTS offered by the Appellant was more than the amount offered in the Resolution Plan. The Respondents submitted that the correct position is that the resolution plan value is Rs. 584.02 crore while the OTS offer was for Rs. 480 Crores only.

47. The Respondents stated that the payment of full amount to Special Operational Creditors is not prejudicial to the CIRP or the Operational Creditors as Special Operational Creditors provided land for the Hotel of corporate debtor on lease, hence Special Operational Creditors had different rights in contrast to other Operational Creditors. The Respondents further stated that under the waterfall mechanism of Section 53 of code, the payment to operational creditors

would remain NIL irrespective of payment or non payment to Special Operational Creditors and further the CoC can provide for payment (either full or partial) to any Operational Creditor for keeping the Corporate Debtor as going concern and in this case without lease of land, there would be nothing left with Corporate Debtor

48. The Respondents submitted that that allegations of bias levelled against Bank of Baroda are baseless and reason for default was not the opening of new bank account in United Bank of India in 2015, but stress was there in account of Corporate Debtor since 2014 and JLF was constituted to address it.

49. The Respondents stated that the allegations of connivance amongst the resolution applicants Blackstone (BREP) & Sattva are baseless as there is no joint venture amongst them. These are two business entities which may decide to collaborate for some specific projects and may also compete against one another in other cases.

50. Concluding their arguments, the Respondents requested this Appellate Tribunal to dismiss this appeal with exemplary costs.

Findings

51. We note that the grievance of the Appellant is against the approval of resolution plan by the Adjudicating Authority vide impugned Order dated 07.02.2020. The Appellant was the promoter of the Corporate Debtor holding 84% of the share capital along with another promoter namely EIH Ltd. –

Respondent No.11 herein, which held 16% of share capital of the Corporate Debtor.

52. The Appellant has shown his grievances against EIH and Bank of Baroda for cheating and siphoning of money. Similarly, the Appellant has grudge against the lenders/CoC for not considering his OTS. The Appellant is also aggrieved by the fact that copy of resolution plan submitted by Resolution Applicant including SRA was not given to him. The Appellant has also stated that the approved Resolution Plan is conditional since it has condition precedent and thus was wrongly approved.

53. The Appellant also accused that the COC has violated Section 30(2) of the Code by not providing the payments to the Operational Creditor and rather has provided payment only to special creditors.

54. The Operational Creditor has also challenged the approval of resolution plan on the ground of feasibility and viability and including the lack of expertise of the SRA.

55. Another ground for challenge is no details of distribution of fund has been provided in the plan.

56. The Appellant alleged again EIH – R11 herein to collude with the other Resolution Applicant and want to avoid attracting of Section 29(A) of the Code.

57. We shall deal with the issues raised by the Appellant in the following discussion.

58. As regards the contention of the Appellant that the impugned Order should be set aside as copy of the resolution plan was not given to him before decision of COC, we have noted that the plan was approved on 18.12.2018 and at that stage, there was no provision in the Code regarding submission of resolution plan to the ex-promoters or suspended directors of the Corporate Debtor. We have noted that the Hon'ble Supreme Court of India laid down stipulation regarding furnishing of Resolution Plan to the suspended directors while pronouncing the Judgement in case of ***“Vijay Kumar Jain vs. Standard Chartered Bank Ltd. and ors.”*** vide its Order dated 31st January, 2019 where Hon'ble Supreme Court of India gave ruling that copies of resolution plan are required to be circulated amongst the suspended directors of the corporate debtors also. We have further noted from the pleadings that the Appellant was attending the COC meeting and was aware of the contents of resolution plan including that of SRA. We also note that subsequent to Judgement in ***Vijay Kumar Jain (Supra)***, the Respondent No.1 vide e-mail dated 20.02.2019 circulated a final resolution plan as approved by CoC in its meeting held on 18.12.2018. We have also noted that CoC during pleading have categorically mentioned that even if resolution plan would have been available with the Appellant, the decision of the CoC would have remained the same. In view of all this especially keeping in view that while approving the resolution plan on 18.12.2018, there was no legal requirement neither in the Code nor in regulation

to submit such resolution plan to suspended directors, hence non-providing copy of the Resolution Plan to the Appellant cannot be faulted upon at this stage due to subsequent pronouncement of Judgement of Hon'ble Supreme Court of India. In any case, we find that no prejudice could have been caused to the Appellant since he was attending all the CoC meetings and was in know of all the developments. Therefore, the contention of the Appellant in this regard are not found to be contravening.

59. We will take up another issue raised by the Appellant that his OTS proposal was not considered by the lenders/CoC. In this regard, we note that the Respondent No.1 categorically stated that he has put up the OTS proposal of the Appellant to the CoC who did not find it prudent to consider and accept the same as it was not found favour with the members of COC. We have also noted that the prima facie reasons for this decision were due to earlier committed defaults by the Appellant which led to filing of Section 7 application by Bank of Baroda. We also note the CoC found OTS as a conditional offer which was against the provision of the Code and regulations. We have noted from the impugned Order that the Adjudicating Authority has categorically recorded that once CIRP is initiated, the settlement between the parties could have been done only in terms of Section 12A of the Code provided there is a consensus between the parties in this regard and further the proposal under Section 12A of the Code is submitted with the approval of 90% voting shares of CoC. We note that the

OTS was indeed considered by CoC but was not found favour and could not muster minimum threshold of 90% of voting shares of CoC members for 12A the Code initiate. As such we do not find any legal infirmity in the decision of the Appellate Authority in rejecting such plea of the Appellant.

60. Another issue raised by the Appellant is regarding non-compliance of the Code by SRA in submitting the conditional resolution plan which contained the condition precedent. The Appellants pleaded that agreeing to conditional Resolution Plan, the payments under Resolution Plan were to be made by the SRA subject to completion of condition precedent, which is not in accordance with the Code and the Regulations.

61. At this stage, it will be important to understand what is a nature of condition precedent made in the Resolution Plan.

62. The condition precedent has been defined in Schedule -I of the Resolution Plan i.e., “condition precedent shall have the meaning escribed to such term in Clause 6.1”

6. CONDITION PRECEDENT AND IMPLEMENTATION OF THE RESOLUTION PLAN

6.1 Condition Precedent

The obligation of the Resolution Applicant to implement the Resolution Plan as detailed in **Clause 6** shall commence immediately from the NCLT Approval Date subject to completion, or waiver by the Resolution Applicant, of the following condition, i.e. receipt of the written consent of the Department of Youth Advancement, Tourism and Culture of the Government of Andhra Pradesh ("YATC") and of Shilparamam Arts, Crafts and Cultural Society ("Society", and together with YATC, "GoT") for change of control and restructuring of the Company ("Condition Precedent").

- (a) Promptly upon, and in any event within 10 (ten) days of the satisfaction and/ or waiver of the Condition Precedent, the Resolution Applicant shall notify the Resolution Professional and the COC in writing ("CP Satisfaction Notice") and also set out the date(s) on which it proposes to complete the steps set out in **Schedule 2 (Resolution Plan Steps)**.
- (b) The Resolution Applicant shall undertake all efforts as may be commercially reasonable to procure the satisfaction of the Condition Precedent as soon as practicable following the issuance of the LOL, and in any case within 1 (one) year of the NCLT Approval Date. However, if the Condition Precedent is not completed to the satisfaction of the Resolution Applicant, despite such commercially reasonable efforts, notwithstanding any other provision in this Resolution Plan, the EOI and RFP or the Code, the COC shall return the Performance Bank Guarantee in full.

63. From above, it is noted that the condition precedent referred to receipt of written consent of YATCL and society (GoT) for change of control and restructuring of Corporate Debtor. Clause 6.1 also mentioned that on the receipt, the approval of Resolution Plan by the Adjudicating Authority the SRA shall take steps as set out in Schedule II of the Resolution Plan and shall undertake all effort to procure the satisfaction of condition precedent within a period of one year of approval of Resolution Plan by the Adjudicating Authority. It is the case of the Respondent that development and management agreement is co-terminus with lease agreement which tantamount that without

prior consent of GoT, the shareholding of the Corporate Debtor cannot be changed and therefore it would be absolutely essential to have such condition precedent.

64. We note that this Appellate Tribunal in the case of ***Jet Aircraft Maintainance Engineers Welfare Association Vs. Ashish Chhawchharia Resolution Professional of Jet Airways (India) Ltd. & Ors.*** in *Company Appeal (AT) (Ins.) No. 752 of 2021*, held that where it has been stipulated that the condition precedent in the Resolution Plan, is necessary for implementation of Resolution Plan, then such condition precedent would be valid. This judgment was challenged before the Hon'ble Supreme Court of India which upheld the same vide order dated 30.01.2023 passed in Civil Appeal No. 407 of 2023. The relevant portion of this Appellate Tribunal is contained in para 109 which reads as under :-

*“109. When we look into the relevant clauses of the plan which has also been captured by the Resolution Applicant in Form H. Para 7.6.1 refers to condition precedents i.e. obligation of the Resolution Applicant to recommence operations as an aviation company subject to fulfillment of conditions after the approval date mentioned therein. Para 7.6.2 deals with fulfilment of condition precedents and Para 7.6.4 deals with automatic withdrawal. In view of the judgment of Hon'ble Supreme Court in “**Ebix Singapore**” (Supra), as noted above, after approval by the CoC, the clause for automatic withdrawal becomes redundant and*

Resolution Applicant has no jurisdiction to withdraw from the Resolution Plan. The condition precedents as mentioned in Para 7.6.1 are basically condition precedents required for aviation business which are must for any company carrying on aviation business. Enumeration of condition precedent is only for purposes of noticing obligations of the Resolution Applicant to recommence the operations as an aviation company after obtaining necessary approvals. Such condition precedent cannot be said to be any hindrance in the approval of the plan by the Adjudicating Authority. We, thus, do not find any substance in the submission of the Appellant that the resolution plan ought to have rejected in view of the condition precedent contained in the resolution plan. The Resolution Applicant has also completed all necessary condition precedents to the satisfaction of the Monitoring Committee. We, thus, are of the view that the judgment of Hon'ble Supreme Court in "**Ebix Singapore**" does not help the Appellant to support his contention that the Resolution Plan is liable to be rejected due to condition precedents."

65. We have already observed that the transfer of ownership in favour of the new management was dependent on the consent of the YATCL and Society and therefore, the same was treated as condition precedent. This seems to be quite logical and cannot be faulted upon. Thus, the arguments of the Appellant in this regard is not convincing and stand rejected.

66. Now we will examine the issue of the Appellant that the Resolution Plan is invalid due to discriminatory treatment to Operational Creditors. We note that by the amended Section 30(2)(b) (notified w.e.f. 6.8.2019), it has been made amply clear that as long as payment to its creditors under plan is in compliance to the amended Section 30(2)(b)(i) and (ii), the same has to be considered as fair and equitable. We have dealt with this issue in great detail in connected CA (AT) (Ins) No.426 of 2020 which is also being pronounced along with this Order. On this account, we have noted that the Hon'ble Supreme Court of India has held time and again that commercial wisdom of CoC is supreme. We have also noted that in the cases of ***Committee of Creditors of Essar Steel India Limited Vs. Satish Kumar Gupta & Ors.*** (Civil Appeal No. 8766-67 of 2019), ***Excel Engineering & Ors. v. Vivek Muralidhar Dabhade*** [2022 SCC OnLine NCLAT 4461] and ***Sabari Realty Private Limited v. Sivana Realty Private Limited & Ors.***, Company Appeal (AT) (Insolvency) No. 1162 of 2023, the different treatments to creditors proposed to be made by SRA which was duly considered and recommended by CoC and finally approved by the Adjudicating Authority were found to be in compliance with Section 30(2) of the Code. Hence, we do not find any illegality on this count. Furthermore, the Appellant being ex-promoters and suspended directors of the Corporate Debtor who himself was in charge of the Corporate Debtor and also held 84% of the share capital of the Corporate Debtor and during his own period, the outstanding

payment due to be made to the operational creditors were not paid. In a manner, the Appellant himself was reason for failure to make payment to the operational creditors and we find it rather strange that the Appellant is taking the plea of non-payment or discriminatory payments among such operational creditors. In any case, the Appellant is not directly or indirectly prejudiced by such payment or discriminatory payments among operational creditors by SRA which has been duly approved by the Adjudicating Authority. Hence, the argument of the Appellant on this count stands rejected.

67. As regards the challenge to the resolution plan by the Appellant on the ground of non-viability and non-feasibility of the resolution plan, we do not find any detailed reasoning furnished by the Appellant for the same. The Appellant has stated that the SRA does not have the expertise and experience in the hospitality industry and rather it is only an investor. The arguments are not found convincing. The SRA has furnished his resolution plan in accordance with terms and conditions while inviting bids and all parameters including technical and financial were considered according to evaluation metrics by the CoC exercising their commercial wisdom. In the present case, we have seen that CoC has examined the same in detail and after its approval, the Respondent No.1 through suitable IA certified compliance of Resolution Plan to be in conformity with the Code including viability and feasibility of the plan and submitted the same to the Adjudicating Authority for its approval, the

Adjudicating Authority approved the same. In view of this, arguments of the Appellant on this ground stands rejected.

68. Yet another ground taken by the Appellant is regarding no detail of distribution funds has been provided in the plan. During pleadings before us, the Appellant submitted that no specific amount has been indicated in the distribution to the financial creditors. In this regard, we would like to reproduce relevant portion of the approved resolution plan which covers the issues:-

EXECUTIVE SUMMARY

1. TREATMENT OF CLAIMS

1.1 Status of claims

Based on the information made available to the Resolution Applicant in the Shared Data by the Resolution Professional:

- (a) the debt filed by each of the Financial Creditors with the Resolution Professional has been admitted and it amounts to an aggregate of INR 949.83 crores ("**Admitted Financial Debt**");
- (b) the claims filed by the Operational Creditors of the Company with the Resolution Professional aggregate to INR 112.52 crores, out of which claims of INR 50.07 crores have been admitted. The amount of claims filed as specified in this clause excludes the claims of INR 41, 99,92,797 ("**Society Claim**") submitted by the Society Further, the Special Operational Creditor vide its letter dated September 14, 2018 has claimed an amount of INR 76,13,93,422;
- (c) the claims filed by Other Creditors of the Company with the Resolution Professional aggregate to INR 10.19 crores out of which claims of INR 5.94 crores have been admitted; and
- (d) a claim of an aggregate amount of approximately INR 6.46 crores has been filed by three employees of the Company with the Resolution Professional out of which claim, an amount of approximately INR 3.44 crores has been admitted.

The requirement for disclosing the Liquidation Value of a company undergoing insolvency resolution process to the resolution applicant has been dispensed with. Accordingly, the Liquidation Value of the Company is currently not available to the Resolution Applicant. Consequently as per the Resolution Applicant's estimate: (i) the liquidation value would not be sufficient to cover the amounts owed to the Financial Creditors in full; and (ii) if the Company were to be liquidated, other than liquidation costs and CIRP Costs, it is only the Financial Creditors and workmen of the Company, who will be entitled to receive the liquidation proceeds (proportionate to the Admitted Financial Debt owing to the Financial Creditors and the workmen's dues which have been unpaid for a period of 24 (twenty four) months preceding the commencement of the CIRP of the Company respectively).

1.2 Financial Commitment

- 1.2.1 As part of the Resolution Plan, the Resolution Applicant proposes to infuse the Financial Commitment into the Company, directly or indirectly, through equity, or through equity and/or debt ("**Capital Instruments**").
- 1.2.2 Please see below the amounts submitted as a bid for the Company and the breakdown of various purposes for utilisation of such amounts (collectively "**Financial Commitment**").

BREP Asia II Indian Holding Co II

Particulars	Amounts (INR crores)
1. Workmen Liquidation Dues, if any.	384 ¹
2. Employee Liquidation Dues, if any.	"Upfront Financial Commitment"
3. Liquidation Value of Operational Creditors and Other Creditors, if any.	
4. Any other Liquidation Value required to be paid under the Code in priority to the amounts owed to the Financial Creditors, if any.	
(Amounts mentioned in serial numbers 1, 2, 3 and 4 above collectively referred to as "Mandatory Payment Amounts").	
5. Actual Special Operational Creditor Amount.	
6. Upfront FC Amount.	
1. Payment of excess CIRP Costs to the extent not met out of the Company's operating cash flows;	180
2. Capex and Working Capital Requirements, on a need to do basis; and	"Capex Financial Commitment"
3. Transaction related expenses	
Identified Bank Guarantees	20.02
Financial Commitment	584.02

1.2.3 No payment has been proposed to:

- (a) the unsecured Financial Creditors, as the Resolution Applicant understands from the information provided in the Data Room, that the Financial Creditors who have submitted the Admitted Debt are all secured Financial Creditors.
- (b) the employees of the Company, since the liquidation value owing to the employees is expected to be NIL. However, the employees will be paid Employee Liquidation Dues, if any.

PART B. FINANCIAL PROPOSAL

8. MANDATORY CONTENTS OF THE RESOLUTION PLAN

This part of the Resolution Plan outlines the various payments to be made to different classes of Creditors and stakeholders of the Company, which shall in summary be as follows⁴:

Sr. No.	Category of Claims ⁵	Amount Claimed (INR)	Amount Admitted (INR)	Resolution Amount as part of the Resolution Plan (INR)
A	CIRP Costs ⁶	As per actuals	As per actuals	As per actuals
B	Payment towards claims			
1.	Workmen and employee dues	6.46 Cr	3.44 Cr	0
2.	Special Operational Creditor	Society Claim	-	Actual Special Operational Creditor Amount ⁷
3.	Financial Creditors	949.83 crores	949.83 crores	Upfront Payment Amount
4.	Creditors who have issued Identified Bank Guarantees	20.02 crores	20.02 crores	To be continued by the banks who have issued the Identified Bank Guarantees
5.	Operational Creditors other than Special Operational Creditor	INR 112.52 crores and the Society Claim	50.07 crores	0
6.	Other Creditors, if any	10.19 crores	5.94 crores	0

⁴ The financial bid has been provided on the assumptions that: (i) all Clearances required for the construction and operation of the projects which are undertaken by the Company until the date of this bid submission are in place and are full and complete, other than as disclosed in the Shared Data; (ii) there is no information which has been withheld or which will negatively affect the status of the projects housed in the Company or otherwise in relation to this resolution process and submission of bid in this CIRP; (iii) the fixed assets of the Company as set out in the Provisional Balance Sheet have not been alienated, disposed or transferred in any manner (and nor has any security interest or Encumbrance been created over such assets after the commencement of CIRP in respect of the Company).

⁵ For the purposes of this Resolution Plan, the List of Creditors has been relied upon to determine/arrive at the Admitted Financial Debt.

⁶ These amounts are computed in accordance with the provisions of the Code and the Resolution Applicant is given to understand that such costs are being met on a monthly basis out of the cash flows of the Company and any CIRP Costs which are outstanding as at the NCLT Approval Date are proposed to be paid in accordance with Clause 8.1 of this Resolution Plan.

⁷ The Resolution Applicant has assumed that the Society Claim is a part of this amount and not in addition to it.

69. From above, it is noted that suitable details of payments to financial creditors and other creditors have been given. It is not required to indicate party-wise the payment in the approved resolution plan as this is subject to decision to be taken by CoC. Hence, we do not find any merit in the argument of the Appellant.

70. The Appellant also alleged that Respondent No.11 – EIH has siphoned Rs.80 Crores in collusion with Bank of Baroda – Respondent No.2 herein for which he has filed a Writ Petition before Hon’ble High Court which is pending. In view of this, we would not like to comment on this aspect.

71. As regard the contention of the Appellant that the Respondent No.11 – EIH held 16% of the shares of the Corporate Debtor and was hit by Section 29A of the Code. We note that even the Adjudicating Authority has indicated the R11/EIH ineligible in terms of Section 29A of the Code.

72. Thus, in view of our detailed discussion in preceding paragraphs, we do not find any merit in the Appeal. The Appeal fails and stands rejected. No case. IA, if any, stand closed.

**[Justice Rakesh Kumar Jain]
Member (Judicial)**

**[Mr. Naresh Salecha]
Member (Technical)**

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