**NATIONAL COMPANY LAW APPELLATE TRIBUNAL,**
**PRINCIPAL BENCH, NEW DELHI**
**Company Appeal (AT) (Insolvency) No. 912 of 2023**

[Arising out of Order dated 17.05.2023 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, Court-I in IA No. 3698 OF 2022 in CP No. 246 OF 2017]

**In the matter of:**

**Peter Beck and Partner Vermoegensverwaltung GMBH** **...Appellant**
**Vs.**

**Sharon Bio-medicine Limited & Ors.** **...Respondents**

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| **For Appellant:** | **Mr. Ankur Kashyap, Mr. Ajith S. Ranganathan, Mr. Rohit Rajershi, Mr. Aman Bajaj and Ms. Gloria Gomies, Advocates.** |
| **For Respondents:** | **Mr. Prateek Kumar, Mr. Siddharth Srivastava, Ms. Raveena Rai, Ms. Apeksha Dhananjay, Advocates for R-1.**<br>**Ms. Srideep Bhatttacharya and Ms. Neha Shivhare, Advocates for R-5.**<br>**Mr. Gopal Jain, Sr. Advocate for R-5.** |

## J U D G M E N T
## (14th August, 2023)

**Ashok Bhushan, J.**

**1**. This Appeal has been filed by a dissenting Financial Creditor challenging the order dated 17.05.2023 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, Court-I, by which order the Adjudicating Authority has allowed the Application filed by the Resolution Professional for approval of the Resolution Plan submitted by Respondent No.4.

2. Brief facts of the case necessary for deciding this Appeal are:-

The Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor- 'Sharon Bio-Medicine Limited' was initiated by the Adjudicating Authority vide order dated 25.04.2017. During the CIRP, Resolution Plan submitted by the Appellant was approved on 28.02.2018. Applications were filed before the Adjudicating Authority seeking appropriate reliefs on account of delay and non-implementation of the Resolution Plan by the Appellant. This Tribunal on 05.01.2022 directed the Appellant to submit an enforceable bank guarantee within 30 days. Appeal filed by the Appellant before the Hon'ble Supreme Court against the order dated 05.01.2022 was dismissed on 28.02.2022. The Adjudicating Authority vide order dated 03.06.2022 directed the Committee of Creditors (CoC) for initiating the fresh CIRP and appointed Respondent No.2 as Interim Resolution Professional (IRP). Resolution Plan submitted by the Respondent No.4 was approved by majority of 79.28% vote share. The Appellant abstained from voting for the approval of the Resolution Plan. On Application filed for approval of the Resolution Plan before the Adjudicating Authority, the Adjudicating Authority approved the Resolution Plan by order dated 17.05.2023. Appellant received an email dated 21.06.2023 along with a statement showing computation of financial Creditor wise distribution of funds. Aggrieved by the order dated 17.05.2023, this Appeal has been filed.

3. Learned Counsel for the Appellant challenging the impugned order submits that the Resolution Plan is violative of Section 30(2)(b) of the

'Insolvency and Bankruptcy Code, 2016' ("IBC Code" for short) and Regulation 38(1)(b) of the 'Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016' ("Regulations, 2016" for short). It is submitted that there cannot be any discrimination in the payment to the unsecured Financial Creditors on the basis of their 'assent' and 'dissent'. The Appellant as well as one 'Indian Factoring and Financial Services Pvt. Ltd.' are unsecured Financial Creditors. Although 'Indian Factoring and Financial Services Pvt. Ltd.' who assented the plan is being paid INR 1.48 Cr. but the Appellant who abstained from voting is being proposed 'nil'. Learned Counsel for the Appellant submits that the legislative history of the IBC and the amendments made therein indicate that legislature never intended any discrimination between one class of Financial Creditor. Referring to the judgment of this Tribunal in ***"Central Bank of India v. Resolution Professional of the Sirpur Paper Mills Ltd.- (2018) SCC OnLine NCLAT 1034"***, it is submitted that the amendments were made in the Regulations 2016 dated 05.10.2018 deleting the definition of 'Dissenting Financial Creditor'. Liquidation value being paid to 'Dissenting Financial Creditors' were specifically omitted from the CIRP Regulations as in Regulation 38(1)(c). Amendments were brought into IBC in August 2019 by Insolvency and Bankruptcy Code (Amendment) Act, 2019 amending Section 30(2)(b) providing certain additional provision that at least a minimum amount (not nil) is paid to the 'Dissenting Financial Creditors' and the distribution must be fair and equitable. In the present case, the plan discriminates against the Appellant. Amendments made in the Regulations in August 2019 providing that Financial Creditors who have a right to vote under

sub-section (2) of Section 21 and did not vote in favour of the Resolution Plan, shall be paid in priority over financial creditors who voted in favour of the plan also supports the submissions of the Appellant. Learned Counsel for the Appellant has relied on the judgment of the Hon'ble Supreme Court in ***"Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta and Ors.- (2020) 8 SCC 531"*** as well as the judgment of this Tribunal in ***"Facor Alloys Limited and Anr. vs. Bhuvan Madan and Ors.- (2020) SCC OnLine NCLAT 789"*** and another judgment of this Tribunal in ***"Akashganga Processors Pvt. Ltd. v. Sri Ravindra Kumar Goyal & Ors.- Company Appeal (AT) (Ins.) No.1148 of 2022.***

4. Learned Counsel for the Resolution Professional refuting the submissions of the Counsel for the Appellant submits that the Resolution Plan approved by the Adjudicating Authority is not discriminatory in any manner. The Appellant being dissenting financial creditor cannot claim equivalent payment as is offered to the assenting financial creditor. It is the Appellant whose Resolution Plan was earlier approved in the first round and Appellant delayed the implementation of the plan for four years and now by filing the Appeal, his only intend is to delay the implementation of the plan. The Resolution Plan is compliant with all provisions of the IBC Code. The CoC having approved the Resolution Plan, the jurisdiction of the Adjudicating Authority is very limited and the distribution made by the CoC does not warrant any interference.

5. Learned Counsel appearing for the Respondent No.5- CoC has also refuted the submissions of the Appellant. It is submitted that the treatment

of dissenting financial creditors is in accordance with the provisions of the IBC Code and Regulations 2016. Treatment of Financial Creditors who do not vote in favour of the plan has been clearly contemplated under Section 30(2)(b)(ii). Dissenting financial creditors secured or unsecured are entitled to payment of liquidation value due to them. The liquidation value due to the Appellant being nil there is no discrimination in payment. The discrimination alleged by the Appellant between unsecured financial creditors is also not correct. Another financial creditor who assented the plan has been paid as per the payment envisaged in the plan. Approval of the plan by the CoC is the commercial wisdom of the CoC does not warrant any interference by this Tribunal.

6. We have considered the submissions of the Learned Counsel for the parties and perused the record.

7. The Resolution Plan giving rise to this Appeal has been approved by the CoC on 16.11.2022 which ultimately was approved by the Adjudicating Authority on 17.05.2023. We may first notice the relevant provisions of the statute which were applicable at the time when Resolution Plan was presented and came for approval before the Adjudicating Authority.

8. Section 30(2)(b) of the IBC Code came to be amended by Act 26 of 2019 w.e.f. 16.08.2019. Section 30(2)(b) is as follows:-

> *"**30. Submission of resolution plan.** -(2) The resolution professional shall examine each resolution plan received by him to confirm that each resolution plan –*

> ******
> *(b) provides for the payment of debts of operational creditors in such manner as may be specified by the Board which shall not be less than—*
>
> *(i) the amount to be paid to such creditors in the event of a liquidation of the corporate debtor under section 53; or*
> *(ii) the amount that would have been paid to such creditors, if the amount to be distributed under the resolution plan had been distributed in accordance with the order of priority in sub-section (1) of section 53,*
> *whichever is higher, and provides for the payment of debts of financial creditors, who do not*
> *vote in favour of the resolution plan, in such manner as may be specified by the Board, which shall not be less than the amount to be paid to such creditors in accordance with sub-section (1) of section 53 in the event of a liquidation of the corporate debtor……"*

9. Regulation 38 of the Regulations 2016 which provides for 'mandatory contents of the resolution plan' which was also amended on 27.11.2019, which is as follows:-

> ***"38. Mandatory contents of the resolution plan.***
> ***[****(1) The amount payable under a resolution plan -*
> *(a) to the operational creditors shall be paid in priority over financial creditors; and*
> *(b) to the financial creditors, who have a right to vote under sub-section (2) of section 21 and did not vote in favour of the resolution plan, shall be paid in priority over financial creditors who voted in favour of the plan.****]***
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> ***[****(1A) 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.]*
> *[(IB) A resolution plan shall include a statement giving details if the resolution applicant or any of its related parties has failed to implement or contributed to the failure of implementation of any*

*other resolution plan approved by the Adjudicating Authority at any time in the past.]*
*(2) A resolution plan shall provide:*

*(a) the term of the plan and its implementation schedule;*

*(b) the management and control of the business of the corporate debtor during its term; and*

*(c) adequate means for supervising its implementation.*

*[(3) A resolution plan shall demonstrate that –*

*(a) it addresses the cause of default;*
*(b) it is feasible and viable;*
*(c) it has provisions for its effective implementation;*
*(d) it has provisions for approvals required and the timeline for the same; and*
*(e) the resolution applicant has the capability to implement the resolution plan"*

10. When we look into Section 30(2)(b), it specifically contemplates about the payment of debts of financial creditors who do not vote in favour of the Resolution Plan which shall not be less than the amount to be paid to such creditors in accordance with sub-section (1) of Section 53 in the event of a liquidation of the Corporate Debtor. Thus, the statute clearly contemplates that minimum payment to such creditor who do not vote in favour of the Resolution Plan as payable to such creditor in accordance with sub-section (1) of Section 53 in the event of a liquidation of the Corporate Debtor. Regulation 38 (a) & (b) provides that the financial creditors, who did not vote in favour of the Resolution Plan, shall be paid in priority over financial creditors who voted in favour of the plan. The priority in payment is a different aspect than the amount to which the creditor who does not vote in favour of the plan is entitled. Regulation has to be read in consonance with the

provisions of the IBC, as per Section 240 of the IBC Code which empower the Board to make Regulations consistent with the Code and to carry out the provisions of this Code. A dissenting financial creditor is entitled for payment as contemplated by the Code.

11. The Hon'ble Supreme Court in ***"Committee of Creditors of Essar Steel India Limited"*** (supra) had occasion to examine the scope of judicial review of a decision of the CoC regarding approval of the Resolution Plan. The Hon'ble Supreme Court has clearly laid down that there can be difference in payment of the debts of financial and operational creditors. It was held that amended Regulation 38 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. The Hon'ble Supreme Court has also noticed that it is the CoC who is to negotiate and accept a resolution plan which may involve differential payment to different classes of creditors. In paragraph 88 of the judgment, following was held:-

> *"88. By reading paragraph 77 de hors the earlier paragraphs, the Appellate Tribunal has fallen into grave error. Paragraph 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 paragraph 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,*

*paragraph 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 paragraph 77 again does not lead to the conclusion that financial and operational creditors, or secured and unsecured creditors, must be paid the same 95 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."*

12. It was further noticed the amendment made in Section 30(2)(b) by amending Act, 2019 has also been noticed by the Hon'ble Supreme Court and it was observed that the provision is a beneficial provision in favour of the Operational Creditors and dissenting Financial Creditors as they are now to be paid a certain minimum amount, the minimum amount in case of dissenting financial creditor has to be paid as contemplated in the statute. In paragraphs 128 & 129 of the Hon'ble Supreme Court has laid down following:-

> *"128. When it comes to the validity of the substitution of Section 30(2) (b) by Section 6 of the Amending Act of 2019, it is clear that the substituted Section 30(2)(b) gives operational creditors something more than was given earlier as it is the higher of the figures mentioned in sub-clauses (i) and (ii) of sub-clause (b) that is now to be paid as a minimum amount to operational creditors. The same goes for the latter part of sub-clause (b) which refers to dissentient financial creditors. Mrs. Madhavi Divan is correct in her argument that Section 30(2)(b) is in fact a beneficial provision in favour of operational creditors and dissentient financial creditors as they are now to be paid a certain minimum amount, the minimum in the case of operational creditors being the higher of the two figures calculated under sub-clauses (i) and (ii) of clause (b), and the minimum in the case of dissentient financial creditor being a minimum amount that was not earlier payable. As a matter of fact, pre-amendment, secured financial creditors may cramdown unsecured financial creditors who are dissentient, the majority vote of 66% voting to*

*give them nothing or next to nothing for their dues. In the earlier regime it may have been possible to have done this but after the amendment such financial creditors are now to be paid the minimum amount mentioned in sub-section (2). Mrs. Madhavi Divan is also correct in stating that the order of priority of payment of creditors mentioned in Section 53 is not engrafted in sub-section (2)(b) as amended. Section 53 is only referred to in order that a certain minimum figure be paid to different classes of operational and financial creditors. It is only for this purpose that Section 53(1) is to be looked at as it is clear that it is the commercial wisdom of the Committee of Creditors that is free to determine what amounts be paid to different classes and sub-classes of creditors in accordance with the provisions of the Code and the Regulations made thereunder.*

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

13. Learned Counsel for the Appellant has referred to judgment of this Tribunal in ***"Central Bank of India v. Resolution Professional of the Sirpur Paper Mills Ltd."*** (supra). The above judgment of this Tribunal was considering the Regulation 38 as it existed prior to amendment made in Regulation 38 on 27.11.2019. The observations made by this Tribunal in paragraph 9 regarding Regulation 38 as existing at that time is not relevant as on date when the Regulations have been amended. The submission of Counsel for the Appellant that legislative amendments in IBC Code and Regulations indicate that legislature always intended to make payment to assenting financial creditor and dissenting financial creditor the same amount is clearly not reflected in the expressed provision of the IBC as noticed above.

14. Learned Counsel for the Appellant has also relied on the judgment of this Tribunal in ***"Facor Alloys Limited and Anr. vs. Bhuvan Madan and Ors."*** (supra) in which case this Tribunal had occasion to consider issue as to whether the Resolution Plan approved by the Adjudicating Authority which was under challenge is discriminatory since it gives differential treatment amongst the same class of the financial creditors merely based on assenting or dissenting financial creditors. The Adjudicating Authority answered the above issue holding that approved Resolution Plan in the above case does not give differential treatment. In the above case, the plan was approved on 13.11.2019 i.e. prior to amendment dated 27.11.2019. In paragraphs 41 and 42, following was held:-

> *"41. It is pertinent to mention that voting on approved Resolution Plan took place on 13th November 2019, on which date only the Operational Creditors were to be paid in priority. The Amendment to Regulation 38(1) of CIRP Regulations mandates priority in payment to dissenting Financial Creditors. This amendment came into effect on 27th November 2019, i.e. post the approval of Resolution Plan by the erstwhile COC of the Corporate Debtor. Therefore, as on the date of approval of the Resolution Plan by the erstwhile COC, the only requirement under the provision of the Code qua the dissenting Financial Creditors was the payment of the minimum liquidation value, which is duly complied in the present case.*
>
> *42. It is settled position in Law that provisions in a Statute would operate prospectively unless the retrospective operation is expressly provided for. There being no clarification provided to that effect, the amended Regulation 38 cannot be said to have retrospective application."*

15. The above judgment also notices that dissenting financial creditors were entitled only of the payment of minimum liquidation value which is duly complied in the above case. The above judgment does not in any manner help the Appellant. The judgment of this Tribunal in ***"Facor Alloys Limited and Anr.***" (supra) also came to be approved by the Hon'ble Supreme Court vide its judgment and order dated 27.09.2021 dismissing the Civil Appeal.

16. Another judgment relied by the Appellant is ***"Akashganga Processors Pvt. Ltd."*** (supra). The above judgment was with regard to difference in

payment made to the Operational Creditors. With regard to Operational Creditors, there is no concept of dissenting and assenting since the Operational Creditor does not have any right to vote. This Tribunal in the said case observed that in event although the liquidation value of the Operational Creditor was nil but even if Resolution Plan proposed any payment to the Operational Creditor there could not have any discrimination between one class of creditors. Following was observed in paragraph 7:-

> *"7. Present is a case where admittedly the claims of two Operational Creditors- State Tax, Government of Gujrat and Central Excise, Government of India were filed as has been admitted by the learned counsel for the Resolution Professional. It was open for the Resolution Applicant not to allocate any amount to any of the Operational Creditor since under Section 53 no entitlement was there in accordance with the total amount available for distribution. However, when the Successful Resolution Applicant was making payment to other two Operational Creditors, there cannot be any discrimination between payment of one class of Creditors."*

17. The above judgment does not help the Appellant in the present case since present is a case where Appellant is claiming discrimination between assenting unsecured and dissenting unsecured Financial Creditors.

18. In the above reference, we may also notice Form-H under Regulations 2016 as amended by Notification dated 27.11.2019. Clause 7 of the Form-H

gives the details of the amounts provided for the stakeholders under the Resolution Plan. Under clause 7, 'unsecured financial creditors' are at Item 2 where there are two separate categories i.e. (i) and (ii). Clause 7 of Form-H is as follows:-

*"7. The amounts provided for the stakeholders under the Resolution Plan is an under.-*

| Sl No. | Category of stakeholder | Sub-Category of Stakeholder | Amount Claimed | Amount Admitted | Amount Provided under the Plan# | Amount Provided to the Amount Claimed (%) |
|---|---|---|---|---|---|---|
| 1. | Secured Financial Creditors | (a) Creditors not having a right to vote under sub-section (2) of section 21 | | | | |
| | | (b) Other than (a) above:-<br>(i)who did not vote in favour of the resolution plan<br>(ii) who voted in favour of the resolution plan | | | | |
| | | Total [(a)+(b)] | | | | |
| 2. | Unsecured Financial Creditors | (a) Creditors not having a right to vote under sub-section (2) of section 21 | | | | |
| | | (b) Other than (a) above:-<br><br>(i) who did not vote in favour of the resolution plan<br><br>(ii) who voted in favour of the resolution plan | | | | |
| | | | | | | |

19. The above Form clearly indicate that there are two different categories one who did not vote in favour of the resolution plan and other those who

voted in favour of the resolution plan. Form-H also clearly indicate that there can be different payment to above two categories. Thus, the submission of the Appellant that there cannot be any discrimination with the payment to unsecured financial creditors who did not vote in favour of the plan and those who voted in favour of the plan cannot be accepted.

20. From the above discussions, we are of the view that assenting financial creditors entitled for payment as proposed in the plan and dissenting financial creditor is entitled as per the minimum entitlement as per Section 30(2)(b). There is no dispute that liquidation value of the Appellant in the present case is nil. The submission of the Appellant that there is a discrimination between the payment of assenting unsecured financial creditor and dissenting unsecured financial creditor cannot be accepted and on the ground, as urged by the Appellant in this Appeal, the Resolution Plan approved by the Adjudicating Authority cannot be held to be discriminatory. We, thus, are of the view that there is no error in the order of the Adjudicating Authority approving the Resolution Plan.

21. There is no merit in the Appeal. The Appeal is dismissed.

**[Justice Ashok Bhushan]**
**Chairperson**

**[Barun Mitra]**
**Member (Technical)**

**New Delhi**
Anjali