

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 272 of 2020

[Arising out of Impugned Judgment dated 30th January 2020 passed by National Company Law Tribunal, Cuttack Bench in CA (IB) No.160/CTB/2019]

IN THE MATTER OF:

**IMR Metallurgical Resources AG
Dammstrasse 19, CH-6300
ZUG, Switzerland
Through Mr Sumit Agarwal
(Authorized Representative)**

...Appellant

Versus

- 1. Ferro Alloys Corporation Limited
Regd. Office at: D.P. Nagar
Village/P.O. Randia
Dist.- Bhadrak, Odisha – 756335** **...Respondent No.1**

- 2. Rural Electrification Corporation
Regd. Office at:
Core-4, SCOPE Complex
7, Lodhi Road, New Delhi – 110003** **...Respondent No.2**

- 3. Bhuwan Madan
(Resolution Professional)
Prize Water House
Coopers Professional Services LLP
Building No.10, 17th Floor
Tower-C, DLF Cyber City
Gurugram – 122002** **...Respondent No.3**

- 4. M/s Sterlite Power Transmission Limited
4th Floor, Godrej Millennium
9 Koregaon Road, Pune
Maharashtra – 411001** **...Respondent No.4**

Present:

For Appellant : Mr Pinaki Misra, Mr Abhimanyu Bhandari, Mr Aditya Shankar, Ms Nattasha Garg and Ms Aashima Singhal, Advocates

For Respondent : Mr Ramji Srinivasan, Sr. Advocate with Mr Karan Kanwar, Mr Sikhar Singh, Advocates for R-2

Mr Sudiptu Sarkar, Sr. Advocate with Mr Diwakar Maheshwari, Ms Pratiksha Mishra, Advocates for R-4 Mr Krishnan Venugopal, Sr. Advocate with Ms Misha, Mr Saurav Panda and Ms Charu Bansal, Advocates for R.P.

J U D G M E N T

[Per; V. P. Singh, Member (T)]

This Appeal has been filed against the Impugned Judgment dated 30th January, 2020 passed by NCLT Cuttack Bench in CA (IB) No. 160/CTB/2019 whereby the Ld. Adjudicating Authority has dismissed the Application filed by the Appellant for seeking intervention and directions for reconsideration of its Resolution Plan before accepting the resolution plan submitted by the Successful Resolution Applicant, mechanically without appreciating the submissions of the Appellant.

2. Appellant contends that the Adjudicating Authority has failed to exercise its power under Section 31 of the Code which mandates that the Adjudicating Authority has to apply its mind before approving or rejecting a Resolution Plan especially when the averments challenging the resolution plan are regarding the irregularities committed by the Resolution Professional and the Committee of Creditors (in short 'CoC') in applying the evaluation matrix under the guise of using the commercial wisdom to the Plan submitted by the Appellant and the successful Resolution Applicant. Appellant further contends that the impugned judgment is passed mechanically without Application of mind to the fact that specific amounts had been considered by R.P. and CoC for the Successful Resolution Applicant as the 'cash in hand' in considering the total upfront cash amount. The same amount has not been considered while

calculating the upfront cash amount for the Appellant. Thus, the Evaluation Matrix has unfairly given undue advantage to the Successful Resolution Applicant over the Appellant. In contrast, on the face of it, the upfront amount offered by the Appellant was six times higher than the successful resolution applicant.

3. It is further contended that the Adjudicating Authority has not given any reasons for rejecting the Application of the Appellant.

4. Appellant also argues that the CoC did not accept the Resolution Plan of the Appellant, which was intimated to the Appellant by email dated 13.11.2019. After that, the R.P. filed an Application being C.A. No. 157/CTB/2019 under Section 31 of the IBC for approval of the Resolution Plan. The Appellant immediately applied Rule 11 of the NCLT Rule read with Section 60(5) of the IBC seeking intervention in the matter and further directions to the COC to reconsider the Resolution Plan of the Appellant on merits and approve the resolution plan being the most viable on quantitative and qualitative parameters. But the Adjudicating Authority vide the impugned order rejected the Application which is under challenge in this Appeal.

5. It is essential to mention that the Resolution Applicant has no vested right that his Resolution Plan must be considered. It is settled position of law as laid down by Hon'ble Supreme Court in (2019) 2 SCC 1 in case of Arcelor Mittal India Pvt Ltd Satish Kumar Gupta that the resolution applicant does not have any vested right that his Resolution Plan must be considered.

6. The commercial wisdom of the CoC is paramount, and it has the absolute prerogative to decide the viability and feasibility of the Resolution Plans presented before them and the same is not to be interfered even by the Adjudicating Authority.

7. In the present case, the CoC after evaluating both the Resolution Plan being that of STPL and IMR based on pre-disclosed evaluation criteria approved the Resolution Plan of STPL by a voting share of 95.15% and the same is duly reflected in e-voting result of 31st CoC meeting held on 11th and 12th November 2019.

8. It is pertinent to mention that in the present case, the Resolution Professional received only one Resolution Plan of STPL within the stipulated timeline which was duly recorded in the minutes of 29th CoC meeting held on 30.10.2019. After that, on 07.11.2019, unsuccessful Resolution Applicant IMR approached the R.P. expressing its interest to submit a Resolution Plan, though the period of submission was already expired on 30.10.2019. The R.P. with the consent of CoC decided to entertain the resolution plan of the unsuccessful Resolution Applicant to maximize the value of the assets of the Corporate Debtor.

9. It is also contended by the Respondent that there is no requirement to furnish the reason for selection or rejection of any Resolution Plan. The only need for CoC is to record their deliberation on the feasibility and viability of the Resolution Plan which has duly been done in the 31st meeting of the CoC and is reflected in the minutes of the meeting. It is also contended by the

Respondent that the evaluation criteria for evaluating the Resolution Plan taken into consideration various financial and non-financial criteria including the equity infusion to continue to manage the corporate debtor as a going concern. After assessing both the resolution plans on the evaluation matrix, the CoC has scored STPL plan higher and approved the same.

10. The Respondent further contends that the CoC has duly considered the payments being made to Operational Creditors before exercise of its commercial decision to vote in favour of STPL's resolution plan which is, non-justiciable as per the law laid down by the Hon'ble Supreme Court.

11. It is pertinent to mention that the evaluation matrix was also under challenge before the Appellate Tribunal in Company Appeal No. 207-208 of 2020. Still, the Appeal was rejected by order of this Appellate Tribunal dated 12.03.2020 wherein it was held:

*“3. Having heard learned counsel for the parties, we are of the considered opinion that the Committee of Creditors, Acting on the basis of evaluation of Proposed Resolution Plan and assessment made by their team of experts, expressed their opinion after due deliberations in CoC Meetings through voting as per voting share which is a collective business decision. The commercial wisdom of the Financial Creditors individually or their collective decision is beyond the pale of challenge before the Adjudicating Authority and the same has been made non-justiciable. This is the dictum of Hon'ble Apex Court in **'K. Sashidhar vs. Indian Overseas Bank'**, (2019) 12 SCC 150: (2019) 4 SCC (Civ) 222: 2019 SCC OnLine SC 257. Dealing with the scope of an appeal under Section 61(1) of the I&B Code, the Hon'ble Apex Court noticed that apart from other grounds the Appeal could be instituted against*

an order approving a Resolution Plan limited to six grounds noticed therein including that the approved Resolution Plan is in the contravention in the provisions of any law for the time being in force or that there has been any material irregularity in exercise of powers by the Resolution Professional during the Corporate Insolvency Resolution Process. Thus, it is clear that the jurisdiction bestowed upon this Appellate Tribunal too is expressly circumscribed. The examination in challenge to the approved Resolution Plan by this Tribunal is limited to matters other than enquiry into the business decision based on commercial wisdom of the Committee of Creditors. The limited judicial review in Appeal does not extend to oversee and question the business decision of the majority of Committee of Creditors and the Committee of Creditors cannot be directed to reverse its business decision or reconsider a settlement proposal that has been rejected with requisite majority.

4. In **‘Maharashtra Seamless Limited Vs. Padmanabhan Venkatesh & Others’**, Civil Appeal No.4242 of 2019 vide **judgment dated 22nd January 2020**, the Hon’ble Apex Court held that the Appellate Tribunal ought to cede ground to the commercial wisdom of the Creditors rather than assess the Resolution Plan on the basis of quantitative analysis.

5. The dictum of law laid down in **‘K. Sashidhar vs. Indian Overseas Bank’ (Supra)** stands reiterated in **‘Committee of Creditors of Essar Steel India Limited Vs. Satish Kumar Gupta and Others’**, (2019) SCC OnLine SC 1478 wherein the Hon’ble Apex Court observed as under:-

“48. Thus, it is clear that the limited judicial review available, which can in no circumstance trespass upon a business decision of the majority of the Committee of Creditors, has to be within the four corners of Section

30(2) of the Code, insofar as the Adjudicating Authority is concerned, and Section 32 read with Section 61(3) of the Code, insofar as the Appellate Tribunal is concerned, the parameters of such review having been clearly laid down in K. Sashidhar (supra).

49. The argument, though attractive at the first blush, but if accepted, would require us to re-write the provisions of the I&B Code. It would also result in doing violence to the legislative intent of having consciously not stipulated that as a ground - to challenge the commercial wisdom of the minority (dissenting) financial creditors. Concededly, the process of resolution plan is necessitated in respect of corporate debtors in whom their financial creditors have lost hope of recovery and who have turned into non-performer or a chronic defaulter. The fact that the concerned corporate debtor was still able to carry on its business activities does not obligate the financial creditors to postpone the recovery of the debt due or to prolong their losses indefinitely. Be that as it may, the scope of enquiry and the grounds on which the decision of “approval” of the resolution plan by the CoC can be interfered with by the adjudicating Authority (NCLT), has been set out in Section 31(1) read with Section 30(2) and by the appellate Tribunal (NCLAT) under Section 32 read with Section 61(3) of the I&B Code. No corresponding provision has been envisaged by the legislature to empower the resolution professional, the adjudicating Authority (NCLT) or for that matter the appellate Authority (NCLAT), to reverse the “commercial decision” of the CoC much less of the dissenting financial creditors for not supporting the proposed resolution plan. Whereas, from the legislative

history, there is contraindication that the commercial or business decisions of the financial creditors are not open to any judicial review by the adjudicating Authority or the appellate Authority.

51. Suffice it to observe that in the I&B Code and the regulations framed thereunder as applicable in October 2017, there was no need for the dissenting financial creditors to record reasons for disapproving or rejecting a resolution plan. Further, as aforementioned, there is no provision in the I&B Code which empowers the adjudicating Authority (NCLT) to oversee the justness of the approach of the dissenting financial creditors in rejecting the proposed resolution plan or to engage in judicial review thereof. Concededly, the inquiry by the resolution professional precedes the consideration of the resolution plan by the CoC. The resolution professional is not required to express his opinion on matters within the domain of the financial creditor(s), to approve or reject the resolution plan, under Section 30(4) of the I&B Code. At best, the Adjudicating Authority (NCLT) may cause an enquiry into the “approved” resolution plan on limited grounds referred to in Section 30(2) read with Section 31(1) of the I&B Code. It cannot make any other inquiry nor is competent to issue any direction in relation to the exercise of commercial wisdom of the financial creditors - be it for approving, rejecting or abstaining, as the case may be. Even the inquiry before the Appellate Authority (NCLAT) is limited to the grounds under Section 61(3) of the I&B Code. It does not postulate jurisdiction to undertake scrutiny of the justness of the opinion expressed by financial creditors at the time of voting. To take any other view would

enable even the minority dissenting financial creditors to question the logic or justness of the commercial opinion expressed by the majority of the financial creditors albeit by requisite percent of voting share to approve the resolution plan; and in the process authorize the adjudicating Authority to reject the approved resolution plan upon accepting such a challenge. That is not the scope of jurisdiction vested in the adjudicating Authority under Section 31 of the I&B Code dealing with approval of the resolution plan.”

12. In this Appeal, the Appellant had challenged the evaluation matrix applied by the CoC which falls within the commercial wisdom of the CoC. It is settled position of law that approval or rejection of Resolution Plan depends upon the commercial wisdom of the CoC, which involves evaluation of the Resolution Plan based on its feasibility. Such commercial wisdom of the CoC with the requisite voting majority is non-justiciable. The powers of the Adjudicating Authority under Section 31 of the Code is limited to the matters covered under Section 30(2) of the Code when the Resolution Plan does not conform to the stated condition. Therefore, the Appellant cannot question the commercial wisdom of the CoC in rejecting the Resolution Plan, with the requisite majority and in approving the Resolution Plan of SPTL. No material irregularity in Corporate Insolvency Resolution Process before the R.P. has been demonstrated.

13. Thus, we find that the impugned order has been passed on proper Application of mind in conformity with the law laid down by the Hon'ble Apex Court in '*K. Sashidhar vs. Indian Overseas Bank*' (*Supra*) and

‘Committee of Creditors of Essar Steel India Limited Vs. Satish Kumar Gupta and Others’ (Supra). Therefore, we are not inclined to interfere with the Impugned Order regarding approval of Resolution Plan. Thus, Appeal fails. No order as to Costs.

[Justice Bansi Lal Bhat]
Acting Chairperson

[V. P. Singh]
Member (Technical)

[Shreesha Merla]
Member (Technical)

NEW DELHI
08th JUNE, 2020

pks/nn