

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI**

**Company Appeal (AT) (Insolvency) Nos. 250-251 of 2019**

(Arising out of Orders dated 8<sup>th</sup> February, 2019 and 11<sup>th</sup> February, 2019 passed by the Adjudicating Authority (National Company Law Tribunal), Kolkata Bench, Kolkata in CA No. 111/KB/2017 and in CP (IB) No. 754/KB/2017)

**IN THE MATTER OF:**

**M/s. Maruti Ferrous Private Limited** **...Appellant**

**Vs.**

**Sunil Ispat & Power Limited & Ors.** **...Respondents**

**Present: For Appellant: - Mr. Joy Sah, Senior Advocate with Mr. Abhijeet Sinha, Mr. Arjun Asthana, Ms. Sreenita Ghosh, Mr. Saikat Sarkar and Mr. Aditya Shukla, Advocates.**

**For Respondents: - Mr. Kunal Tandon and Ms. Niti Jain, Ms. Richa, Advocates.**

**Mr. Gaurav Meshram, Asst. Commissioner, Excise Department for R3.**

**Mr. Arun Gupta and Mr. Arik Banerjee, Advocates for R.P.**

**J U D G M E N T**

**SUDHANSU JYOTI MUKHOPADHAYA, J.**

In the ‘Corporate Insolvency Resolution Process’ against ‘Sunil Ispat & Power Limited’- (‘Corporate Debtor’), the Appellant- ‘M/s. Maruti Ferrous Private Limited’ (hereinafter referred to as “Successful Resolution

Applicant”) submitted ‘Resolution Plan’ which was approved by the ‘Committee of Creditors’ with 100% voting shares.

2. By impugned order dated 8<sup>th</sup> February, 2019, as corrected by order dated 11<sup>th</sup> February, 2019, the Adjudicating Authority (National Company Law Tribunal), Kolkata Bench, Kolkata, approved the plan under Section 31 of the Insolvency and Bankruptcy Code, 2016 (“I&B Code” for short) with following observations:

*“7. Ld. RP pointed out at page 61 of the plan the provision is made to incur the CIRP cost of Rs.35 lakhs. At page 64 of the plan, it is mentioned that during CIRP, the RP did not receive any claim from employees and workmen of the corporate debtor. Hence, no provision is made thereto. It appears from record that the RP verified operational creditor’s claim worth Rs. 19,82,08,779/- (including government dues and taxes). It is suggested in the plan that they may be waived or written off. However, I hold that such jurisdiction is not conferred on this authority under I&B Code. The charge of the government dues/ taxes shall remain subsisting. This plan is approved subject to these observations.”*

3. The grievance of the Appellant was only with regard to the observations made aforesaid by the Adjudicating Authority for the statutory dues worth Rs. 19,82,08,779/-.

4. It was submitted that the 'Financial Creditors' have been provided with 9% of their dues whereas in terms of order passed by the Adjudicating Authority, the 'Operational Creditors' particularly those who have not supplied the goods nor provided the services but given the entitlement under statutory provisions have been ordered to be paid 100%.

5. In the case of "**Binani Industries Limited vs. Bank of Baroda & Anr.— Company Appeal (AT) (Insolvency) No. 82 of 2018 etc.**", this Appellate Tribunal held that the 'Resolution Plan' cannot discriminate between those who are similarly situated.

6. In "**Swiss Ribbons Pvt. Ltd. & Anr. vs. Union of India & Ors.— 2019 SCC OnLine SC 73**", wherein the Hon'ble Supreme Court held:

*"71. The NCLAT has, while looking into viability and feasibility of resolution plans that are approved by the committee of creditors, always gone into whether operational creditors are given roughly the same treatment as financial creditors, and if they are not, such plans are either rejected or modified so that the operational creditors' rights are safeguarded. It may be*

*seen that a resolution plan cannot pass muster under Section 30(2)(b) read with Section 31 unless a minimum payment is made to operational creditors, being not less than liquidation value. Further, on 05.10.2018, Regulation 38 has been amended. Prior to the amendment, Regulation 38 read as follows:*

*“38. Mandatory contents of the resolution plan.—*

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

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

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

*(c) liquidation value due to dissenting financial creditors and provide that such payment is made before any recoveries are made by the financial creditors who voted in favour of the resolution plan.”*

*Post amendment, Regulation 38 reads as follows:*

*“38. Mandatory contents of the resolution plan.—*

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

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

7. In the aforesaid background, we are of the view that the ‘Financial Creditor’ cannot be discriminated in the manner as suggested by the Adjudicating Authority by directing to pay 100% to the ‘Operational

Creditors' who otherwise do not contribute in operation of the Company but are entitled under the existing laws.

8. In the aforesaid background to provide same treatment to the 'Financial Creditors' and the 'Operational Creditors', we asked the Appellant to propose modified 'Resolution Plan', which has been submitted.

9. In terms of the approved 'Resolution Plan' by the 'Committee of Creditors', as held in its meeting dated 10<sup>th</sup> January, 2019, the distribution was as follows:

<b>S. No.</b>	<b>Particulars</b>	<b>Outstanding as per Claim Form (Dues as on 31.07.2018)</b>	<b>Payment Proposed Total Amount</b>	<b>Percentage of Total Claim</b>
	<b>COST TO BE INCURRED</b>			
1	<b>Insolvency Resolution Process Cost</b>	<b>N.A.</b>	<b>3,500,000</b>	<b>100%</b>
2	<b>Payment to Financial Creditors</b>			
a.	HUDCO	1,397,915,717	125,812,500	9%
b.	Asset Reconstruction Company (India) Ltd.	893,740,896	80,428,500	
c.	Syndicate Bank	337,085,340	30,500,000	
d.	Bank of Baroda	340,626,013	30,500,000	
e.	Central bank of India	419,577,074	37,759,000	
	Total Payable To The Financial Creditor	<b>3,388,945,040</b>	<b>305,000,000</b>	
	<b>Payment to Operational Creditors/ Statutory/liabilities</b>			

3	A.	Operational Creditor	NIL	NIL	NIL
	B.	Workmen Dues	NIL	NIL	NIL
	C.	Government /Statutory Dues			
	a.	Commercial Taxes Department, Government of Chhattisgarh	52,713,896	NIL	N.A.
	b.	Central Excise Duty, Government of Chhattisgarh	136,452,329	NIL	
	c.	Income Tax Department DCIT C Circle 3(1), Government of India	9,121,554	NIL	
	Total Payable to Operational Creditor		<b>198,287,779</b>	<b>NIL</b>	
SUB-TOTAL		<b>3,587,232,819</b>	<b>308,500,000</b>		
4	<b>Cost to be incurred under the normal course of business</b>				
a.	Up gradation and Modernization of Unit		N.A	115,000,000	
b.	Add: Working Capital		N.A	195,000,000	N.A
<b>TOTAL</b>		<b>3,587,232,819</b>	<b>618,500,000</b>		

<b>Means of Finance</b>	<b>Total Amt Rs in Cr</b>
Fresh Equity to be infused by the Resolution Applicant	10.00
Unsecured Loans by Applicant/ Associates	20.85
TERM LOAN (not from existing secured financial creditors of company)	15.00
Cash Credit Limit (not from existing secured financial creditors of company)	16.00
<b>TOTAL (Rs. In crores)</b>	<b>61.85</b>

10. After our observation, the Appellant submitted modified 'Resolution Plan' showing the distribution without changing the other factors relating to viability and feasibility, which is as follows:

S. No.	Particulars	Outstanding as per Claim Form (Dues as on 31.07.2018)	Payment Proposed Total Amount	Percentage of Total Claim
	COST TO BE INCURRED			
1	<b>Insolvency Resolution Process Cost</b>	N.A.	<b>4,500,000</b>	<b>100%</b>
2	<b>Payment to Financial Creditors</b>			
	a.	HUDCO	1,397,915,717	125,812,500
	b.	Asset Reconstruction Company (India) Ltd.	893,740,896	80,428,500
	c.	Syndicate Bank	337,085,340	30,500,000
	d.	Bank of Baroda	340,626,013	30,500,000
	e.	Central bank of India	419,577,074	37,759,000
	Total Payable To The Financial Creditor		<b>3,388,945,040</b>	<b>305,000,000</b>
3	<b>Payment to Operational Creditors/ Statutory/liabilities</b>			
	A.	Operational Creditor	NIL	NIL
	B.	Workmen Dues	NIL	NIL
	C.	Government/ Statutory Dues		

	a.	Commercial Taxes Department, Government of Chhattisgarh	52,713,896	4,744,250
	b.	Central Excise Duty, Government of Chhattisgarh	136,452,329	12,280,710



	c.	Income Tax Department DCIT C Circle 3(1), Government of India	9,121,554	821,000	
	Total Payable to Operational Creditor**		<b>19,82,87,779</b>	<b>17,845,960</b>	9%
	SUB—TOTAL		<b>3,587,232,819</b>	<b>327,345,960</b>	
4	<b>Cost to be incurred under the normal course of business</b>				
	a.	Up gradation and Modernization of Unit	N.A	115,000,000	<b>N.A</b>
	b.	Add: Working Capital	N.A	195,000,000	
	<b>TOTAL</b>		<b>3,587,232,819</b>	<b>637,345,960</b>	

<b>Means of Finance</b>	<b>Total Amt Rs in Cr</b>
Fresh Equity to be infused by the Resolution Applicant	10.00
Unsecured Loans by Applicant! Associates	22.73
TERM LOAN (not from existing secured financial creditors of company)	15.00
Cash Credit Limit (not from existing secured financial creditors of company)	16.00
<b>TOTAL (Rs. In crores)</b>	<b>63.73</b>

11. As we find that the proposed modified distribution of the 'Resolution Plan' is in accordance with law and the same treatment has been given to the 'Financial Creditors' namely— 'HUDCO', 'Asset Reconstruction Company (India) Ltd.', 'Syndicate Bank', 'Bank of Baroda' and 'Central Bank of India' (9%) of their dues and the 'Operational Creditors' namely— 'Commercial Taxes Department, Government of Chhattisgarh', 'Central Excise Duty, Government of Chhattisgarh' and 'Income Tax Department DCIT C Circle 3(1), Government of India' (9%) of

their dues to all the 'Operational Creditors', we accept the proposed modified portion of the 'Resolution Plan', as quoted above, and substitute the same in place of the original one. The Appellant is to make payment within one month from the date of the order of this Appellate Tribunal, as shown in the modified 'Resolution Plan'.

12. The orders passed by the Adjudicating Authority dated 8<sup>th</sup> & 11<sup>th</sup> February, 2019 is upheld with modifications as aforesaid.

The appeals are allowed with aforesaid observations and directions.

(Justice S.J. Mukhopadhaya)  
Chairperson

(Justice A.I.S. Cheema)  
Member(Judicial)

(Kanthi Narahari)  
Member(Technical)

NEW DELHI  
30<sup>th</sup> May, 2019  
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