

**IN THE NATIONAL COMPANY LAW APPELLATE TRIBUNAL**

**Company Appeal (AT) (Insolvency) No. 773 of 2018**

(Arising out of Order dated 13<sup>th</sup> November, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), Chandigarh Bench, Chandigarh in CA No.477/2018 & 339/2018 in CP(IB) No. 102/Chd/Pb/2017)

**IN THE MATTER OF:**

**Mecamidi HPP India Private Limited**

**...Appellant**

**Vs.**

**Rishi Ganga Power Corporation Limited**

**...Respondents**

**Present: For Appellant:- Mr. Nakul Mohta and Mr. Ankur Goel, Advocates.**

**For Respondents:- Mr. Pulkit Goyal, Mr. M.S. Kalra, Mr. Sandeep Mishra, Mr. Nikhil Jain and Ms. Isha Khurana, Advocates for RP (R2).**

**Mr. K. Datta, Mr. Prithu Garg, Mr. Abhay Pratap Singh and Ms. Niharica Khanna, Advocates for R-3.**

**Mr. Rajesh Kr. Gautam and Ms. Khushboo Aggarwal, Advocates for R-4.**

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

**SUDHANSU JYOTI MUKHOPADHAYA, J.**

Pursuant to an application under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("I&B Code" for short) filed by the 'Punjab National Bank'- ('Financial Creditor'), the 'Corporate Insolvency

Resolution Process’ was initiated against ‘M/s. Rishi Ganga Power Corporation Ltd.’- (‘Corporate Debtor’).

2. In the said ‘Resolution Process’, the ‘Committee of Creditors’ after considering the cases of different ‘Resolution Applicants’, approved the ‘Resolution Plan’ of ‘M/s. Kundan Care Products Ltd.’. The said plan having approved by the Adjudicating Authority by order dated 13<sup>th</sup> November, 2018, the Appellant- ‘Operational Creditor’ has challenged the same.

3. Learned counsel appearing on behalf of the Appellant submitted that the ‘Resolution Plan’ is arbitrary and discriminatory and is against the object of the ‘I&B Code’.

4. Further, according to learned counsel for the Appellant, the plan approved is in violation of Section 30(2) (b) of the ‘I&B Code’.

5. The case was earlier taken up on 18<sup>th</sup> March, 2019, when following observations made by this Appellate Tribunal:

*“18.03.2019 – We have discussed matter with Appellant (‘Sole Operational Creditor’), counsel for the Appellant, learned counsel for the ‘Resolution Professional’ and representative of ‘Financial Creditors’ (there are three Financial Creditors) about the distribution as shown in the ‘Resolution Plan’. Prima Facie, we are of the view that the plan approved by the ‘Committee of*

*Creditors' appears to be discriminatory in a sense that it has allowed 27.83% in favour of the three 'Financial Creditors' but no amount allocated in favour of the 'Operational Creditors'.*

*Parties are given liberty to file its chart showing distribution between the 'Financial Creditor' and 'Operational Creditors' in a manner which is not arbitrary or discriminatory. This Appellate Tribunal if so required may substitute the Resolution plan instead of setting aside the same.*

*Post this case for 'orders' on **8<sup>th</sup> April, 2019**. The appeal may be disposed of on the next date. In the meantime, parties may file reply-affidavit."*

6. Learned counsel appearing on behalf of the 'Resolution Applicant'- (M/s. Kundan Care Products Ltd.) submitted that the Appellant has agreed to revise the plan to make it non-discriminatory and in consonance of provisions of Section 30(2) (b) of the 'I&B Code'. It is accepted that no amount has been allocated to the 'Operational Creditor'.

7. Learned counsel appearing on behalf of the 'Punjab National Bank'- (4<sup>th</sup> Respondent) submitted that pursuant to the observations of this Appellate Tribunal, a meeting of erstwhile 'Financial Creditors' was

held along with erstwhile 'Resolution Professional' and the 'Successful Resolution Applicant' on 2<sup>nd</sup> April, 2019 to arrive at a consensus for payment to Appellant- 'M/s. Mecamidi HPP India Ltd.' so that a Chart showing distribution between the 'Financial Creditors' and the 'Operational Creditors' in a manner which is not arbitrary or discriminatory. However, no consensus could be arrived at between the erstwhile 'Financial Creditors' and the 'Successful Resolution Applicant' and thereby requested this Appellate Tribunal to pass appropriate order.

8. The distribution of amount amongst the 'Financial Creditors' and the 'Operational Creditor' as shown in the 'Resolution Plan' of 3<sup>rd</sup> Respondent- ('M/s. Kundan Care Products Ltd.') is as under:

Sl. No.	Category of stake holder	Name	Amount claimed (In Cr.)	Amount admitted by Resolution Professional (In Cr.)	Amount provided under the Resolution Plan (In Cr.)	Percentage of amount allowed in the Resolution Plan (In Cr.)
1	Financial Creditor	Punjab National Bank	98.76	98.76	27.48	27.83
2	Financial Creditor	Orient Bank of Commerce	59.51	59.51	16.56	27.83
3	Financial Creditor	Kotak Mahindra Bank	1.37	1.37	0.38	27.83
4	Operational Creditor	Mecamidi HPP India Pvt. Ltd.	4.71	4.71	0	0
5	Undisclosed/Contingent Operational Creditor	N.A.	0	0	0.50	NA

9. In "***Binani Industries Limited Vs. Bank of Baroda & Anr. – Company Appeal (AT) (Insolvency) No. 82 of 2018 etc.***", this Appellate Tribunal by its judgment dated 14<sup>th</sup> November, 2018 held

that the 'I&B Code' or the Regulations framed by the Insolvency and Bankruptcy Board of India do not prescribe differential treatment between the similarly situated 'Operational Creditors' or the 'Financial Creditors' on one or other grounds.

10. In "**Swiss Ribbon Pvt. Ltd. & Anr. v. Union of India & Ors.— 2019 SCC OnLine SC 73**)", the Hon'ble Supreme Court while looking into the discrimination as had been made out by the 'Financial Creditor' observed and held:

*"70. Quite apart from this, the United Nations Commission on International Trade Law, in its Legislative Guide on Insolvency Law [**UNCITRAL Guidelines**]" recognizes the importance of ensuring equitable treatment to similarly placed creditors and states as follows:*

***"Ensuring equitable treatment of similarly situated creditors***

*7. The objective of equitable treatment is based on the notion that, **in collective proceedings, creditors with similar legal rights should be treated fairly, receiving a distribution on their claim in accordance with their relative ranking and interests.** This key objective recognizes that **all creditors do not need to be***

***treated identically, but in a manner that reflects the different bargains they have struck with the debtor.*** This is less relevant as a defining factor where there is no specific debt contract with the debtor, such as in the case of damage claimants (e.g for environmental damage) and tax authorities. Even though the principle of equitable treatment may be modified by social policy on priorities and give way to the prerogatives pertaining to holders of claims or interests that arise, for example, by operation of law, it retains its significance by 12 UNCITRAL Legislative Guide on Insolvency Law ensuring that the priority accorded to the claims of a similar class affects all members of the class in the same manner. The policy of equitable treatment permeates many aspects of an insolvency law, including the application of the stay or suspension, provisions to set aside acts and transactions and recapture value for the insolvency estate, classification of claims, voting procedures in reorganization and distribution mechanisms. An insolvency law

*should address problems of fraud and favouritism that may arise in cases of financial distress by providing, for example, that acts and transactions detrimental to equitable treatment of creditors can be avoided.”*

**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.”***

11. Learned counsel appearing on behalf of the 3<sup>rd</sup> Respondent (‘Successful Resolution Applicant’) has brought on record a revised distribution chart and submitted that keeping in consideration the Liquidation value of the Company at Rs. 15.39 Crores, as per which the Appellant- ‘Operational Creditor’ is entitled to minimum Rs.0.44 Crores. The proposed redistribution of amount amongst Creditors is as follows:

Name of Creditor	Claim Amount	As per Original plan		As per Revised Plan		As per Liquidation
		Amount Provided	Ratio	Amount Provided	Ratio	
PNB	98.76	27.48	27.83%	26.70	27.04%	9.25
OBC	59.51	16.56	27.83%	16.08	27.02%	5.57
Kotak	1.37	0.38	27.83%	0.37	27.01%	0.12
Operational Creditor (Mecamidi)	4.71			1.27	26.96%	0.44
	164.35	44.42		44.42		15.39

**All values in crore (INR)**

12. Admittedly, as per the original distribution, the ‘Operational Creditor’ has been paid ‘Nil’ which is much less than the Liquidation value to which the Appellant is entitled. In such case, we hold that the approved plan is in contravention of Section 30(2) (b) of the ‘I&B Code’.

13. Further, the distribution as made between the ‘Financial Creditor’ and the ‘Operational Creditor’ i.e. 27.83% in favour of the ‘Financial Creditor’ and ‘Nil’ amount in favour of the ‘Operational Creditor’, is also arbitrary and discriminatory.

14. As per the decision of this Appellate Tribunal in **“Binani Industries Limited Vs. Bank of Baroda & Anr”** (Supra) and the Hon’ble Supreme Court in **“Swiss Ribbon Pvt. Ltd. & Anr. v. Union of India & Ors.”** (Supra), the ‘Operational Creditors’ are to be given roughly the same treatment as the ‘Financial Creditors’. Such treatment having not been made instead of rejecting the plan, we modify the plan as proposed by ‘Resolution Applicant’ which also pass the test of Section 30 (2) (b).

15. For the reasons aforesaid, while we allow the ‘Resolution Applicant’ to modify and substitute the ‘Resolution Plan’ and the re-distribution be made in a manner as proposed by 3<sup>rd</sup> Respondent (‘Resolution Applicant’), as follows:

Name of Creditor	Claim Amount	As per Original plan		As per Revised Plan	
		Amount Provided	Ratio	Amount Provided	Ratio
PNB	98.76	27.48	27.83%	26.70	27.04%
OBC	59.51	16.56	27.83%	16.08	27.02%
Kotak	1.37	0.38	27.83%	0.37	27.01%
Operational	4.71			1.27	26.96%

Creditor (Mecamidi)			
	164.35	44.42	44.42

**All values in crore (INR)**

16. The impugned order dated 13<sup>th</sup> November, 2018 passed by the Adjudicating Authority and the 'Resolution Plan' both stand modified to the extent above. The 'Resolution Professional' and the 'Committee of Creditors' and other stakeholders will act in terms with the modified plan.

The appeal is allowed with aforesaid observations and directions. However, in the facts and circumstances of the case, there shall be no order as to costs.

(Justice S.J. Mukhopadhaya)  
Chairperson

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

(Kanthi Narahari)  
Member(Technical)

NEW DELHI

23<sup>rd</sup> April, 2019

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