

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

**Company Appeal (AT) (Insolvency) No. 1339 of 2019**  
**&**  
**I.A. No. 3858 of 2019**

**IN THE MATTER OF:**

**M/s. Nadig Associates**

**...Appellant**

**Versus**

**M/s. BCIL Red Earth Developers  
India Pvt. Ltd. & Ors.**

**...Respondents**

**Present:**

**For Appellant :**

**Mr. Jayna Kothari, Senior advocate with  
Mr. Nidhi Khanna, Advocate**

**O R D E R**

**25.11.2019** Having heard learned counsel for the appellant we find that there is no delay in preferring the appeal.

I.A. No. 3858 of 2019 stands disposed of.

The Appellant (Operational Creditor) has preferred this appeal against order dated 9<sup>th</sup> August, 2019 passed by the Adjudicating Authority (National Company Law Tribunal), Bengaluru Bench approving the 'resolution plan' submitted by 'Citrus Ventures Private Limited' in the 'corporate insolvency resolution process' of 'M/s. BCIL Red Earth Developers India Pvt. Ltd.' Learned counsel appearing on behalf of the Appellant submits that the 'resolution plan'

is against the provisions of Regulation 38(1A) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 and in terms of priority in payment it should have been given to the 'Operational Creditor'. It is also submitted that the 'liquidation value' as determined is rupees zero in the 'resolution plan' and it is stated that if any amount is payable to the 'secured financial creditors' and 'unsecured financial creditors' etc., the Adjudicating Authority noticed the 'resolution plan' which is required under Section 30(1), relevant of which is as follows:

5. *The Resolution Plan includes a statement under Regulation 38(1A) of the CIRP Regulations as to how it has dealt with the interest of all stakeholders in compliance with the Code and Regulations made there under:*

*The amount provided for the stakeholders under the Resolution Plan is as under:*

*(Amount in Rs. Lakh)*

<i>S l . N o .</i>	<i>Category of Stakeholder</i>	<i>Amount Claimed</i>	<i>Amount Admitted</i>	<i>Amount Provided under the Plan #</i>	<i>Amount provided to the Amount Claimed %</i>
1	Corporate Insolvency Resolution Process (CIRP) Expenses	-	-	150 (Note 1)	100%
2	Secured Financial Creditors				

	PMS Clients of Reliance Nippon Life Asset Management Ltd	11,602	11,602	4,181 (Note 1, 2, 3 and 6)	29%
	Reliance India Realty Opportunities LLP	3,051	3,051		
3	Unsecured Financial Creditors				
	Home Buyers (Excluding Handed over units of Phase 2, Phase 1 and BCIL Yelahanka Projects LLP)	5,175	3,337	Home Buyers will get their homes constructed and registered in their name (Note 4)	
	Home Buyers-Handed over units of Phase 2	145	-	Common facilities will be made available	
	Home Buyers - Handed	169	-		
	Over units of Phase 1				
	Home Buyers-BCIL Yelahanka Projects LLP	2,201	1,985	200 (Note 5)	9%
4	Operational Creditors	169	82	- (Note 2)	0%
	Government	527	501	- (Note 2)	0%
	Workmen	-	-	-	N.A
	Employees	138	134	- (Note 6)	0%
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6	Other Debts and Dues	1,580	154	-	0%
	Total	24,756	20,846	4,531 plus Home buyers will get their homes constructed and registered in their name and common facilities will be made available	

*\*if there are sub-categories in a category, please add rows for each sub-category.*

*#Amount provided over time under the Resolution Plan and includes estimated value of non-cash components. It is not NPV.*

*Notes: 1) Net surplus shall be first available towards payment of CIRP Expenses. The resolution plan has considered CIRP expenses of Rs. 1.5 Crore. Any change in CIRP expenses will be adjusted from claims of other creditors on proportionate basis. The same shall be paid within 9 months from the date of takeover of the Company.*

- 2) Any available net surplus from the project after payment of CIRP fees, employees dues and RA fees shall be then utilized towards repayment to the Secured Financial Creditor upto Rs. 43 Crore. Remaining balance if any shall be shared between the Secured Financial Creditor and operational Creditor (including any statutory dues) in the ratio of 80:20 to be payable at the completion of the project.*
- 3) Notwithstanding contrary to anything the RA shall Endeavour to service debt repayment to the extent of Rs. 43 Crores to the Secured Financial Creditor. Further, for any sale above the stipulated base price of Rs. 5,750 per square feet as disclosed*

*in the business plan, the incremental price above the stipulated base price as per the business plan will be shared between the Secured Financial Creditor and the Resolution Applicant in the ratio of 80:20.*

- 4) *RA shall endeavor that all sold villas are handed over to the customers without any encumbrances and lien. RA requests Secured Financial Creditor to issue unconditional NOCs to all sold units without any additional cost subject to clause 3.1.12 and 3.1.25a of the resolution plan.*
- 5) *Against the payment to BCIL Yelahanka, the RA proposes a one-time payment of Rs. 2 Crores which will be paid at the completion of the project.*
- 6) *Employee dues shall be adjusted from the realization of the Secured Financial Creditor basis mutual discussion and conclusion as per clause 3.1.25b of the resolution plan.*
6. *The interest of existing shareholders have been altered by the Resolution Plan as under:*

*As per clause 3.1.8 of the Resolution Plan submitted by Citrus Ventures Private Limited states that the resolution applicant will acquire all 100% shares of the Corporate Debtor, upon approval of the Resolution Plan. As a part of the Resolution Process, takeover of the Company is proposed to be achieved in compliance with the authorities'*

*orders including transfer of promoters share. Since, there is no terminal value in the Company beyond the Resolution proposed the shares will be transferred at a token value.”*

Referring to clause 2 of the aforesaid suggestion in the resolution plan, it is submitted that the proposal to pay only in a proportion of the surplus after clearing the dues payable to the ‘Interim Resolution Professional’ and employees etc. and another remaining balance, if any, be shared between the ‘secured financial creditor’ and the ‘operational creditor’ in the ratio of 80:20 for payment of completion of the project is against the law.

Reliance has been placed on the decision of the Hon’ble Supreme Court in ‘**Committee of Creditors of Essar Steel India Limited vs. Satish Kumar Gupta & Ors.**’ in ‘*Writ Petition (Civil) No. 8766-67 of 2019*’ (2019 SCC OnLine SC 1478) decided on 15.11.2019 wherein the Hon’ble Supreme Court observed as follows:

**74.** *The very next paragraph, however, states as follows:*

**“29.** *However further question remains whether the Court has jurisdiction like an appellate authority to minutely scrutinise the scheme and to arrive at an independent conclusion whether the scheme should be permitted to go through or not when the majority of the creditors or*

*members or their respective classes have approved the scheme as required by Section 391 sub-section (2). On this aspect the nature of compromise or arrangement between the company and the creditors and members has to be kept in view. It is the commercial wisdom of the parties to the scheme who have taken an informed decision about the usefulness and propriety of the scheme by supporting it by the requisite majority vote that has to be kept in view by the Court. The Court certainly would not act as a court of appeal and sit in judgment over the informed view of the parties concerned to the compromise as the same would be in the realm of corporate and commercial wisdom of the parties concerned. The Court has neither the expertise nor the jurisdiction to delve deep into the commercial wisdom exercised by the creditors and members of the company who have ratified the Scheme by the requisite majority. Consequently the Company Court's jurisdiction to that extent is peripheral and supervisory and not appellate. The Court acts*

*like an umpire in a game of cricket who has to see that both the teams play their game according to the rules and do not overstep the limits. But subject to that how best the game is to be played is left to the players and not to the umpire.”*

- 75.** *In Mihir Mafatlal (supra), the Court was dealing with schemes of amalgamation under Section 391 of the Companies Act, 1956. Under Section 392 of the said Act, the High Court is vested with a supervisory jurisdiction, which includes the power to give directions and make modifications in such schemes, as it may consider necessary, for the proper working of the said Schemes. This power in Section 392 is conspicuous by its absence when it comes to the Adjudicating Authority under the Code, whose jurisdiction is circumscribed by Section 30(2). It is the Committee of Creditors, under Section 30(4) read with Regulation 39(3), that is vested with the power to approve resolution plans and make modifications therein as the Committee deems fit. It is this vital difference between the*

*jurisdiction of the High Court under Section 392 of the Companies Act, 1956 and the jurisdiction of the Adjudicating Authority under the Code that must be kept in mind when the Adjudicating Authority is to decide on whether a resolution plan passes muster under the Code. When this distinction is kept in mind, it is clear that there is no residual jurisdiction not to approve a resolution plan on the ground that it is unfair or unjust to a class of creditors, so long as the interest of each class has been looked into and taken care of. It is important to note that even under Sections 391 and 392 of the Companies Act, 1956, ultimately it is the commercial wisdom of the parties to the scheme, reflected in the 75% majority vote, which then binds all shareholders and creditors. Even under Sections 391 and 392, the High Court cannot act as a court of appeal and sit in judgment over such commercial wisdom.*

**The constitution of a sub-committee by the  
Committee of Creditors**

**76.** *A large part of Shri Sibal's submission was centered around the fact that the Committee of Creditors delegated its functions to a subcommittee, which delegation is impermissible. As a result of this delegation, the sub-committee secretly made negotiations with ArcelorMittal, which secret negotiations then produced a wholly inequitable result in that Standard Chartered Bank, though a financial creditor, was only paid 1.74% of its admitted claim of INR 3487 crores as opposed to other financial creditors who were paid 74.8% of what was claimed by them.*

From the record we find that the 'corporate insolvency resolution process' related to a developer who has to deliver the premises to the allottees and the 'resolution applicant' has taken care of the allottees relating to which the appellant has no grievance. The appellant claims to be an 'Operational Creditor' having provided architect services. Admittedly, as the liquidation value of the claim amount of the Appellant is zero, it is stated that in terms of Section 53 read with Section 30(4), the 'Operational Creditor' can only get the amount after payment of any amount to the secured financial creditor, unsecured financial creditors particularly the allottees. If any amount is required for investment, for construction and for completion of the project, then it is to be seen that the 'corporate insolvency resolution process' in a case of developer/infrastructure

project proceeds in the right direction of achieving the object of securing the interests of allottees and the exercise undertaken is result-oriented. Other 'Operational Creditors' can only be provided, if any, amount remains after giving it to the secured and unsecured financial creditor and allottees etc.

We are of the view that the decision as taken by the Hon'ble Supreme Court in '**Swiss Ribbons Pvt. Ltd. & Anr. vs. Union of India & Ors. – Writ Petition (Civil) No. 99 of 2018**' by its judgment dated 25<sup>th</sup> January, 2019 and '**Committee of Creditors of Essar Steel Limited**' (Supra) has taken care of insofar as it relates to Appellant (Architect of the project), hence no interference is called for. The appeal is dismissed.

[Justice S.J. Mukhopadhaya]  
Chairperson

[Justice Bansi Lal Bhat]  
Member (Judicial)

[Justice Venugopal M.]  
Member (Judicial)

/ns/sk